THE UNENUMERATED POWER

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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 Supreme 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 and coequal with 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 corporations 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 preexisting power across three cases—Trustees of Dartmouth College v. Woodward*,* McCulloch v. Maryland*, and* Osborn v. Bank of the United States—*establishing an independent threshold for the creation of federal corporations: "constitutional" purpose. Congress has effectively relied on this tacit, but independent, legal power for over two centuries.*

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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 is concrete, constrained, and original.

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 in passing, without developing why it is constitutional, describing what its legal parameters are, or explaining what it means today.[2] Some

[1] See Erwin Chemerinsky, Constitutional Law 120–21, 155, 1846 (6th ed. 2020) (discussing *McCulloch v. Maryland* but containing no index entry for "corporation" as it relates to Congress); Geoffrey R. Stone, Louis Michael Seidman, Cass R. Sunstein, Mark V. Tushnet & Pamela S. Karlan, Constitutional Law 66–68, 1644 (8th ed. 2018) (discussing *McCulloch v. Maryland* but containing no index entry for "corporation"); see also Randy E. Barnett & Josh Blackman, Constitutional Law: Cases in Context 116, 1768 (3d ed. 2018) (mentioning a "power of incorporation" in passing in reference to *McCulloch* but containing no index entry for "corporation"); Paul Brest, Sanford Levinson, Jack M. Balkin, Akhil Reed Amar & Reva B. Siegel, Processes of Constitutional Decisionmaking: Cases and Materials 27–28, 59, 1774 (7th ed. 2018) (focusing on "banking" but not on corporations, noting that the First and Second Banks were formed by incorporation but refraining from offering an opinion as to whether or not the power to incorporate was drafted into the Constitution, and containing no index entry for "corporation").

[2] Charles Black, Jr., noted in 1969 that, in *McCulloch v. Maryland*, Chief Justice Marshall "decided . . . that Congress possesses the power . . . [of] chartering corporations" on bases other than the Necessary and Proper Clause. Charles L. Black, Jr., Structure and Relationship in Constitutional Law 14 (1969). Recently, scholars have stated that the corporate power exists and is constitutional but have not developed the point further. See, e.g., Nikolas Bowie, Corporate Personhood v. Corporate Statehood, 132 Harv. L. Rev. 2009, 2015 (2019)

go so far as to erroneously claim that "[a]s best we can tell, the people who wrote and ratified the Constitution 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 ("RFC") to the National Railroad Passenger Corporation ("Amtrak"), and from the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") to the COVID-19 bailout—

(reviewing Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018)) ("Even 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 (Mar. 4, 2020) [hereinafter Gienapp, Lost Constitution] (unpublished manuscript) (on file with author) ("The real question . . . was whether it was politically useful to reinforce the already vested [incorporation] power through enumeration or not." (citation omitted)); Robert J. Kaczorowski, Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution, 101 Minn. L. Rev. 699, 701–02, 706 (2016) (describing incorporation as "one of [Congress's] inherent sovereign powers"—evidence of a broader theory of constitutional understanding he argues existed in the early republic called "inherent national sovereignty constitutionalism"—but leaving ambiguous the scope, nature, number, independence, or possible contemporary applications of the powers that flow from this theory).

As I discuss in Part II, a broad "sovereignty" argument is, on its own, 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. For the enumerated/unenumerated debate at the Founding generally, see Richard Primus, "The Essential Characteristic": Enumerated Powers and the Bank of the United States, 117 Mich. L. Rev. 415, 417–26 (2018) [hereinafter Primus, Essential Characteristic].

[3] Winkler, supra note 2, at 3; see also Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 355 (1996) (arguing that James Madison's motion at the Constitutional Convention to grant Congress a power of incorporation "obviously presumed that such authority did not yet exist elsewhere in the Constitution" and that Alexander Hamilton was "less likely to agonize over constitutional distinctions with Madison's intensity").

trillions of dollars circulate through the federal corporate form.[4] Courts and scholars do not question whether or not federal incorporation is legal as a general concern, but there is a broad and long-standing consensus that the existing law of federal corporations is dysfunctional.[5] Contemporary doctrine is either inconsistent, unstable, or avoidant.[6] In fact, the doctrine of constitutional avoidance itself emerged out of a confrontation with a federal corporation—the Tennessee Valley Authority ("TVA")—in *Ashwander v. TVA*.[7]

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 fallout from the 2008 financial crisis: not only did federal incorporation imply federal backing which, in turn, encouraged financial institutions to incorrectly price mortgage-backed securities, but the lack of clear legal rules governing this area of law also exacerbated the failure of public confidence in government that followed.[8]

[4] See infra Appendix; infra Part I.

[5] See infra Part I; see, e.g., Warren M. Persons, Government Experimentation in Business, at ii, ix, 5 (1934); John McDiarmid, Government Corporations and Federal Funds 5 (1938); Annmarie Hauck 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 307–25 (4th ed. 1986); Francis J. Leazes, Jr., Accountability and the Business State: The Structure of Federal Corporations 3, 75 (1987); A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543, 547–58; Kenneth J. Meier, Foreword *to* Jerry Mitchell, The American Experiment with Government Corporations, at xii (1999); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1370–71 (2003); Government by Contract: Outsourcing and American Democracy 3 (Jody Freeman & Martha Minow eds., 2009) [hereinafter Government by Contract].

[6] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 407–08 (1995) (O'Connor, J., dissenting) ("Despite the prevalence of publicly owned corporations, whether they are Government agencies is a question seldom answered, and then only for limited purposes." (first citing Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946); and then citing Nat'l R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 471 (1985))); see also Froomkin, supra note 5, at 564 ("[T]he 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.").

[7] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring) (detailing reasons courts should avoid constitutional questions).

[8] Additional problems are discussed later in the Introduction and in Section I.B. For discussion of the financial crisis, see infra Paragraph I.B.2.i. For a discussion on mortgages, see Jacobs v. Fed. Hous. Fin. Agency, 908 F.3d 884, 887 (3d Cir. 2018). It is important to note that federal incorporation was on both sides of the financial crisis: the federal takeover of General Motors transformed General Motors into a federal corporation because over fifty percent of the stock was held by the federal government. See 28 U.S.C. § 1349. For a

As a matter of constitutional theory, the costs are arguably even greater. In overturning *Roe v. Wade*, the Court's recent case law has raised the stakes of the perennial contest over whether constitutional law should recognize unenumerated rights and powers and on what basis.[9] Thanks to the Ninth Amendment, no one formally disputes the possible existence of unenumerated rights—even Robert Bork's famous "ink blot" statement about the Ninth Amendment conceded, hypothetically, that unenumerated rights might exist.[10] And for much of the twentieth century, the expansion of Commerce Clause doctrine hardly made the search for more congressional power—enumerated or otherwise—seem urgent.[11] 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,

discussion of the problems associated with the legality of the bailout, see Dennis K. Berman, Debating the Legality of the Bailout, Wall St. J., https://www.wsj.com/articles/SB10001424052748703471904576003880475807692 (last updated Dec. 7, 2010, 12:01 AM) (reporting on a bipartisan conference at Stanford Law School in 2010 on the Constitution and the 2008–2009 bailout); David Zaring, Litigating the Financial Crisis, 100 Va. L. Rev. 1405, 1406–08 (2014).

[9] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022); see Jeannie Suk Gersen, If Roe v. Wade Is Overturned, What's Next?, New Yorker (Apr. 17, 2022), https://www.newyorker.com/magazine/2022/04/25/if-roe-v-wade-is-overturned-whats-next [hereinafter Gersen, *Roe*].

[10] Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong. 249 (1987) [hereinafter Bork Nomination] (statement of Hon. Robert H. Bork). The Ninth Amendment, of course, expressly contemplates unenumerated rights. U.S. Const. amend. IX. Importantly, powers are less limited by constitutional text than scholars often assume: Congress overwhelmingly voted against attaching "expressly" to "delegated" in the Tenth Amendment, clearly rejecting the Articles of Confederation's prior restriction, by a vote of 32-17. U.S. Const. amend. X; 1 Annals of Cong. 797 (1789) (Joseph Gales ed., 1834); see also John Mikhail, Fixing Implied Constitutional Powers in the Founding Era, 34 Const. Comment. 507, 513 (2019) (reviewing Jonathan Gienapp, The Second Creation: Fixing the American Constitution in the Founding Era (2018) [hereinafter Gienapp, Second Creation]) (arguing that several states ratified the Constitution without amendment because they understood the Constitution to contain implied powers).

Scholars have long considered the possibility of unenumerated constitutionalism as a matter of general inquiry. See Black, supra note 2, at 7–8; Thomas C. Grey, Do We Have an Unwritten Constitution?, 27 Stan. L. Rev. 703, 703–05 (1975); Laurence H. Tribe, The Invisible Constitution, at xx (2008); Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By, at ix–xvi (2012); Farah Peterson, Constitutionalism in Unexpected Places, 106 Va. L. Rev. 559, 562 (2020).

[11] See infra Subsection IV.A.3.

for long stretches of time, been doctrinally stable.[12] While this disfavor has most visibly affected rights, there are signs that it has affected congressional power as well.[13]

In recent years, scholars have discussed and debated unenumerated constitutional law in two ways.[14] There is a growing school of thought that argues that it is a mistake to understand the Constitution as one of "enumerated powers."[15] Scholars have also identified or otherwise theorized the existence of silent or unnamed "backdrops" or "conventions" in the law.[16] Neither group, however, has articulated what a concrete, entirely "silent" constitutional power might be.[17]

[12] See John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 935–37 (1973); see also Roe v. Wade, 410 U.S. 113, 174–76 (1973) (Rehnquist, J., dissenting) (comparing *Roe* to *Lochner v. New York*, 198 U.S. 45, 74 (1905)); Brief for Petitioners at 1, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392) (arguing that "nothing in constitutional text, structure, history, or tradition supports a right to abortion"). For further evidence of the shadow that hangs over the idea of unenumerated constitutionalism, see infra Section IV.B.

[13] See, e.g., NFIB v. Sebelius, 567 U.S. 519, 533–35 (2012); United States v. Lopez, 514 U.S. 549, 567–68 (1995); see also Andrew Coan & David S. Schwartz, The Original Meaning of Enumerated Powers, 109 Iowa L. Rev. 971, 973–75 (2024) (surveying the landscape of recent Supreme Court jurisprudence for why "enumerationism lies around like a loaded weapon, potentially threatening a broad range of federal environmental, civil-rights, public-health, wage-and-hour, and workplace- and consumer-safety regulations" (citations omitted)). 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. See infra Subsection IV.B.3.

[14] For further discussion of the debate over unenumerated rights and how it fits into the problem of unenumerated law generally, see infra Section IV.B.

[15] See Coan & Schwartz, supra note 13, at 974–75; Robert J. Reinstein, The Aggregate and Implied Powers of the United States, 69 Am. U. L. Rev. 3, 7 (2019); Primus, Essential Characteristic, supra note 2, at 417–26; John Mikhail, Fixing the Constitution's Implied Powers, Balkinization (Oct. 25, 2018), https://balkin.blogspot.com/2018/10/fixing-constitutions-implied-powers.html [https://perma.cc/MFB5-KYK6]; Andrew Coan, Implementing Enumeration, 57 Wm. & Mary L. Rev. 1985, 1989 (2016); John Mikhail, The Necessary and Proper Clauses, 102 Geo. L.J. 1045, 1047 (2014) [hereinafter Mikhail, Necessary and Proper]; Richard Primus, The Limits of Enumeration, 124 Yale L.J. 576, 580 (2014).

[16] E.g., Stephen E. Sachs, Constitutional Backdrops, 80 Geo. Wash. L. Rev. 1813, 1816 (2012); Ashraf Ahmed, A Theory of Constitutional Norms, 120 Mich. L. Rev. 1361, 1364 (2022). But see Roderick M. Hills, Jr., Strategic Ambiguity and Article VII: Why the Framers Decided Not to Decide, 1 J. Am. Const. Hist. 379, 383–84 (2023) (detailing how ambiguous terms in Article VII were meant to be ambiguous and had no hidden or fixed meaning in order to reassure Federalists and Anti-Federalists alike when ratifying the Constitution).

[17] "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. 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

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 ratification 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.[18] In other words, the corporate power exists independently of the Necessary and Proper Clause, the Commerce Clause, and the spending power.[19] 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.

To demonstrate the existence of the corporate power, this Article relies on several interpretive modes of argument.[20] Part I, which is discussed further in the Introduction, describes the twentieth-century case law 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

nevertheless include them here. For a discussion on the distinction between "constructions" and the interpretation of rights or powers, see Jack M. Balkin, The New Originalism and the Uses of History, 82 Fordham L. Rev. 641, 648–54 (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 & Schwartz, supra note 13, at 974–75, 977 (arguing that these three clauses are "most naturally read to create a federal government empowered to address all important national problems"), with Reinstein, supra note 15, at 7 (arguing that the General Welfare Clause is overbroad and that there is a four-point grouping of federal power clustered in categories that interact with the Necessary and Proper Clause 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, 193, 207 (2020) [hereinafter Gienapp, Myth] (arguing that the General Welfare Clause and the Preamble were meant to be active clauses as part of a "Wilsonian" understanding of the Constitution).

[18] See infra Part III.

[19] See infra Part III.

[20] This approach is indebted to Philip Bobbitt, Constitutional Fate: Theory of the Constitution 6–8 (1982), though the arguments here do not follow his modalities exactly.

of law.[21] 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.[22] But as the Framers discussed themselves, they had specific reasons to omit the word for this corporate power.[23] At the time the Constitution was drafted, anti-monopoly sentiment was high.[24] The political climate meant that including the word "corporation" in the Constitution posed nothing less than a threat to ratification.[25] The Framers discussed drafting strategies which explicitly took into consideration 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.[26] The early Congress passed federal incorporation laws by an overwhelming majority.[27] And for years after ratification, the legal matter was uncontested: until James Madison raised political objections to the first bank bill and then again after that bill was passed, architects of government action relying on the corporate power did not appear to have thought it was necessary to engage in any sustained legal defense of their project.[28] As Part II explains, these facts together

[21] See infra Section II.B.

[22] See Rakove, supra note 3, at 355 (describing as authoritative Madison's argument that the power was rejected); Brest et al., supra note 1, at 27–28 (leaving open the question of whether the power was rejected or not for pedagogical reasons); cf. Winkler, supra note 2, at 3–5 (arguing that, while corporations influenced the Framers, the Framers never considered whether the Constitution applied to corporations).

[23] 2 The Records of the Federal Convention of 1787, at 615–16 (Max Farrand ed., 1911) [hereinafter Farrand]; see also 3 Farrand, supra, at 375–76 (describing concerns that anti-bank sentiment would prevent Pennsylvania from ratifying should the power to charter corporations be included).

[24] See infra Sections II.A–B.

[25] See 2 Farrand, supra note 23, at 615–16 (recording concerns raised at the Constitutional Convention that the inclusion of a corporate power would prejudice and divide the states against ratification); see also Bray Hammond, Banks and Politics in America from the Revolution to the Civil War 104–05 (1957) (citing reports of non-Convention members who were told that while individuals wished to propose that the Constitution authorize the charter of a bank, the mere mention of it would destroy ratification); 3 Farrand, supra note 23, at 375–76 (listing concerns that anti-bank sentiment would prevent Pennsylvania from ratifying the Constitution).

[26] 2 Farrand, supra note 23, at 615–16; see infra Part II.

[27] The House voted 39-19 to adopt the bill chartering the First Bank of the United States. R.K. Moulton, Legislative and Documentary History of the Banks of the United States 13–18 (New York, G. & C. Carvill & Co. 1834).

[28] See infra Section II.B; Ron Chernow, Alexander Hamilton 349–54 (2004) (explaining that Hamilton "had not foreseen the looming constitutional crisis that his bank bill was to instigate," discussing the constitutionality of the Bank of the United States, noting that the bill

indicate that, as a legal matter, the corporate power was in the Constitution from the beginning.[29]

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" case law, or doctrinal foundations on which subsequent law is moored.[30] Part III excavates this foundation for federal incorporation law.[31] Scholars often read *McCulloch v. Maryland* for its holding that the Bank of the United States was constitutional. In doing so,

"virtually breezed through the Senate," and observing that "nothing presaged" the fight over the Bank that was soon to emerge); see also Primus, Essential Characteristic, supra note 2, at 424 ("[A]s far as I can tell, *nobody* thought the [First] Bank raised that kind of [constitutional] problem at any time between Hamilton's submitting his Report on a National Bank to Congress and shortly before Madison made his famous speeches in the House."). That Congress resumed its use of federal incorporation in earnest after Madison's defeat over the first bank bill, chartering a second bank among other things, further suggests that the weight of legal opinion was for, not against, federal incorporation.

[29] See infra Section II.A. 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 that the naming of the power would have adverse political—but not legal—effects. See Primus, Essential Characteristic, supra note 2, at 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, The Path of the Law, 10 Harv. L. Rev. 457, 457 (1897).

[30] For a discussion of the "paradigm-case method," see Jed Rubenfeld, Revolution by Judiciary: The Structure of American Constitutional Law 15–18 (2005).

[31] This Article uses sources like the Marshall Court and William Blackstone as the legal authorities they have been and continue to be. For a discussion of Blackstone, see infra note 252. Chief Justice Marshall has sometimes been scrutinized for his Federalist politics. See John Fabian Witt, The Operative: How John Marshall Built the Supreme Court Around His Political Agenda, New Republic (Jan. 7, 2019), https://newrepublic.com/article/152667/john-marshall-political-supreme-court-justice [https://perma.cc/HM9Q-3TU3]; see also Kurt Lash, Response, *McCulloch* v. Madison: John Marshall's Effort to Bury Madisonian Federalism, 73 Ark. L. Rev. 106, 115 (2020) (alternatively paginated version, beginning on page 119, appears in some online databases) ("*McCulloch* . . . [was] a failed effort to bury the federalist interpretive theories of James Madison and reinvent the nature and origins of the American Constitution."). This Article does not highlight recent criticism of Chief Justice Marshall to the same extent as it does with Madison, however, because a chorus of historians agree that Madison was inconsistent both about enumeration and the Bank question—each of which directly affects how scholars have understood federal incorporation in particular. E.g., Mary Sarah Bilder, Madison's Hand: Revising the Constitutional Convention 2 (2015) [hereinafter Bilder, Madison's Hand]. By contrast, while there is no question Chief Justice Marshall was a Federalist, Witt, supra, there is also no clear evidence that he was judging in bad faith when he wrote *McCulloch*. See David S. Schwartz, Misreading *McCulloch v. Maryland*, 18 U. Pa. J. Const. L. 1, 68 (2015) (arguing that "Marshall's approach to implied powers reflects moderate, rather than aggressive nationalism").

they treat *McCulloch* as a singular case: the constitutionality of the Bank of the United States is 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 constitutionality of the question ultimately turns on the Necessary and Proper Clause, more or less alone.[32]

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 secondary problems related to the preexisting constitutional power of incorporation. Offering new readings of *McCulloch v. Maryland*, *Dartmouth College v. Woodward*, and *Osborn v. 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.[33] In addition to other relevant rules governing federal incorporation, the Marshall Court articulated an independent threshold for when federal corporations were proper: "constitutional" purpose.[34]

Parts II and III challenge long-standing assumptions common in constitutional legal scholarship that attribute unwarranted authority to

[32] See, e.g., Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68; Jeff Neal, McCulloch v. Maryland: Two Centuries Later, Harv. L. Today (Sept. 23, 2019), https://hls.harvard.edu/today/mcculloch-v-maryland-two-centuries-later/ [https://perma.cc/69FX-4YEJ].

[33] See infra Part III. *Dartmouth* has, of course, long been read for the origins of the "private," presumptively state-chartered, corporation. Gordon S. Wood, Empire of Liberty: A History of the Early Republic, 1789–1815, at 465–66 (2009) [hereinafter Wood, Empire] (describing the "momentous implications" of *Dartmouth*, which transformed hundreds of business corporations into private property of individuals); Morton J. Horwitz, The Transformation of American Law, 1780–1860, at 112 (1977) (describing Justice Story's concurring opinion in *Dartmouth* as solidifying the conception of corporations as private bodies). For a discussion of the relationship between state law and corporate law, see, e.g., Lev Menand & Morgan Ricks, Federal Corporate Law and the Business of Banking, 88 U. Chi. L. Rev. 1361, 1362 (2021) ("It is a bedrock . . . principle of U.S. business law that corporate formation and governance are the province of state, not federal, law."). For the colloquial usage of *Dartmouth* as the foundation of that regime, see, e.g., Zephyr Teachout, October's Book Club Pick: How Businesses Became People, N.Y. Times (Mar. 5, 2018), https://www.nytimes.com/2018/03/05/books/review/adam-winkler-we-the-corporations.html (reviewing Winkler, supra note 2) (describing *Dartmouth* as "a pathbreaking case from 1819 establishing that corporations are [presumptively state-based] private entities over which a state has limited control"). Part III shows how *Dartmouth* offers insight into federal, not state, incorporation.

[34] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419–21 (1819); see infra Section III.B.

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.[35] Thanks largely to Madison's statement, it has become commonplace to assert that the Constitution is only one of "enumerated powers."[36] Building on advances in historical scholarship, this Article shows that Madison's arguments were an early use of constitutional argument as political sally: articulated for a political audience, they did not unsettle the underlying legal consensus that the power enjoyed.[37]

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, the equal footing doctrine,[38] the Territory Clause,[39] the Patent Clause,[40] and the First Amendment[41] all bear the marks of the corporate power.

[35] Legislative and Documentary History of the Bank of the United States 39–41 (M. St. Clair Clarke & D.A. Hall eds., Washington, Gales & Seaton 1832) [hereinafter St. Clair Clarke & Hall]; see also Rakove, supra note 3, at 351–54 (quoting to Madison's February 8, 1791, speech against the bank bill, stating that while powers of the Constitution at the time of the Convention were "dark, inexplicable and dangerous," they are now "clear and luminous" (citation omitted)).

[36] The Tenth Amendment's statement that the Constitution is one of "delegated" powers is frequently conflated with "enumerated" powers. U.S. Const. amend. X; see The Founders and Federalism, Am. Gov't, USHistory.org, https://www.ushistory.org/gov/3a.asp [https://perma.cc/V2EF-RFED] (last visited Feb. 9, 2025) ("[D]elegated (sometimes called enumerated or expressed) powers are specifically granted to the federal government in Article I, Section 8 of the Constitution."); see also Primus, Essential Characteristic, supra note 2, at 419–20 (critiquing the common assumption that limits on Congress are embodied in an enumeration of powers rather than built into the process of federal lawmaking).

[37] See Noah Feldman, The Three Lives of James Madison: Genius, Partisan, President 286 (2017) (describing Madison's arguments against the Bank, which relied not on policy grounds but on its constitutionality, as "initiat[ing] what [would] become [Madison's] repeated practice of claiming that political enemies are bent on subverting the basic principles of the Constitution"); Gordon S. Wood, Revolutionary Characters: What Made the Founders Different 148–59 (2006) [hereinafter Wood, Revolutionary Characters] (describing contrasting Madisons: one who was subject to political influence, and the other who was a strict constitutionalist); Bilder, Madison's Hand, supra note 31, at 2 (noting that "[a]s a reliable source . . . Madison's Notes [to the Constitutional Convention] are a problem").

[38] U.S. Const. art. IV, § 3, cl. 1.

[39] Id. art. IV, § 3, cl. 2.

[40] Id. art. I, § 8, cl. 8.

[41] Id. amend. I.

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.[42] 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 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, judicial 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 valuable, not less. 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 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.[43]

The costs of leaving the corporate power inchoate counsel against leaving it as it stands. As Part I argues, the legal ambiguity around federal incorporation in the aggregate 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

[42] There is no casebook for federal incorporation. Among the most helpful preexisting 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, 317–59 (2009) (providing a survey of federal jurisdiction features of federally chartered corporations); see Kevin R. Kosar, Cong. Rsch. Serv., RL30533, The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics 1–10 (2011) (classifying forms of "hybrid organizations," which are federal entities that have been assigned legal characteristics of both governmental and private sectors).

[43] See infra Subsection I.A.1. For instance, federal incorporation can allow Congress to engage in off-budget accounting. See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927) ("[A]n 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." (citation omitted)).

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.[44] 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.[45] 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.[46] 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. Part I argues that these transactions are the latest "generation" in federal corporate activity.

With the charter power thus established in Parts I, II, and III, Part IV makes two interventions. Section 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 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, federal corporations allow the federal government to craft a corporate form that includes the kind of substantive, not economic, rules that regulatory agencies are

[44] Metzger, supra note 5, at 1370–71; Government by Contract, supra note 5, at 3; Berman, supra note 8; Zaring, supra note 8, at 1406–08; see infra Subsection I.B.2.

[45] See infra Paragraph I.B.2.ii.

[46] Housing and Economic Recovery Act of 2008, 12 U.S.C. §§ 4501–4642; Puerto Rico Oversight, Management, and Economic Stability Act ("PROMESA"), 48 U.S.C. §§ 2101–2241; Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Announces Global Resolution of Criminal and Civil Investigations with Opioid Manufacturer Purdue Pharma and Civil Settlement with Members of the Sackler Family (Oct. 21, 2020) [hereinafter Justice Department Announces Global Resolution], https://www.justice.gov/opa/pr/justice-department-announces-global-resolution-criminal-and-civil-investigations-opioid [https://perma.cc/W3XU-5EDK]; see also Samuel Issacharoff & Adam Littlestone-Luria, Remedy Becomes Regulation: State Making After the Fact, DePaul L. Rev. (forthcoming) (manuscript at 26–27), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4869528 [https://perma.cc/YQ2N-BCJB] (describing institutional design through the courts but driven by private litigants that defies existing categories, similar to that analyzed here).

currently prohibited from imposing on state-chartered corporations.[47] Federal corporations remain bespoke, are not governed by general incorporation laws, and support the production of goods and services—they are not just devices for federal spending.[48] Along with Part I, Section IV.A helps to outline these activities and differences.[49]

Drawing on Parts II and III, Section IV.A also offers three new tools for courts and scholars focused on contemporary doctrine: (1) clarity with respect to threshold questions such as when a federal corporation has "private" status; (2) an alternative justification for federal legislation that engages in financial activity, broadly defined;[50] and (3) 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 federal corporation law as part of its general reconsideration of administrative law.[51] A clear understanding of federal incorporation may prove important if it does so, not least because federal corporate activity may intersect with the rapidly changing landscape of Appointments Clause jurisprudence.

Section 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

[47] E.g., Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 520–22 (D.C. Cir. 2015) (holding that the Securities and Exchange Commission ("SEC") cannot require companies to adhere to certain disclosure requirements).

[48] See infra Appendix.

[49] 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 Regional Rail Reorganization Act Cases, 419 U.S. 102, 161–62 (1974) (Douglas, J., dissenting); Marcel Kahan & Edward B. Rock, When the Government Is the Controlling Shareholder, 89 Tex. L. Rev. 1293, 1295 (2011); Steven M. Davidoff & David Zaring, Regulation by Deal: The Government's Response to the Financial Crisis, 61 Admin. L. Rev. 463, 465 (2009). Also, forced consolidation resulted in the Railway Express Agency. See infra Appendix. This Article leaves these questions for future work to discuss in full.

[50] For example, rather than relying on the Commerce Clause, the spending power, or the tax power, courts might find legislation like the Affordable Care Act constitutional because this legislation creates a federal corporation. See infra Paragraph I.B.2.iii.

[51] See infra Paragraph I.B.2.ii.

interpretation generally—and for how we address "silent" rights and powers in particular.

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 systemically 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 Justice Black.[52] 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, for example, in *Dobbs v. Jackson Women's Health Organization*.[53] The corporate power also suggests that there is firmer 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 "interprovision

[52] See Griswold v. Connecticut, 381 U.S. 479, 508–09 (1965) (Black, J., dissenting). Justice Black's dissent was based on his opposition to the resurrection of the "ordered liberty" test that *Dobbs* relies on. Id. at 526 n.21 ("[C]ases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of 'ordered liberty' or 'shocking the conscience' or natural law to decide what laws it will permit state legislatures to enact." (citing Gideon v. Wainwright, 372 U.S. 335 (1963))). Justice Black's worry about "ordered liberty" stemmed from not only his commitment to the hard-won First Amendment rights his fundamentalism protected, id. at 509 ("One of the most effective ways of diluting . . . a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning."), but also the possibility that incorporation—extending federal constitutional rights to protect Americans against state overreach, which he supported—would be diluted if it were conflated with the "ordered liberty" test. Id. In short, he appears to have 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.

[53] See infra Subsection IV.B.2.

interpretation" of the Warren Court—indicate as much.[54] This interpretive unity transcends disagreements about Federalist politics and the particular legal climate of the 1960s and deserves further attention on 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.[55] 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.[56] 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.[57] What is lost is the reality of historical friction between law and politics. This, in turn, endangers the possibility that accurate historical work might coexist with positive legal argument.[58] The corporate power is evidence of the kind of collateral damage that can occur when we are limited to realist or originalist perspectives: if we fully commit to either at the expense of contradictory evidence, we would be unable to explain its presence.

[54] For the canonical statement of "structural interpretation," see Black, supra note 2, at 7.

[55] For a helpful survey of originalism, see Gregory Ablavsky, Akhil Amar's Unusable Past, 121 Mich. L. Rev. 1119, 1119–27 (2023) (reviewing Akhil Reed Amar, The Words That Made Us: America's Constitutional Conversation, 1760–1840 (2021)). 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), https://www.nytimes.com/2022/08/19/opinion/liberals-constitution.html (urging a shift away from constitutional law and toward "ordinary expressions of popular will"); Sanford Levinson, What Is This Project, Anyway?, Democracy J., Summer 2021, https://democracyjournal.org/magazine/61/what-is-this-project-anyway/ [https://perma.cc/9R2S-C8DM] (describing the Constitution as "a clear and present danger" and proposing significant reforms).

[56] See infra Subsection IV.B.1. This effort is not limited to the 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 & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 484–87 (2022).

[57] See, e.g., Richard H. Fallon, Jr., The Chimerical Concept of Original Public Meaning, 107 Va. L. Rev. 1421, 1427 (2021) (positing that original public meanings "are insufficient to resolve any historically contested or otherwise reasonably disputable issue"); Gienapp, Second Creation, supra note 10, at 1–12 (arguing against the concept of a "fixed" Constitution).

[58] For a discussion of further implications, see infra Subsection IV.B.1.

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 hidden in some sense.[59] 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.[60] 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."[61] 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 suspect or political.[62] 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.

[59] These interpretive conventions fall into roughly two groups: interpretive conventions about legibility, such as statutory canons and constitutional interpretation, and statutory disclosure rules.

[60] 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 v. Maryland*, Chief Justice Marshall himself argues that the Constitution does not exhibit the "prolixity of a legal code" because if it did "[i]t would probably never be understood by the public." 17 U.S. (4 Wheat.) 316, 407 (1819). Importantly, however, Chief Justice Marshall relies on this lack of prolixity as one of several reasons that the corporate power is clearly in the Constitution. See id. at 410–24.

[61] 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, 7 (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. 885, 886 (2016).

[62] 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.

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 costs, not just political and financial costs. Part II describes the original drafting of the charter power, addressing the debate over whether 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 in the Appendix, 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.

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

A. Chartered Corporations

Federal corporations have been chartered across nearly two and a half centuries of law.[63] Primarily used for federal economic activity, these entities are usually created by Congress through an independent statute which generally serves as their charter.[64] Unlike with state corporations,

[63] See infra Appendix.

[64] Occasionally, the executive branch or a federal agency will charter a corporation through a state charter, relying on an existing statute for the authority to do so. See infra Appendix.

which are chartered through general incorporation statutes, the charter for a federal corporation is a bespoke piece of drafting with no boilerplate or default rules outside of what various interpretive conventions might bring to bear.[65] Charters often contain typical corporate provisions, articulating the number of board seats and describing a capital structure, for instance.[66] Charters may specify that one or more board members be nominated by the president, although they do not always do so.[67] In addition to these hallmarks of the corporate form, federal corporate charters may include extensive descriptions of purpose and guidelines for action that more closely resemble conventional legislative bills.[68]

The most well-known examples of federal corporations are New Deal institutions like the TVA (1933), the RFC (1932), and the Federal Deposit Insurance Corporation (1933). Contemporary federal corporations include Amtrak (1971), Fannie Mae (1968), Freddie Mac (1970), and the (until recently ignored) Small Business Administration (1953). Federal corporations include now-niche entities like the Communications Satellite Corporation (1963) and the Overseas Private Investment Corporation (1969). And hidden-in-plain-sight goliaths like the First Bank of the United States (1791) and the Union Pacific Railroad (1862) are also federal corporations.

The stated purposes and substantive areas of federal corporate involvement have varied widely across their history. Federal corporations exist or have existed domestically, in foreign jurisdictions,[69] and as part of Indian law.[70] Domestic federal corporate concerns have included

[65] See infra note 340.

[66] See, e.g., Energy Security Act, Pub. L. No. 96-294, §§ 116–117, 94 Stat. 636, 636–39 (1980) (detailing the governance structure of the United States Synthetic Fuels Corporation).

[67] See, e.g., 49 U.S.C. § 24302 (detailing the Amtrak Board of Directors, which includes presidential appointees).

[68] In this respect, federal corporate charters resemble the early corporate charters from which they descend. See, e.g., Energy Security Act, Pub. L. No. 96-294, §§ 100, 111–123, 94 Stat. 611, 616–17, 633–44 (1980) (containing an extensive preamble and specific provisions).

[69] Examples of federal corporations in foreign jurisdictions include the Panama Railroad Company (1855), the Virgin Islands Corporation (1949), the Overseas Private Investment Corporation (1969), and the African Development Foundation (1980). See infra Appendix.

[70] Section Seventeen of the Indian Reorganization Act of 1934 prompted a wave of tribal incorporation, although the law and practice of tribal incorporation remain vexed. See Theodore H. Haas, U.S. Indian Serv., Ten Years of Tribal Government Under the Indian Reorganization Act 3–5 (1947), https://thorpe.law.ou.edu/IRA/IRAbook/tribalgovtp1-12.htm [https://perma.cc/V2N4-DS3N]. The Indian Reorganization Act stipulates that, although tribes and tribal members may not use state corporate law to incorporate without losing

energy and technology,[71] prisons and judicial administration,[72] transportation,[73] export and import management,[74] education,[75] housing,[76]

sovereign immunity, tribes may form corporations by applying for federal charters instead. 25 U.S.C. § 5124.

[71] Federal corporations addressing energy and technology include the Tennessee Valley Authority (1933), the Rural Telephone Bank (1971), the Synthetic Fuels Corporation (1980), and the United States Enrichment Corporation (1992). See infra Appendix.

[72] Federal corporations addressing prisons and judicial administration include the Federal Prison Industries, Inc. (1934), the Legal Services Corporation (1974), and the State Justice Institute (1984). See infra Appendix.

[73] Federal corporations addressing transportation include the Union Pacific Railroad (1862), the Railway Express Agency (1918), the Inland Waterways Corporation (1924), the Saint Lawrence Seaway Development Corporation (1954), Amtrak (1971), and the Consolidated Rail Corporation ("Conrail") (1976). See infra Appendix.

[74] Federal corporations addressing export and import management include the Export-Import Bank (1934) and the Overseas Private Investment Corporation (1969). See infra Appendix.

[75] Federal corporations addressing education include the General Education Board (1903), the Carnegie Foundation for the Advancement of Teaching (1906), and the Student Loan Marketing Association ("Sallie Mae") (1973). See infra Appendix.

[76] Federal corporations addressing housing include the United States Housing Corporation (1917), the Home Owners' Loan Corporation (1933), the Subsistence Homestead Corporation (1933), the Federal Housing Administration (1934), Fannie Mae (1938), the Defense Homes Corporation (1940), the Government National Mortgage Association ("Ginnie Mae") (1968), the National Corporation for Housing Partnerships (1968), and Freddie Mac (1970). See infra Appendix.

farming,[77] commodity price regulation,[78] land preservation,[79] general financial liquidity (the banking sector),[80] and, last but not least, war.[81]

Despite the breadth of their substantive uses, federal corporations generally share broad financial characteristics.[82] Congress uses federal corporations to engage in financial activity via a discrete institutional organization, often using them to promote liquidity as well.[83] Unlike administrative agencies, they do not primarily engage in formal rulemaking or "regulatory" activities, but rather financial ones.[84] Federal

[77] Federal corporations addressing farming include the Federal Farm Loan Board (1916), the Federal Crop Insurance Corporation (1938), and the Farm Credit System Insurance Corporation (1987). See infra Appendix.

[78] Federal corporations addressing commodity price regulation include the Food Administration (1917), the Grain Corporation (1917), the Sugar Equalization Board (1918), the Federal Surplus Commodities Corporation (1933), and the Commodity Credit Corporation (1933). See infra Appendix. It is worth noting that the Food Administration, the Sugar Equalization Board, and the Commodity Credit Corporation all had Delaware charters, several of which were created by executive order pursuant to existing legislation. See infra Appendix. The Grain Corporation was also created by executive order. See infra Appendix.

[79] Federal corporations addressing land preservation include the National Park Foundation (1967) and the Valles Caldera Trust (2000). See infra Appendix.

[80] Federal corporations addressing general financial liquidity include the National Banking System (1863), the Reconstruction Finance Corporation (1932), the Federal Deposit Insurance Corporation (1933), the Federal Savings and Loan Insurance Corporation (1934), the Securities Investor Protection Corporation (1970), the Federal Financing Bank (1973), the Pension Benefit Guaranty Corporation (1974), the National Credit Union Administration Central Liquidity Facility (1979), the Financing Corporation (1987), the Resolution Trust Corporation (1989), and the Resolution Funding Corporation (1989). See infra Appendix.

[81] Federal corporations addressing war include the Emergency Fleet Corporation (1917), the United States Spruce Production Corporation (1917), the Defense Homes Corporation (1940), the Rubber Reserve Corporation (1940), the Rubber Reserve Company (1942), and the War Assets Administration (1946). See infra Appendix. The use of federal incorporation to control the Panama Canal was a matter of both military and financial concern. See generally John M. Belohlavek, A Philadelphian and the Canal: The Charles Biddle Mission to Panama, 1835–1836, 104 Pa. Mag. Hist. & Biography 450 (1980).

[82] Federal charters are sometimes used to grant honorific status to some preexisting nonprofit organizations, see Kosar, supra note 42, at 23–24, such as the Boy Scouts of America, 36 U.S.C. § 30901. These entities are not discussed here because they do not constitute the primary use of federal incorporation.

[83] Examples include the National Banking System (1863), the Reconstruction Finance Corporation (1932), the Federal Deposit Insurance Corporation (1933), the Federal Savings and Loan Insurance Corporation (1934), the Securities Investor Protection Corporation (1970), the Federal Financing Bank (1973), the Pension Benefit Guaranty Corporation (1974), the National Credit Union Administration Central Liquidity Facility (1979), the Financing Corporation (1987), the Resolution Funding Corporation (1989), and the Resolution Trust Corporation (1989). See infra Appendix.

[84] See infra Appendix; see also Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015) (Alito, J., concurring) (observing that rulemaking is primarily a hallmark of

corporations can organize the production of goods and services.[85] Untethered from the profit-focused legal duties of state-based corporate law, providing liquidity to the market and other chartered objectives often organize corporate activity instead.[86]

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.[87]

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.[88] They include but are not 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

administrative, not federal, corporate activity). However, the Sugar Equalization Board (1918) is an example of price regulation by federal corporations.

[85] Examples include the United States Spruce Production Corporation (1917), which engages in timber production; the United States Housing Corporation (1917), which builds homes; and the United States Enrichment Corporation (1992), which engages in in uranium enrichment. See infra Appendix.

[86] McDiarmid, supra note 5, at 8, 28 (providing an overview of the budgets of federal corporations); see Shayerah Ilias Akhtar, Cong. Rsch. Serv., 98-567, The Overseas Private Investment Corporation: Background and Legislative Issues 13–14 (2016) (observing that, on a year-to-year basis, the Overseas Private Investment Corporation has often been "self-funded," and that it has only occasionally provided the U.S. government with a return). There are several instances of federal corporations being privatized for substantial figures, but further research would be required to establish accurate assessments as to whether or not these transactions ultimately created a surplus for the federal government. The United States Enrichment Corporation, Conrail, and the Communications Satellite Corporation ("COMSAT") are examples of privatization. See infra Appendix.

[87] See Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 520, 521 (D.C. Cir. 2015) (holding that the SEC may not require disclosure of conflict minerals in corporate disclosures because it violates the speech rights of corporations).

[88] E.g., Michael Gou, Gary Richardson, Alejandro Komai & Daniel Park, Reconstruction Finance Corporation Act, Fed. Rsrv. Hist. (Jan. 2022), https://www.federalreservehistory.org/essays/reconstruction-finance-corporation [https://perma.cc/FGV6-PKJW] (discussing the capital structure of the Reconstruction Finance Corporation); see also Collins v. Yellen, 141 S. Ct. 1761, 1771–72 (2021) (describing a federal corporation being created to govern another existing federal corporation as a form of corporate reorganization).

(backed by the Treasury but run as independent entities); and as independent entities (without express Treasury backing).[89]

1. 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.[90] Under 28 U.S.C. § 1349, federal courts have jurisdiction over corporations where over fifty percent of the capital stock of an entity is held by the federal government, creating a default presumption of federal corporate status above this threshold.[91] But courts have found that federal corporations are governmental even where there is a minority government stake.[92] Scholarly attempts to comprehend federal corporations are contradictory and confused.[93] And statutory analysis—

[89] McDiarmid, supra note 5, at 51–73, 168 (describing the Reconstruction Finance Corporation and the Commodity Credit Corporation); see infra Appendix.

[90] 5 U.S.C. § 103(1) defines "[g]overnment corporation" as "a corporation owned or controlled by the Government of the United States." But the definition of government control on which the definition of "government corporation" turns is unclear. 5 U.S.C. § 103(2) refers to "[g]overnment controlled corporation[s]," but never defines "control." "Government controlled corporation[s]" are also included in the definition of "agency" under the Freedom of Information Act. Id. § 552(f)(1). However, "control" is not defined. Id. As discussed in Part III, in *Osborn v. Bank of the United States*, the Court held that the Bank of the United States was not private despite the fact that the government only held a minority share of the bank. 22 U.S. (9 Wheat.) 738, 860 (1824). For a discussion about the shares of the Bank, see Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386–87 (1995). The Government Corporations Control Act ("GCCA"), 31 U.S.C. §§ 9101–9110, applies to covered corporations, but it does not apply to all federal corporations. "[W]holly-owned" federal corporations, for example, are not determined by criteria but via a statutory list. Id. § 9101(3). In 1995, the General Accounting Office (now Government Accountability Office) attempted to compile a list of federal corporations, but had to rely on self-reporting, noting that "[n]o comprehensive descriptive definition of or criteria for creating [government corporations] exist[s]." U.S. Gen. Acct. Off., GAO/GGD-96-14, Government Corporations: Profiles of Existing Government Corporations 2 (1995); see also Walsh, supra note 5, at 353 ("None of the available sources of nationwide data precisely defines public authorities or government corporations or provides counts of them.").

[91] 28 U.S.C. § 1349.

[92] *Osborn*, 22 U.S. (9 Wheat.) at 859–61; A History of Central Banking in the United States, Fed. Rsrv. Bank of Minneapolis [hereinafter History of Central Banking], https://www.minneapolisfed.org/about-us/our-history/history-of-central-banking [https://perma.cc/39ZY-PFLZ] (last visited Feb. 10, 2025) (noting that the Bank had a minority stake); see infra Section III.C.

[93] Scholars often explain away the extent to which federal corporations disrupt existing legal categories as *both* emergency exceptions and pragmatic noises. For pragmatic accounts, see

which courts have only sometimes deployed—has not provided clarity or consistency.[94]

In 1945, Congress passed the Government Corporation Control Act ("GCCA"), a statute designed to impose uniformity on federal corporations.[95] 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 ("APA").[96] 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 generally. The result was a statute which was and remains easy to circumvent: by creating new entities, Congress can avoid any regulations attached to the enumerated list the GCCA provided. Meanwhile, federal corporations' relationship to other areas of law remains uncertain. For example, many federal corporations are not bound by the Freedom of Information Act; civil service laws may, but do not always, apply; and the fiduciary duties of federal corporate board members are unclear.[97]

Scholars' responses reflect the challenges inherent in addressing a form of law that does not sit well within any existing field of study. Public finance scholarship is imprecise when it comes to matters of legal form.[98]

Seidman & Gilmour, supra note 5, at 307–25; Walsh, supra note 5, at 353; Persons, supra note 5, at ix, 5. For information on the emergency exception, see Leazes, supra note 5, at 20.

[94] See supra note 90.

[95] 31 U.S.C. §§ 9101–9110.

[96] Leazes, supra note 5, at 48 (discussing the GCCA); William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1216 (2001) (discussing "super-statutes"). Although the APA does not govern corporations, it may apply to rulemaking endeavors by wholly owned federal corporations. See Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015) (Alito, J., concurring) (observing that rulemaking activity is evidence that an entity is an "agency").

[97] U.S. Gen. Acct. Off., supra note 90, at 9–10; Leazes, supra note 5, at 48; Froomkin, supra note 5, at 553–54, 588; see also Kahan & Rock, supra note 49, at 1297 (describing challenges arising from government majority ownership of for-profit corporations); Davidoff & Zaring, supra note 49, at 466 (discussing how the government operated at the limits of its legal authority during its response to the financial crisis). But see Union Pac. Ry. Co. v. Chi., Rock Island & Pac. Ry. Co., 163 U.S. 564, 598–99 (1896) (noting that presidentially appointed directors of Union Pacific "had the same powers as other directors and no more").

[98] Public finance scholars and political scientists frequently describe federal corporations in terms of their ownership characteristics, such as "government-sponsored enterprise[s],"

Legal scholarship generally remains focused on how federal incorporation disturbs preexisting fields of study.[99] Administrative-law scholars cite federal corporations for state action and delegation problems.[100] Public-law scholars sometimes include federal corporations in their accounts of "privatization."[101] Private-law scholars cite "moral hazard" or reframe banking law as federal corporate law.[102] 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 that 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 "[t]wilight [z]one" in which it was encountered.[103]

2. The Court's Three Approaches

The Supreme Court itself has long been aware of the poor fit between existing frameworks and the federal corporate activity it must comprehend from time to time. Judicial analysis of federal incorporation can be categorized into three approaches: (1) jurisprudence which attempts to "solve" for federal incorporation by definitively reconciling it with administrative or private law, or what I refer to as a "fundamental" approach; (2) state action doctrine; and (3) a variety of mechanisms, like avoidance.[104] The cumulative result is a doctrine which "do[es] not follow

"government corporations" (wholly owned federal corporations), or by other public finance terminology such as "quasi-corporations." E.g., U.S. Gen. Acct. Off., supra note 90, at 18, 26; Dylan G. Rassier, Melissa J. Braybrooks, Jason W. Chute & Howard I. Krakower, U.S. Bureau of Econ. Analysis, Quasi-Corporations and Institutional Sectors in the U.S. National Accounts 1 (2016), https://www.bea.gov/system/files/papers/WP2017-1.pdf [https://perma.cc/56NX-45EY]. But because these characteristics have little independent legal weight, they are not reproduced here.

[99] E.g., Kahan & Rock, supra note 49, at 1297; Davidoff & Zaring, supra note 49, at 466; Froomkin, supra note 5, at 548.

[100] Metzger, supra note 5, at 1371–73.

[101] Government by Contract, supra note 5, at 128, 261.

[102] E.g., Neil Bhutta & Benjamin J. Keys, Moral Hazard During the Housing Boom: Evidence from Private Mortgage Insurance, 35 Rev. Fin. Stud. 771, 774 (2022); Menand & Ricks, supra note 33, at 1363–64.

[103] Seidman & Gilmour, supra note 5, at 307.

[104] 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

a consistent pattern except that most of the decisions have been brief and, when taken as a group, contradictory."[105]

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 that 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.

i. 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*.[106] 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.[107]

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

interpretation. But see infra Part III (discussing how the Marshall Court departed from treating federal corporations like statutes).

[105] Froomkin, supra note 5, at 564.

[106] Late-nineteenth-century doctrine had left courts with only the word "instruments" to apply to federal corporate activity. See Farmers' & Mechs.' Nat'l Bank v. Dearing, 91 U.S. 29, 33 (1875). But see Sloan Shipyards Corp. v. U.S. Shipping Bd. Emergency Fleet Corp., 258 U.S. 549, 568 (1922) (holding that the Emergency Fleet Corporation was a "corporation[]" and thus not entitled to sovereign immunity); United States v. Strang, 254 U.S. 491, 493 (1921) (same).

[107] See Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946).

in separate instances.[108] At one point, Justice Brandeis characterized it as both in the same opinion.[109]

The contradictions that appeared at the high-water mark of its application further demonstrate the problem with this approach: in the 1946 case *Cherry Cotton Mills, Inc. v. United States*, Justice Black asserted that the RFC—the largest, most visible, most controversial, and most independent of New Deal federal corporations—was an agency.[110] "That the Congress chose to call [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."[111] Years of congressional hearings, however, had shown that the RFC was not bound by regular agency reporting rules.[112] 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 held that he could. The result of the *Cherry Cotton Mills* holding maintained the status quo: the RFC retained its autonomous characteristics.[113] Justice Black's clear tone, in other words, could only offer superficial order.

[108] Compare *Sloan Shipyards*, 258 U.S. at 568 (holding the Emergency Fleet Corporation to be a corporation for the purposes of sovereign immunity), and *Strang*, 254 U.S. at 493 (same), with United States v. Walter, 263 U.S. 15, 18 (1923) (regarding the Emergency Fleet Corporation as an "instrumentalit[y] of the government" when considering whether an individual had conspired to commit fraud against it).

[109] United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 5–6 (1927) ("The Fleet Corporation is thus an instrumentality of the Government. But it was organized under the general laws of the District of Columbia, as a private corporation, with power to purchase, construct and operate merchant vessels. . . . Being a private corporation, the Fleet Corporation may be sued in the state or federal courts like other private corporations . . . ." (citing *Walter*, 263 U.S. at 18)).

[110] 327 U.S. at 539. Decided the same year as the GCCA was passed, *Cherry Cotton Mills* appeared to offer a moment of interbranch coordination. Just as the GCCA failed to be comprehensive, however, *Cherry Cotton Mills*'s application of the "agency" label to the RFC did not ultimately succeed at organizing federal corporate law. For a discussion of the RFC, see McDiarmid, supra note 5, at 156–78.

[111] *Cherry Cotton Mills*, 327 U.S. at 539 (citing Inland Waterways Corp. v. Young, 308 U.S. 517, 524 (1940)).

[112] See McDiarmid, supra note 5, at 156–78.

[113] *Cherry Cotton Mills*, 327 U.S. at 539.

ii. 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.

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.[114] 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.[115] 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,[116] a "private" actor not subject to the Fourth Amendment,[117] a "public" actor subject to the Fourteenth Amendment,[118] a "private" employer not subject to Fifth Amendment due process requirements when firing employees,[119] and a "private" actor unable to enjoy Supremacy Clause immunity from state liquor laws,[120] to name a selection.

State action doctrine is often decried as a "conceptual disaster area;" even the Court concedes that "our cases deciding when private action might be deemed that of the state have not been a model of

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

[115] Metzger, supra note 5, at 1374–77.

[116] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 394, 400 (1995).

[117] Ry. Lab. Execs.' Ass'n v. Nat'l R.R. Passenger Corp., 691 F. Supp. 1516, 1524 n.11 (D.D.C. 1988) (citations omitted).

[118] Merola v. Nat'l R.R. Passenger Corp., 683 F. Supp. 935, 940–41 (S.D.N.Y. 1988).

[119] Anderson v. Nat'l R.R. Passenger Corp., 754 F.2d 202, 204 (7th Cir. 1984) (per curiam); Kimbrough v. Nat'l R.R. Passenger Corp., 549 F. Supp. 169, 173 (M.D. Ala. 1982). An analogous line of cases found that Conrail is also not a "public" employer. E.g., Morin v. Consol. Rail Corp., 810 F.2d 720, 723 (7th Cir. 1987) (per curiam); Myron v. Consol. Rail Corp., 752 F.2d 50, 55–56 (2d Cir. 1985).

[120] Nat'l R.R. Passenger Corp. v. Miller, 358 F. Supp. 1321, 1329 (D. Kan. 1973), *aff'd*, 414 U.S. 948 (1973).

consistency."[121] 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.

iii. 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 embraced.[122]

The primary way courts avoid federal corporations is by limiting their presence in court altogether. Doctrine is currently confused as to whether federal corporations automatically receive federal jurisdiction.[123] As

[121] Charles L. Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 95 (1967); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting).

[122] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 407–08 (1995) (O'Connor, J., dissenting) (declining to join the majority based largely on the fact that *Lebron* marked the end to this era's long-standing strategy of avoidance, a period during which "whether [federal corporations] are Government agencies [was] a question seldom answered, and then only for limited purposes" (first citing Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946); and then citing Nat'l R.R. Passenger Corp. v. Atchinson, Topeka & Santa Fe Ry. Co., 470 U.S. 451, 471 (1985))). On the Court's mid-twentieth-century practice of narrowing jurisdiction to avoid addressing federal corporations, see Lund, supra note 42, at 317–59. Since the mid-century high-water mark of the GCCA, Congress has declined to engage in any holistic consideration of federal incorporation, both because it may itself be uncertain about the extent of its own powers in this respect and the utility of federal incorporation has, in certain ways this Article discusses, been augmented by this lack of both internal attention and external scrutiny. Congress's request for clarification about federal incorporation underscores that representatives may be uncertain about the scope of their own power. See Kosar, supra note 42, at 1–10. For a discussion of Congress's efforts to preserve its flexibility through a lack of uniformity and Congress's continued rejection of proposals for a general federal incorporation statute, see infra note 340. For evidence of avoiding public scrutiny, note that in 1992, the House Judiciary Subcommittee on Administrative Law and Governmental Relations Chairman Barney Frank issued a public moratorium on offering honorific federal charters authorized by his committee, generating headlines suggesting that federal corporations were no more. See Bill McAllister, Congressional Charters Abolished: Laws Recognizing Organizations Seen as Meaningless 'Nuisance,' Wash. Post (Apr. 8, 1992), https://www.washingtonpost.com/archive/politics/1992/04/09/congressional-charters-abolished/718f346b-07dc-4556-8cdb-f66efdfac5ec/. Congress, however, was in the process of fully renegotiating—but hardly retiring—the framework for Fannie Mae and Freddie Mac. See id.

[123] See infra note 303. Compare Pacific Railroad Removal Cases, 115 U.S. 1, 12–13 (1885) (holding that removal to federal court was lawful based on the existence of a federal charter), and Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 394 (1939) ("The legal position of [an RFC subsidiary] is, therefore, the same as though Congress had expressly empowered it 'to sue and be sued.'"), with Ass'n of Westinghouse Salaried Emps. v.

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.[124] While courts today have not eliminated this possible course, contemporary courts generally require a "sue and be sued" clause in the authorizing charter or other express grant of federal jurisdiction as a practical matter to allow federal corporations into federal court.[125] Overall, doctrine is characterized by narrowing access.[126]

Congress has similarly preferred avoidance. Across the twentieth century, Congress issued a series of carve-outs precluding federal jurisdiction from several significant categories of federal corporations wholesale.[127] In the twenty-first century, Congress appears to have doubled down on this approach: as discussed below, large federal transactions may now be replacing federal corporations. Where jurisdiction was previously eliminated through a sweeping statute, it is now denied through a provision: these transactions often contain anti-review clauses (of questionable enforceability).[128] Rather than wait for the

Westinghouse Elec. Corp., 348 U.S. 437, 451 (1955) ("Federal jurisdiction based solely on the fact of federal incorporation has, however, been severely restricted . . . .").

[124] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 806–07 (1824); see infra Section III.C; see also Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 74 (1809) (discussing the "sue and be sued" language with which *Osborn* is in tension).

[125] Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 255 (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"). Courts have nevertheless declined to eliminate the possibility that the underlying federal charter itself is sufficient for federal jurisdiction. Id. at 251 n.3 ("[W]e hold that the 'sue and be sued' provision of the Red Cross's Charter suffices to confer federal jurisdiction independently of the organization's federal incorporation."); see also Lund, supra note 42, at 330–59 (chronicling the development of jurisdictional rules for federally chartered corporations); see infra Section III.C.

[126] Lund, supra note 42, at 330–59.

[127] Federal corporations' federal jurisdiction likely enabled Congress to engage in strikebreaking in the nineteenth century, possibly explaining why these carve-outs only appeared when they did. E.g., Richard White, Railroaded: The Transcontinentals and the Making of Modern America 291–92 (2011) (demonstrating one instance of strikebreaking and documenting the contemplation of federal status as a legal strategy for similar purposes by Charles Francis Adams, Jr., the sometime-president of the Union Pacific Railroad and great-grandson of President John Adams, and A.J. Poppleton, the Union Pacific's lead attorney); see also Act of July 12, 1882, ch. 290, § 4, 22 Stat. 162, 163 (removing federal jurisdiction for banks on the basis of their federal charter alone); Act of Jan. 28, 1915, ch. 22, § 5, 38 Stat. 803, 804 (removing federal jurisdiction for railroads on the basis of their charter alone).

[128] Collins v. Yellen, 141 S. Ct. 1761, 1775–76 (2021).

Court to decline to discuss federal incorporation, Congress has attempted to ensure that result itself.[129]

B. Liquidity Versus Legitimacy

1. The Benefits of Indeterminacy

As Section I.A has shown, Congress and the executive branch have consistently relied on federal corporations—despite their legal uncertainty. Section 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.[130] Congress's use of federal incorporation in the twentieth and twenty-first centuries—and the corporate power's concomitant ambiguity—suggests that this theory is correct.

Since Congress created the first federal corporation, 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.[131] The Union Pacific Railroad used its federal charter to prop up its stock—and with that, stock markets.[132] The United States Fleet Corporation

[129] 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" federal law—is up to the Court.

[130] Frank H. Knight, Risk, Uncertainty and Profit 35, 38 (1921); see also Carol M. Rose, Crystals and Mud in Property Law, 40 Stan. L. Rev. 577, 578 (1988) (noting that economic actors sometimes prefer "ambiguous" terms over clear ones).

[131] See, e.g., Hammond, supra note 25, at 95.

[132] See White, supra note 127, at xxvi ("[T]he transcontinental railroads emerged in markets shaped by large public subsidies and particular legal privileges . . . ."); Gary Richardson & Tim Sablik, Banking Panics of the Gilded Age, Fed. Rsrv. Hist. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/banking-panics-of-the-gilded-age [https://perma.cc/8GG8-MZQT] ("The Panic of 1873 arose from investments in railroads."); see also Edward F. McQuarrie, The US Bond Market Before 1926: Investor Total Return from 1793, Comparing Federal, Municipal and Corporate Bonds: Part II: 1857 to 1926, at 6 (Mar. 19, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3269683 [https://perma.cc/2THS-RTE4] (noting the correlation between long bond and stock prices in the nineteenth century). Though fully demonstrating the link would require further research, the unusually high correlation between bond and stock prices McQuarrie observes for the latter half of the nineteenth century further suggests that the legal relationship between charters,

demonstrated that, by the early twentieth century, the federal government was making as much use of complex corporate structure—and the accounting mechanisms it enabled—as those in private markets.[133]

Two features of federal incorporation have enabled this activity: the implied financial value of federal law and the bespoke legal form federal incorporation offers.[134] 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.[135] In this way, a federal charter *itself* has value.[136]

The twentieth century saw legal ambiguity become an increasingly important additional factor. Specifically, federal corporations 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 offered Congress and the 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 determine federal corporate status privately and autonomously, away from both

including stock backed by federal charters, and the credibility of the federal government may have also been reflected in their valuation.

[133] See McDiarmid, supra note 5, at 86–88.

[134] A standard corporate form can enable liquidity. But 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.

[135] See, e.g., Don Layton, Joint Ctr. for Hous. Stud. of Harv. Univ., The Role of the Implied Guarantee Subsidy in FHLB Membership: Beautiful Politics but Ugly Policy 5–6 (2020), https://www.jchs.harvard.edu/sites/default/files/media/imp/harvard_jchs_COVID_nhlb_politics_and_policy_layton_2020.pdf [https://perma.cc/QQ95-3NZB] (describing the impact of the "implied guarantee" of federal financial backing for the Federal Home Loan Banks); W. Scott Frame, Andreas Fuster, Joseph Tracy & James Vickery, Fed. Rsrv. Bank of N.Y., The Rescue of Fannie Mae and Freddie Mac 4 (2015), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr719.pdf [https://perma.cc/NC82-NE3F] (noting that Fannie Mae and Freddie Mac issue debt at low yields because of the perception that their securities are guaranteed by the federal government).

[136] The benefits of federal backing extend beyond implied insurance. Historically, federal bonds that have "circulation privileges" have long traded at a premium, serving as both currency and collateral for secondary financial institutions. See Jeremy J. Siegel, The Real Rate of Interest from 1800–1990: A Study of the U.S. and U.K. 3 (Rodney L. White Ctr. for Fin. Rsch., Working Paper No. 9-91, 1991), https://rodneywhitecenter.wharton.upenn.edu/wp-content/uploads/2014/04/9109.pdf [https://perma.cc/6Y6R-SCR2].

judicial and public scrutiny.[137] Second, regulatory confusion has allowed for off-budget accounting. In the twentieth century, Congress developed federal corporations hand in hand with accounting mechanisms that allowed federal corporations to finance activity without going through normal appropriations oversight.[138] 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.[139]

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.[140]

The benefits of ambiguity are also political, not just financial. Federal corporations allow the federal government to create below-the-radar entities that they can disown, dissolve, or even sell off on the private market when it becomes financially or politically beneficial to do so.[141] 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.[142] The importance of these features should not be undervalued.

2. The Costs of Indeterminacy

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

[137] See supra Section I.A.

[138] See McDiarmid, supra note 5, at 215.

[139] United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927).

[140] See McDiarmid, supra note 5, at 215–17.

[141] See, e.g., James Sterngold, 85% U.S. Stake in Conrail Sold for $1.6 Billion, N.Y. Times, Mar. 27, 1987, at A1 (discussing the federal government's sale of the Consolidated Rail Corporation).

[142] For a foundational discussion of the comparative advantages of debt, credit, and taxation as political concerns, see John Brewer, The Sinews of Power: War, Money and the English State, 1688–1783, at xiii–xxii (1990).

also of the stability of the constitutional law on which it depends.[143] The legitimacy of constitutional law, in turn, is frequently equated with general legal coherence, consistency, and constraint. As long as assumptions that the law generally possesses these characteristics continue, 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.

i. 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.[144]

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.[145] Less discussed was how this feature of the bailout avoided review. The financial crisis saw activity that the Court had questioned in *Youngstown Sheet & Tube Co. v. Sawyer*

[143] See Douglass C. North & Barry R. Weingast, Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England, 49 J. Econ. Hist. 803, 804–06 (1989); see also Christine Desan, Making Money: Coin, Currency, and the Coming of Capitalism 11 (2014) (discussing the relationship between sovereign power and the issuance of credit).

[144] See, e.g., Metzger, supra note 5; Government by Contract, supra note 5; Berman, supra note 8; Zaring, supra note 8; Bhutta & Keys, supra note 102; Layton, supra note 135.

[145] See Berman, supra note 8; see also Zaring, supra note 8, at 1406 (arguing that the failures of 2008–2009 point to the need for more robust judicial oversight going forward).

(*The Steel Seizure Case*) (an executive intervention in private holding) treated as out of bounds when the federal government took over General Motors.[146] 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. 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.[147] Clarifying the constitutional status of federal corporations would help prevent such confusion in the future.

ii. 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 constitutional questions."[148] The Court has indicated that clarifying these

[146] Compare Youngstown Sheet & Tube Co. v. Sawyer (*The Steel Seizure Case*), 343 U.S. 579, 585, 587 (1952) (denying the executive the power to seize private property absent statutory or constitutional authorization), with In re Chrysler LLC, 576 F.3d 108, 121 (2d Cir. 2009) (declining to review the constitutionality of the use of Troubled Asset Relief Program funds to purchase Chrysler), and Starr Int'l Co. v. United States, 856 F.3d 953, 969 (Fed. Cir. 2017) (declining to review the constitutionality of the American International Group bailout). But see Collins v. Yellen, 141 S. Ct. 1761, 1780 (2021) (holding that plaintiffs had standing to sue for constitutional harms where the harms retrospectively involved the transfer of a right to a dividend).

[147] For a discussion of corporate personhood, see infra Section III.A. Under reverse incorporation, Citizens United v. FEC, 558 U.S. 310, 343 (2010), can apply to federal corporations. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Fourteenth Amendment's Equal Protection Clause is incorporated against the federal government through the Fifth Amendment's Due Process Clause).

[148] Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("[E]veryone should pay close attention when Congress 'sponsor[s] corporations that it specifically designate[s] *not* to be agencies or establishments of the United States Government.' Recognition that Amtrak is part of the Federal Government raises a host of constitutional questions." (alteration in original) (quoting Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 390 (1995))). The Court remanded the case to the U.S. Court of Appeals for the District of Columbia Circuit. Id. at 46 (majority opinion). But in doing so, Justice Thomas all but invited rehearing to "resolve" some of the "fundamental" concerns that it raised. Id. at 69, 85 (Thomas, J., concurring in judgment). He pointed out that Amtrak's federal corporate status "raises serious constitutional questions to which the majority's holding that

constitutional questions means embracing a "fundamental" approach to federal incorporation—which it revived in 1995 after a long, avoidant lull.[149]

This development has significant implications: a swath of entities—now deemed "agencies"—could become subject to the Court's new Appointments Clause and nondelegation doctrine jurisprudence.[150] *Lebron v. National Railroad Passenger Corp.* 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.[151] With no alternative view of the original corporate power in sight, the Court risks mistaking a vigorous application of revived Appointments Clause and nondelegation doctrines for a fundamental understanding of federal incorporation.

iii. 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 resemble federal corporations in other respects and facilitate activity similar to that which federal incorporation has historically encompassed.

Three recent examples illustrate the point: the Puerto Rico Oversight, Management, and Economic Stability Act ("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 U.S. Bankruptcy Court for the Southern District of New York, and Purdue Pharma over the ongoing Oxycontin litigation (commenced in 2020); and the recently litigated Federal Housing Finance Agency ("FHFA") conservatorship of Fannie Mae and Freddie Mac (conservatorship ongoing since 2008;

Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again." Id. at 91.

[149] *Lebron*, 513 U.S. at 394, 398 (holding that Amtrak—a federal corporation that self-identifies as "private"—was categorically an "agency").

[150] *Ass'n of Am. R.Rs.*, 575 U.S. at 62–63 (Alito, J., concurring) (focusing, among other things, on delegation and Appointments Clause questions).

[151] *Lebron*, 513 U.S. at 398.

litigation resolved in 2021).[152] This Article refers to these entities as "corporations-by-transaction."

These transactions trigger both statutory and factual thresholds 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
>
> (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 being understood 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 Territory Clause.[153] The trust structure created by the Purdue Oxycontin settlement—which provides for a coalition of affected states and municipalities to become the beneficiaries of a newly created entity manufacturing opioids in order to pay claimants rather than liquidate assets—resembles Progressive Era and New Deal federal corporations in the business of commodity production more than conventional legal settlements, but it lacks even the modest public accountability mechanisms attached to these entities.[154] The FHFA

[152] See supra note 46.

[153] Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1679–80 (2020) (relying on the Territory Clause but not expressing its decision in terms of federal incorporation).

[154] See Justice Department Announces Global Resolution, supra note 46; Confirmed Plan of Reorganization Facilities Creation of New Company—"Knoa Pharma," Purdue (Sept. 3, 2021), https://www.purduepharma.com/news/2021/09/03/confirmed-plan-of-reorganization-facilitates-creation-of-new-company-knoa-pharma/ [https://perma.cc/6F4M-RYS2]; see also Purdue Pharma L.P. Files Broadly Supported Plan of Reorganization, Purdue (Mar. 16, 2021), https://www.purduepharma.com/news/2021/03/16/purdue-pharma-l-p-files-broadly-supporte

receivership replicated doctrinal uncertainty around federal corporate status at the statutory level by (1) including an "anti-injunction" clause, and (2) granting the director the choice between two worlds of fiduciary duties: one that was private, and one that was public.[155]

The legal result in two of these cases has provoked enormous public disaffection; the third generated significant litigation.[156] 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.[157]

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 they resemble "agencies" less and other units of activity more.[158] 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 2000.[159]

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

d-plan-of-reorganization/ [https://perma.cc/B5RZ-94AX] (describing a "National Opioid Abatement Trust").

[155] 12 U.S.C. § 4617(f); id. § 4617(b)(2)(J)(ii).

[156] Many Puerto Ricans refer to PROMESA as "la junta." Marisa Gerber, Puerto Ricans Press for Gov. Rossello's Resignation Ahead of Major Protest Monday, L.A. Times (July 20, 2019, 6:51 PM) (emphasis omitted), https://www.latimes.com/world-nation/story/2019-07-20/puerto-ricans-press-for-gov-rossello-resignation-ahead-of-major-protest-monday. For a discussion of the Oxycontin case, see All the Beauty and the Bloodshed (Participant & Praxis Films 2022) (made by Laura Poitras, in collaboration with Nan Goldin). For an example of complex and protracted litigation resulting from the financial crisis, see Collins v. Yellen, 141 S. Ct. 1761 (2021).

[157] For a related discussion addressing this phenomenon, see Issacharoff & Littlestone-Luria, supra note 46 (manuscript at 26–27).

[158] Both PROMESA and, to a lesser extent, the FHFA have overcome Appointments Clause challenges. *Aurelius Inv.*, 140 S. Ct. at 1665 (holding that PROMESA's appointments procedure for the Financial Oversight and Management Board was constitutional); *Collins*, 141 S. Ct. at 1783 (holding that a statutory for-cause removal restriction for the FHFA director was unconstitutional but that actions taken while under that directorship were nevertheless not void).

[159] See infra Appendix.

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.

* * *

As Part I has demonstrated, federal incorporation has been systemically important for over two hundred years. The legal ambiguity that 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 by relying on existing administrative- or private-law categories, as 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 has 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 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 Bank, readings that interpret 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 an

obvious part of our constitutional framework.[160] Many ignore the existence of the corporate power altogether, seeing only the Bank, not its legal form.[161] Some suggest the power to charter was rejected at the Framing.[162]

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 President Washington signed legislation chartering the Bank and, more often, until *McCulloch* 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, serve as examples.[163]

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 both to ratify the Constitution and to mention the corporate power, in particular, by name.[164] 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 were no corporate power. These efforts reflect a basic legal consensus, not confusion—even though some debated the matter. In any case, these features, and the eventual path of the law, indicate that, irrespective of

[160] *McCulloch* deals with the Second, not the First, Bank. For the purposes of the enumerated/unenumerated debate, however, scholars have not found a material distinction between the two. See, e.g., Brest et al., supra note 1, at 37; see also Josh Chafetz, Multiplicity in Federalism and the Separation of Powers, 120 Yale L.J. 1084, 1103 n.121 (2011) (reviewing Alison L. LaCroix, The Ideological Origins of American Federalism (2010)) (noting that the constitutional issues at issue with the Second Bank "are identical to those raised in the political branches during the debate over the First Bank").

[161] See Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68.

[162] See, e.g., Winkler, supra note 2, at 3; Rakove, supra note 3, at 355.

[163] See infra Subsection IV.B.1. For an example of this narrative, see, e.g., Brest et al., supra note 1, at 57.

[164] For a discussion of Madison's inconsistency, see Feldman, supra note 37, at 286; Wood, Revolutionary Characters, supra note 37, at 148–59; Bilder, Madison's Hand, supra note 31, at 1–16.

what happened in closed session, the corporate power was legally "in" the Constitution as a stand-alone power from ratification.[165]

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."[166] 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 'to grant charters of incorporation where the interest of the U.S. might require [and] the legislative provisions of individual States may be incompetent.'"[167]

When the Constitution was ratified, however, the word "corporation" was nowhere to be found. Though some scholars have taken this silence to mean either rejection or indeterminacy,[168] in this particular case absence cannot clearly or reliably be construed as either.[169] Instead, as the

[165] See Holmes, supra note 29, at 457.

[166] 2 Farrand, supra note 23, at 321.

[167] Id. at 615. The distinction would later matter in *McCulloch*, where the Court embraced Madison's September "interest" proposal rather than this prior "public good" requirement. See infra Section III.B.

[168] Rakove, supra note 3, at 355; Brest et al., supra note 1, at 27–28, 57; Neal, supra note 32.

[169] See Black, supra note 2, at 7–8, 14; Bowie, supra note 2, at 2015; Gienapp, Lost Constitution, supra note 2 (manuscript at 46 n.146).

The records of the ratification debates state that the specific power of general incorporation was rejected as an enumerated power. 3 Farrand, supra note 23, at 375 ("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. Id. ("Several particular powers were then proposed.").

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. at 376. Specifically, he noted that all that existed of the corporate power was the patent power. Id. 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, at 355. Importantly, however, Baldwin's statement to that effect is only his personal commentary; it is not a transcript of what was said. To that point, Jack Rakove's position—which builds on Baldwin alone through the lens of Madison's disputation of the bank bill—is an outlier in the literature. For a different view from a contemporary scholar, see, e.g., Pauline Maier, The Revolutionary Origins of the American Corporation, 50 Wm. & Mary Q. 51, 52 (1993) (noting "[t]he Constitutional Convention's failure to grant Congress the *explicit* power to incorporate," but refusing to draw the inference that it therefore did not exist (emphasis

records to the Constitutional Convention and the subsequent treatment of the power demonstrate, silence reflected circumstances particular to the corporate power. Those circumstances required that the corporate power be left legally present, but only implied.

The Framers debated the corporate power in closed session,[170] finding 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.[171] At the same time, a decade of financial instability and post-revolutionary tensions since independence meant that formerly charter-espousing colonists now had 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.[172]

The notes of the Constitutional Convention suggest that including the power by name risked ratification itself. Rufus King worried that "[t]he States [would] be prejudiced and divided into parties by [the mention of the corporate power]."[173] Specifically, he pointed out that, in Philadelphia and New York, the charter power "[would] be referred to the establishment of a Bank, which has been a subject of contention in those Cities."[174] These discouraging connotations were widespread: "[i]n other

added)). For an example of the omission of inferential language or uncertainty, see Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68.

[170] Con. Res. 8, 15th Cong., 3 Stat. 475 (1818) (identifying that Congress did not authorize publication of records from the Constitutional Convention until 1818); see also Margaret Wood, Constitution Day: Records of the Constitutional Convention, Libr. of Cong. Blogs (Sept. 17, 2018), https://blogs.loc.gov/law/2018/09/constitution-day-records-of-the-constituti onal-convention/ [https://perma.cc/38TT-U2HE] (stating that the delegates of the Constitutional Convention decided to "keep the records of the convention secret at that time").

[171] 1 William Blackstone, Commentaries *472 ("[T]he king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given."). For a discussion on Blackstone as legal authority, see infra note 252; infra Section III.A.

[172] See 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. 1 Documentary History of the Constitution of the United States of America, 1786–1870, at 95, 142 (Washington, Dep't of State 1894) (showing the extensive consideration given to taxation within the colonies). 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. Primus, Essential Characteristic, supra note 2, at 427–28.

[173] 2 Farrand, supra note 23, at 616.

[174] Id.

places," he continued, federal incorporation "[would] be referred to mercantile monopolies."[175] Gouverneur Morris summarized that "it was extremely doubtful whether the Constitution they were framing could ever be passed at all by the people of America."[176]

This situation presented a problem: how to include a specific power, without specific mention. Morris suggested that "to give [the Constitution] its best chance . . . *they should make it as palatable as possible, and put nothing into it not very essential, which might raise up enemies*."[177] 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."[178]

As it happened, federal incorporation is clearly visible not just in the constitutional provision concerning trade, but in several other items as well. The federal corporate power is implicit in Article IV, Section 3's prohibition on states engaging in their own territorial expansion.[179] Article IV provides that no new state may be "formed or erected within the Jurisdiction of any other State."[180] Among other things, this forbids states from repeating the chartering process through which they themselves came into existence while allowing the federal government to

[175] Id. Some thought this interpretive problem was overstated. James Wilson even thought that 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 [and] parties apprehended." Id. Wilson was quickly rebutted. Id.

[176] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 611 (Jonathan Elliot ed., 2d ed., Washington 1836). David Schwartz, John Mikhail, and Jonathan Gienapp have all recently argued that it is Gouverneur Morris and James Wilson—not Madison—who should be seen as the primary "pens" of the Constitution. David S. Schwartz & John Mikhail, The Other Madison Problem, 89 Fordham L. Rev. 2033, 2063 (2021); Gienapp, Myth, supra note 17, at 203; see also William Michael Treanor, The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution, 120 Mich. L. Rev. 1, 6 (2021) (describing Morris's role in drafting the Constitution).

[177] 3 Farrand, supra note 23, at 375–76 (emphasis added).

[178] 2 Farrand, supra note 23, at 616. Few vocally disagreed, but the totality of evidence suggests that these views were superseded. George Mason advocated "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." Id.

[179] See U.S. Const. art. IV, § 3.

[180] Id.

continue the same process.[181] In doing so, it functionally prohibits states from using the corporate form to expand their own geographical—and subsequently, jurisdictional—boundaries. By giving up full sovereignty upon entering the new constitutional compact, states were ceding one part of the power to incorporate to Congress. In other words, without discussing the Necessary and Proper Clause, 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.[182] 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.[183] Federal incorporation offered this same device for expansion exclusively to the U.S. Congress: a device Congress used domestically to expand westward, and, a generation later, to engage in foreign conquest, with the acquisition of the Panama Canal.[184] Today, this legal framework remains an integral part of federal incorporation as it is currently wielded. It undergirds, for instance, legal descendants of the charter power's role in territorial expansion such as PROMESA.[185]

The so-called "Patent" Clause reflects the existence of 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 Power . . . [t]o 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."[186] Like the silence of the corporate power, this clause bears the imprint of how political context could shape word choice *without* changing underlying

[181] See Herbert L. Osgood, The Corporation as a Form of Colonial Government, 11 Pol. Sci. Q. 259, 261 (1896) (explaining that the colonies originated as corporations chartered by the British Crown).

[182] U.S. Const. art. IV, § 3.

[183] See Osgood, supra note 181, at 261–62.

[184] Alexander Hamilton repeatedly referred to the territorial governments as federal corporations. Alexander Hamilton, Opinion on the Constitutionality of a National Bank (1791), *reprinted in* The Federalist: A Commentary on the Constitution of the United States 655, 667–68, 674 (Paul Leicester Ford ed., New York, H. Holt 1898). For a discussion of Panama, see generally Belohlavek, supra note 81.

[185] See supra Paragraph I.B.2.iii.

[186] U.S. Const. art. I, § 8.

legal meaning.[187] 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.[188]

Finally, the Tenth Amendment's "Reservation" Clause did not apply to the corporate power—despite its silence. The Tenth Amendment provides that "[t]he 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."[189] 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.[190] Conversely, recent scholarship has suggested that the corporate power was a "vested" power that needs no further explanation other than that it inhered in Congress as part of their sovereignty—and therefore, that we need not consider federalism at all.[191]

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 rights in the new republic, British sovereignty was, by definition, something the

[187] Compare id. (working around the language of "patents" and instead referring to "exclusive Right"), with Statute of Monopolies 1623, 21 Jac. c. 3, § 6 (Eng.) (expressly preserving for Parliament the right to grant "letters patent" for inventions for up to fourteen years).

[188] See, e.g., Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 544 (1823) ("[I]mmediately after the granting of the letters patent, the corporation proceeded . . . to take possession of parts of the territory . . . known by the name of the colony of Virginia.").

[189] U.S. Const. amend. X.

[190] See, e.g., Wood, Empire, supra note 33, at 465–66; James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States 1780–1970, at 9 (1970); Horwitz, supra note 33, at 111–14 (describing *Dartmouth* and the development of corporations as a separation of public and private interests); Lawrence M. Friedman, A History of American Law 495–511 (1973) (writing about "the corporation" without mentioning federal charters or federal corporations); see also Maier, supra note 169, at 52 (identifying multiple states, including Massachusetts and Pennsylvania, that exhibited "early regional patterns of corporate development"); Winkler, supra note 2, at 10–25 (discussing the development of Jamestown and the Virginia Company as the first corporation in the United States); Menand & Ricks, supra note 33, at 1362 (observing this phenomenon). But see Stefan Link & Noam Maggor, The United States as a Developing Nation: Revisiting the Peculiarities of American History, 246 Past & Present 269 (2020) (providing an important recent critique of this narrative). For how this background assumption affects how scholars have interpreted *Dartmouth*, including debates about corporate personhood, see supra note 33; infra notes 246–48.

[191] Bowie, supra note 2, at 2015; Gienapp, Lost Constitution, supra note 2 (manuscript at 46 n.146).

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 automatically inhere in the new federal government. 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.[192] 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, there was no clear reservation. By 1787, state constitutions conflicted as to whether they acknowledged their own corporate power and how. Pennsylvania reserved the power to incorporate in its post-revolution constitution.[193] North Carolina expressly eschewed the corporate prerogative.[194] 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.[195] 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 that allowed or disallowed incorporation itself governed the federal power would be to effectively allow one state to have greater

[192] E.g., United States v. Burr, 25 F. Cas. 30, 34–35 (C.C.D. Va. 1807) (No. 14,692d).

[193] Eleven new state constitutions were drafted during or shortly after the Revolution. See 18th Century Documents: 1700–1799, Avalon Project, https://avalon.law.yale.edu/subject_menus/18th.asp [https://perma.cc/3DMJ-FMD8] (last visited Feb. 11, 2025) (listing all state constitutions). Only Pennsylvania and Vermont claimed an express right on the part of their legislatures to grant charters of incorporation. Pa. Const. of 1776, § 9; Vt. Const. of 1777, ch. 2, § 8.

[194] N.C. Const. of 1776, art. XXIII.

[195] Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730–1870, at 191 (1983). 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. But they did not preclude the existence of the federal power. See infra Section III.A.

interpretive weight than the others. This would be a clear violation of the states' equal rights vis-à-vis each other and could not stand.[196] 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.

Third, 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.[197] This suggests that *other* corporate entities might be made by the federal government. At the very least, with the states' default claim to a corporate power unclear, the Establishment Clause's specific proscription of particular federal action gives rise to the inference that where *no* such express prohibitions are made, powers that are not mentioned *and* not restricted might, at a minimum, be held concurrently.[198]

All told, 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 exists. 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 the Constitution was penned, not "interpreted" into the document 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.[199] It worked so well, in fact, that as Alexander Hamilton

[196] U.S. Const. art. IV, § 1.

[197] Id. 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." Id.

[198] Id.

[199] See Holmes, supra note 29, at 457 (discussing 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

prepared to introduce his bank bill to Congress, he appears not to have spent any time developing arguments for the "constitutionality" of the bank.[200] Two years after ratification, he assumed he would not need to. With constitutionality 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 20, 1791.[201]

When the bill reached the House floor, however, things became more complicated. Almost one year earlier, Congress had debated how to handle the Revolutionary War debt.[202] Of the many issues this presented, a central one was how to address the old continental bonds that had been paid as military wages during the Revolutionary War.[203] This federal debt was now mostly held by speculators, having been sold for a pittance during the ten years of inflation between independence and ratification that wracked the new union.[204]

Confronting the problem, Madison had presented a plan to handle repayment through bond "discrimination" to Congress. He suggested that the Treasury should discriminate between original and secondary

document. The analogy to corporate documents—which are necessarily drafted in this manner, because they are both prospective and intended to achieve a certain legal result—is illustrative.

[200] See Chernow, supra note 28, at 349–54 (showing a lack of discussion on the constitutionality of the bill); see also Primus, Essential Characteristic, supra note 2, at 424 (stating that "there is no indication . . . that anyone, Madison or otherwise, was skeptical of the Bank for enumerated-powers reasons until near the very end").

[201] Primus, Essential Characteristic, supra note 2, at 447 (suggesting that the bill passed with "relatively little controversy"). There were no references to the Constitutional Convention on the Senate floor, nor was there any extensive debate over the Necessary and Proper Clause. 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: Article I, 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." Benjamin B. Klubes, The First Federal Congress and the First National Bank: A Case Study in Constitutional Interpretation, 10 J. Early Republic 19, 25 (1990) (quoting Letter from Senator Pierce Butler to General James Jackson (Jan. 24, 1791), *in* The Letters of Pierce Butler, 1790–1794, at 91, 92 (Terry W. Lipscomb ed., 2007)). He then wrote dismissively that "the arguments adduced on this head need not be mentioned to professional Gentlemen of your abilities." Letter from Senator Pierce Butler to General James Jackson (Jan. 24, 1791), supra. As Klubes further notes, monopoly concerns were also raised on the House floor; however, they were not precise constitutional arguments in the way that Madison's arguments were. See Klubes, supra, at 28–29.

[202] Feldman, supra note 37, at 297–98.

[203] Id. at 295–97.

[204] Id. at 294–95.

holders.[205] The original holders would have to be found.[206] They could then be paid in full for the right they no longer held in paper, minus the purchase price.[207] The secondary holders would be bought out for their purchase of the debt—but not receive any upside now that the bonds had value.[208] In this manner, Madison believed, Revolutionary War veterans would not be penalized for the circumstances that had led them to sell off their bonds before they could be realized.[209] At the same time, the government would not be forced to pay out more than the face value that other proposals were now willing to pay to the secondary holders.[210]

Hamilton—Madison's sometime friend with whom he had coauthored the Federalist Papers—was uninterested in Madison's concerns. After the 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.[211] In that report, Hamilton recommended paying secondary holders in full and alone.[212] The policy was adopted.[213] 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.[214]

When Madison saw the bank bill, he was shocked by Hamilton's rejection of his proposed compromise in ways that would ultimately lead him to denounce the bill as both a moral and legal "evil."[215] With

[205] Id. at 295.
[206] Id.
[207] Id.
[208] Id.
[209] Id.
[210] Discrimination Between Present and Original Holders of the Public Debt (Feb. 11, 1970), *in* 13 The Papers of James Madison 34, 35–37 (Charles F. Hobson & Robert A. Rutland eds., 1981); see also Feldman, supra note 37, at 295 (explaining that Madison's compromise to pay original debt holders and subsequent purchasers of the bonds would not cost the government more money because "[t]he money saved by not paying the current debt holders the full face value of the bonds should be used to compensate the original debt holders who had sold off their paper").
[211] See Alexander Hamilton, Report Relative to a Provision for the Support of Public Credit (Jan. 9, 1790), *in* 6 The Papers of Alexander Hamilton, December 1789–August 1790, at 51, 68 (Harold C. Syrett & Jacob E. Cooke eds., 1962).
[212] Id.
[213] Act of Aug. 4, 1790, ch. 34, 1 Stat. 138.
[214] For an overview of the First Bank's structure, see, e.g., Andrew T. Hill, The First Bank of the United States, Fed. Rsrv. Hist. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/first-bank-of-the-us [https://perma.cc/6FFU-Z85R].
[215] Feldman, supra note 37, at 288, 295–96, 300, 356.

Hamilton, Madison had supported the need for economic union in the years leading up to the Constitutional Convention.[216] 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.[217] Yet now the architecture of the union was, to his eyes, being distorted, and even—by encouraging financial centralization in New York—being put to perverse use.[218] Earlier disagreements—for instance, Madison's dispute with Hamilton about bond policy—had forced Madison to argue on policy grounds, which 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 taken one of the only full sets of notes from the debates from the Constitutional Convention.[219]

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.[220] 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.[221] He then stated that "he well recollected that a power to grant charters of

[216] Id. at 345 (discussing Madison's nationalist views on trade policy).

[217] Id. at 53, 68, 73, 84, 93, 95, 108, 151 (describing Madison's efforts to engineer a constitutional convention, and to ensure ratification).

[218] Id. at 295.

[219] While several attendees, including Hamilton, took notes during the Convention, which were published after Congress lifted the ban on publicizing these records in 1818, several note-keepers did not attend the entire Convention or had disorganized notes. William Jackson, the secretary of the Convention, for instance, took notes that many found to be unclear, and delegate Robert Yates left the Convention part way through. According to his own papers, by contrast, Madison physically made his presence as note-keeper known. See Wood, supra note 170; 3 Farrand, supra note 23, at 550 ("I chose a seat in front of the presiding member . . . ."). For a recent thorough and critical overview of the availability of various records of the Convention, see generally Mary Sarah Bilder, How Bad Were the Official Records of the Federal Convention?, 80 Geo. Wash. L. Rev. 1620 (2012) [hereinafter Bilder, Official Records].

[220] The Bank Bill (Feb. 2, 1790), *in* 13 The Papers of James Madison, supra note 210, at 372, 374.

[221] Id. at 379.

incorporation had been proposed in the general convention and rejected."[222]

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.[223] The usual scheme 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.[224]

Assuming that 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.[225] In addition, reading Chief Justice Marshall as constructing the corporate power in response to Madison rather than recapitulating settled law in the face of Madison's attempt to unsettle it makes Chief Justice 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

[222] Id. at 374.

[223] E.g., Brest et al., supra note 1, at 27–59. Separate from the corporate power, there was a broader, ongoing debate about the breadth of the Necessary and Proper Clause. See, e.g., Gienapp, Second Creation, supra note 10, at 90–92.

[224] E.g., Brest et al., supra note 1, at 57–59.

[225] 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 and 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. See Jim Zeender, Jefferson in Paris: The Constitution, Part I, U.S. Nat'l Archives: Pieces of Hist. (Dec. 5, 2012), https://prologue.blogs.archives.gov/2012/12/05/jefferson-in-paris-the-constitution-part-i/ [https://perma.cc/75EL-HAY9]. 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 the subscribers into a corporation," Jefferson actually never argued that federal incorporation is unconstitutional, just that the Bank is. See Jefferson, supra note 184, at 651. His argument against the Bank is also loosely worded (that it would "communicate to [the Bank subscribers] a power to make laws paramount to the laws of the States"). Id. And, notably, President 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 President Washington was already inclined towards the constitutionality of his actions. Letter from George Washington to Alexander Hamilton (Feb. 16, 1791), *in* 8 The Papers of Alexander Hamilton, February 1791–July 1791, at 50, 50–51 (Harold C. Syrett & Jacob E. Cooke eds., 1965).

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 occurred with the Affordable Care Act, for instance.[226] 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.[227]

In fact, Madison's response was political improvisation, not a principled reminder of a constitutional problem with which all were acquainted. 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 Constitution."[228] 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.[229] 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) but instead used the *lack* of enumeration to his advantage.[230] 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 of the Convention under lock and key after ratification. Once the Convention was over, however, Madison continuously relied on

[226] NFIB v. Sebelius, 567 U.S. 519, 574 (2012).

[227] See infra Section IV.B.

[228] Feldman, supra note 37, at 286 (noting that in his floor statements on the Bank, Madison "[f]atefully" argued "that the bank is not merely wrong but unconstitutional" (emphasis omitted)).

[229] Id. at 345. Feldman argues that following the "enumerated/implied" lines he developed in arguing against the Bank, Madison painted himself into a constitutional corner. Id. 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." Id.

[230] Madison argued that the president clearly had the removal power because of the "construction and implication" of the power in the Constitution. Rakove, supra note 3, at 353–54 (quoting Floor Statement of James Madison to Congress (Feb. 4, 1791), *in* St. Clair Clarke & Hall, supra note 35, at 50).

public knowledge that he had attended the conventions as a source for his own argumentative authority.[231]

Scholars have recently shown that Madison was not consistent in his interpretive approaches nor his political recollections.[232] 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 on the corporate power in Philadelphia. However, 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 different from the Constitution itself.[233] 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

[231] See Bilder, Official Records, supra note 219, at 1624 (noting that Madison "'was not above hinting in congressional debate that his notes . . . would support a given reading' if he could share them" (alteration in original) (quoting R.B. Bernstein, The Founding Fathers Reconsidered 150 (2009))); see also Feldman, supra note 37, at 194 (describing how the authorship of the Federalist Papers was "not a closely guarded" secret—and thereby they leaned on Madison's prominent role in the Convention for authority); id. at 337 (documenting Madison founding the *National Gazette* as an outlet for continuous commentary on the Constitution and other matters that reinforced his reputation); id. at 404 (explaining Madison changing tactics from invoking intentions at the Constitutional Convention as having authority to "public meaning" having authority because of friction between his own views during the Convention and his subsequent political positions, continuing to rely on his central role and identifying himself with the Constitution itself without revealing the transcripts of the constitutional debates); id. at 623 (noting selling Madison's closely guarded records to Congress in the 1830s); id. at 625 (stating that Madison was referred to as "the father of the Constitution" by 1829).

[232] See Feldman, supra note 37, at 286; Wood, Revolutionary Characters, supra note 37, at 148–59; Bilder, Madison's Hand, supra note 31, at 1–16; see also Schwartz & Mikhail, supra note 176, at 2063 (explaining that the perception that Madison led the Constitutional Convention is not supported by the historical record).

[233] Although Madison cited policy reasons for changing his position a third time in 1816, he agreed to sign a bill chartering the Second Bank of the United States as President himself. Hammond, supra note 25, at 233–34.

Convention.[234] The bank bill was passed by a large majority, which included those who had attended the Constitutional Convention.[235]

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. 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,[236] *McCulloch* on federal power,[237] and *Osborn* on "arising under" federal jurisdiction.[238] 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 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

[234] 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. Gienapp, Lost Constitution, supra note 2 (manuscript at 48 & n.156) (citing Letter from Fisher Ames to George Richards Minot (Feb. 17, 1791), *in* 1 Works of Fisher Ames 95, 95 (Seth Ames ed., Boston, Little, Brown & Co. 1854)); see also Primus, Essential Characteristic, supra note 2, at 442–54, 478–79 (discussing theories surrounding the formulation of Madison's enumerated-powers argument against the Bank); Gienapp, Lost Constitution, supra note 2 (manuscript at 48) (noting that Madison "prompted this debate out of desperation").

[235] The House voted 39-19 to adopt the bill. Moulton, supra note 27, at 13–17.

[236] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 629–30, 636–39 (1819).

[237] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 419 (1819).

[238] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 759–60 (1824).

corporations as a distinct category from state (private) corporations.[239] *McCulloch* created a purposive standard for federal corporations based on a "constitutional" interest.[240] *Osborn* suggested that federal corporations could not be persons despite the beginnings of corporate autonomy that *Dartmouth* previously carved out for state-chartered private entities.[241] And *Osborn* rejected two thresholds that courts use today to treat federal corporations as analogous to either 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.[242] The Court expressly rejected the idea that financial holdings dictated the constitutional status of power dealing with the Bank, which had only a twenty percent government stake at the time.[243] 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."[244]

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 rely solely 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 Versus State Corporations*

Dartmouth College v. Woodward has long been treated as synonymous with the advent of the contemporary corporate form: a presumptively

[239] See infra Section III.A.
[240] See infra Section III.B.
[241] See infra Subsection III.C.1.
[242] See infra Subsection III.C.2.
[243] See infra Subsection III.C.2.
[244] See infra Subsection III.C.3.

state-chartered, private entity; and one (now) afforded the status of legal "person."[245] Holding that the Contracts Clause barred the State of New Hampshire from retroactively altering the charter of Dartmouth, the Court inscribed the category of "private corporation" into American law.[246]

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.[247] 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.[248]

Importantly, the corporation at issue in *Dartmouth* was not a state-chartered entity—it was a preexisting British corporation.[249] To solve the case, the Court needed only to clarify how new American constitutional law applied to this category of preexisting corporate entities.[250] On its

[245] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 629–30, 636–39 (1819); see, e.g., Horwitz, supra note 33, at 112; Wood, Empire, supra note 33, at 465–66; Teachout, supra note 33.

[246] 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 2, at i–xiii; Bowie, supra note 2, at 2009–12. 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 248.

[247] *Dartmouth*, 17 U.S. (4 Wheat.) at 627–30; id. at 663–64 (Washington, J., concurring); id. at 667–70 (Story, J., concurring).

[248] 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 R. Lamoreaux & John Joseph Wallis, Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy, 41 J. Early Republic 403, 408–10 (2021). This turn has not displaced an underlying assumption that capitalism emerged hand in hand with private property and local, state-centric democracy. See Hurst, supra note 190, at 9; Wood, Empire, supra note 33, at 465–66; Horwitz, supra note 33, at 111–14. 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, supra note 169, at 52; Menand & Ricks, supra note 33, at 1361–62 (observing this phenomenon); Winkler, supra note 2, at 3. But see Link & Maggor, supra note 190, at 270–72, 293–97 (providing an important recent critique of this narrative).

[249] *Dartmouth*, 17 U.S. (4 Wheat.) at 519.

[250] 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

facts, in other words, *Dartmouth* could have been decided without constructing new legal categories.

As dicta suggest, 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,

> In respect to franchises, whether corporate or not, which include a pernancy of profits, such as a right of fishery, or to hold a ferry, a market, or a fair, or to erect a turnpike, *bank*, or bridge, there is no pretence to say that grants of them are not within the [C]onstitution.[251]

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.[252] 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 think of today most clearly as their purposes. For example, corporations were "eleemosynary," civil, or ecclesiastical.[253]

Property with Privilege: The Dartmouth College Case, 15 Va. L. Reg. 417, 417 (1909) (observing that Chief Justice Marshall chose a "forced and unheard-of construction" instead).

[251] *Dartmouth*, 17 U.S. (4 Wheat.) at 699 (Story, J., concurring) (emphasis added).

[252] 1 William Blackstone, Commentaries at 450 (Robert Malcolm Kerr ed., 4th ed., London, John Murray 1876). Like any legal authority, Blackstone was debated at the time he was writing. For this and other reasons, scholars have also questioned Blackstone's primacy as part of a greater inquiry into how originalists relate the common law to constitutional law and the legitimacy of such an approach. See Bernadette Meyler, Towards a Common Law Originalism, 59 Stan. L. Rev. 551, 555–59 (2006); Emily Kadens, Justice Blackstone's Common Law Orthodoxy, 103 Nw. U. L. Rev. 1553, 1555 (2009). 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 he was at the time and continues to be.

[253] See 2 Stewart Kyd, A Treatise on the Law of Corporations 103, 205 (London, J. Butterworth 1794) (discussing eleemosynary and ecclesiastical corporations). For a typography of British corporate "types" and a discussion of both Kyd and Kent (the leading post-Blackstone treatises), see Hartog, supra note 195, at 197.

What unified these myriad types was the power the sovereign had to alter or revoke the granted charters entirely: the power of *quo warranto*.[254] *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 nonsensical: corporations' charters could be revoked even without the clear presence of *ultra vires* activity.[255]

The question at the heart of *Dartmouth*—when and where *quo warranto* powers applied—thus went to the heart of the problem that constructing the corporate power in a federal system *also* presented: because *quo warranto* essentially designated sovereignty over the corporate form, the Court had to decide which governments were sovereign over which forms of corporate entities in addressing it, 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*.[256] 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. Because these created unique interpretive burdens on the Marshall Court, neither existing British precedents nor sister constitutional powers were

[254] See John Baker, An Introduction to English Legal History 156 (5th ed. 2019); Catherine Patterson, Quo Warranto and Borough Corporations in Early Stuart England: Royal Prerogative and Local Privileges in the Central Courts, 120 Eng. Hist. Rev. 879, 879 (2005) (describing *quo warranto* as "a writ by which the King questioned the basis of a franchise, privilege or liberty").

[255] *Quo warranto* was rarely exercised in full; its power (and for this Article, its importance) laid 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. See Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 88–89 (2017). This particular act of *quo warranto* was reversed by Parliament after the Glorious Revolution. See id. But such controversy never eliminated *quo warranto* from legal understanding. The London example should also be understood in light of the fact that it was itself an extraordinary and unprecedented use of the corporate power to punish political dissent.

[256] *Dartmouth*, 17 U.S. (4 Wheat.) at 667–70 (Story, J., concurring).

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 division of corporate power was unclear. But so were analogies to existing federal powers.[257] 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.[258]

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 toll bridges.[259] 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.[260] 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

[257] See, e.g., United States v. Burr, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d) (demonstrating sovereign immunity as an example of how transplanted concepts from English law are not replicated automatically in constitutional law).

[258] U.S. Const. art. I, § 8.

[259] For anti-monopoly clauses in state constitutions, see supra note 172 and accompanying text. 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, Eighteenth Century Business Corporations in the United States, *in* Essays in the Earlier History of American Corporations 3, 16–17, 19–30, 305–06 (1917).

[260] Davis, supra note 259, at 21–30.

"purpose[]" and of public and private to resolve the problem of whether Dartmouth's charter could be revoked.[261]

The Court's chosen framework relied heavily on an idea Alexander Hamilton had sketched out in 1791.[262] In early debates about the Bank of the United States, Hamilton had argued that it was possible to see the federal corporate power as neither exclusive nor concurrent, but as *qualitatively* different from the state corporate power.[263] Addressing the problem of whether corporate power was "unlimited" in his long letter to President 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.[264] 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: "Thus 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."[265] 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 coordination problems ("the collection of taxes," "the trade with foreign countries," or "the trade between the States, or with the Indian tribes"), territorial expansion, federal property (Hamilton cited Congress's capacity to have police for the protection of the capital), and international dealings.[266]

Dartmouth's construction of a "private" status for state corporations took up this idea of a "qualitative" distinction between state and federal corporations. Effectively, *Dartmouth* used the idea of "purposes" to draw a line between state and federal corporations.[267] *Dartmouth* held that "private" state corporations could be independent, but "public" state corporations were not.[268] Federal corporations, as *McCulloch* and *Osborn*

[261] *Dartmouth*, 17 U.S. (4 Wheat.) at 667–70 (Story, J., concurring).

[262] Hamilton, supra note 184, at 655.

[263] Id. at 656 ("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 to 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*.").

[264] Id. at 656–58.

[265] Id. at 657.

[266] Id. at 657–58, 664–65, 676.

[267] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 668–69 (1819) (Story, J., concurring).

[268] Id.

would soon clarify, could not include either state "public" corporations *or* "private" ones, by contrast.[269]

Since *Dartmouth* changed the default rules for state corporations *only*, federal corporations retained the old, holistic relationship to sovereignty, which included *quo warranto* powers.[270] This meant not only that the federal corporate prerogative continued to include *quo warranto* powers, but also that federal corporate drafting would continue to be bespoke.[271] It also laid the groundwork for later case law which clarified that, unlike state corporations, federal corporations could never be fully "private."[272]

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).[273] 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 the Clause would grant states power over federal corporations as well.[274]

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.

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[269] See infra Sections III.B–C.

[270] See Blackstone, supra note 252, at 450–52; Baker, supra note 254, at 155–56; Patterson, supra note 254, at 879–80.

[271] See supra Section I.A; infra Appendix; supra note 49.

[272] Because Dartmouth College was constructively a state corporation, the Court did not answer 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 Subsection III.C.2. But see S. Pac. R.R. Co. v. United States, 168 U.S. 1, 2 (1897) (holding that Congress could retake land grants from a federal corporation, but only based on reservation clauses in the statute granting land, implying, in other words, that under other conditions, property, once transferred, could vest in a federal corporation and could not be revoked unilaterally).

[273] *Dartmouth*, 17 U.S. (4 Wheat.) at 651.

[274] 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. 17 U.S. (4 Wheat.) 316, 436–37 (1819).

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.[275] This was a category that *Dartmouth* had created to refer primarily to municipal and local corporations not enfranchised with the new "private" status.[276] Rather, federal corporations were *constitutional* corporations.

The idea of a "constitutional corporation" echoed a phrase James Madison had 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."[277]

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.[278] 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 category rather than a federal one, Madison's "interest" proposal lived on, in other words, in *McCulloch*'s broader category of a constitutional purpose—one which

[275] Id. at 419 (eschewing the language of "public" for "constitutional"); see also Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 859–60, 866–67 (1824) (explaining that if a federal corporation could, in theory, have no relationship to government and its principal aim was private gain, then it would be a private corporation, but also denying the possibility of such an entity based on the federal status conferred by the underlying charter); infra Section III.C.

[276] See supra Section III.A; *Dartmouth*, 17 U.S. (4 Wheat.) at 668–69 (Story, J., concurring).

[277] See supra Section II.A; 2 Farrand, supra note 23, at 615.

[278] *McCulloch*, 17 U.S. (4 Wheat.) at 411–12, 419.

could presumably include financial dealings that might be disallowed under 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.[279]

Third, *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.[280] 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.[281] It was the penultimate case 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.[282] The Court offered two holdings in the case. First, the Court found that the Bank was constitutional.[283] Second, the Court held that Maryland did not have the power to tax the Bank.[284]

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, and the second involved the Court expounding on the corporate power's prerogatives.[285] By addressing these questions side by side, the questions

[279] See infra Subsections III.C.2–3.
[280] See *McCulloch*, 17 U.S. (4 Wheat.) at 401.
[281] Id. at 317–18.
[282] Id. at 316–17.
[283] Id. at 425.
[284] Id. at 436.
[285] In other words, the Court had to address first why an unenumerated power was not limitless, and second what it might include within those limitations. Id. at 412, 419.

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.[286] 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 Chief Justice Marshall discusses the Necessary and Proper Clause at length in this portion of the opinion,[287] *McCulloch* is often treated as synonymous with that clause.[288] In addition, scholars often focus on the stated problem of the constitutionality of a bank—but not on the legal form which created it: the federal corporation.[289] Further, because the case does not repeatedly describe the charter power as an independent power—instead often referring to it as a "means," or tool for certain ends—the fact that federal incorporation is in fact analyzed independently in the case, let alone in others, has receded from view.[290]

Yet as Charles Black correctly observed some time ago, it is the corporate status of the Bank—not the Necessary and Proper Clause nor

[286] On the second question, the Court held, on the basis of the Supremacy Clause, that Maryland could not tax the bank. Id. at 327–30. In doing so, the Court restated that federal corporations, once properly created, were entitled to the privileges (and restrictions) that went with federal law. See id. This question was important because it 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.

[287] Id. at 331, 344.

[288] See, e.g., Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 67–68; Barnett & Blackman, supra note 1, at 186. 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 Chief Justice 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. 17 U.S. (4 Wheat.) at 405. 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: conceding in vague terms to Madison's politics before striking the death blow to their underlying constitutional claim. For more on Madison, see supra Part II.

[289] See, e.g., Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68; Neal, supra note 32.

[290] See *McCulloch*, 17 U.S. (4 Wheat.) at 409 (describing the burden on the plaintiffs of establishing restrictions on federal incorporation as a "means"). But see id. at 401 (describing incorporation as "[t]he power now contested").

the question of a "bank" as an independent topic—that *McCulloch* turns on.[291] Counsel for the State of Maryland had moved discussion to the Necessary and Proper Clause, not the Court.[292] Arguing that the clause was a limitation on powers, including the creation of a bank, counsel claimed that the Necessary and Proper Clause "was inserted for the purpose of conferring on Congress the power of making laws."[293] The Court, however, dismissed not just this argument, but the entire line of reasoning outright, stating that the fact "[t]hat a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned."[294]

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 bespoke, and unlike post-*Dartmouth* state corporations, there was no distinction between private and public federal corporations. 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 its "type," meaning it would be limited and structured based on that purpose.[295]

[291] Black, supra note 2, at 7, 14. 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 160, at 1103–05 (arguing that *McCulloch* turned on a question of power and sovereignty rather than a question of jurisdiction); Kaczorowski, supra note 2, at 772 (observing that Chief Justice Marshall's decision was based on "general reasoning" and "had nothing to do with the Necessary and Proper Clause").

[292] As Chief Justice Marshall explained, "The counsel for the State of Maryland have urged various arguments, to prove that [the Necessary and Proper Clause], 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*, 17 U.S. (4 Wheat.) at 412.

[293] Id.

[294] Id. at 413. Chief Justice Marshall was, of course, ignoring the fact that the Necessary and Proper Clause itself was the end result of debates and revisions aimed at persuading delegates from several states that their concerns about overreaching federal power were unnecessary, or at least should be set aside in favor of other considerations. For discussion of the debates around and the drafting of the clause itself, see Mikhail, Necessary and Proper, supra note 15, at 1054–58.

[295] See Kyd, supra note 253, at 103, 219; Hartog, supra note 195, at 197.

Chief Justice 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."[296] 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.[297]

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.[298] These ends include unenumerated and enumerated powers, Chief Justice Marshall wrote.[299] "Beneficial" created important room away from the existentially imperative (the "nugatory" necessary, as Thomas Jefferson had put it previously[300]). But unenumerated powers were 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[]."[301]

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. Further, it did not obviously require association with another enumerated power as an "end," if, through constitutional interpretation, an unenumerated "constitutional purpose" might be articulated. Finally, the idea of a constitutional corporation presumed that any such creation

[296] *McCulloch*, 17 U.S. (4 Wheat.) at 419.
[297] Id. at 417, 419.
[298] Id. at 327, 406, 409, 424, 429.
[299] Id. at 409.
[300] Jefferson, supra note 184, at 653.
[301] *McCulloch*, 17 U.S. (4 Wheat.) at 419.

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.[302] 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.[303]

[302] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 759–60 (1824).

[303] Because the Second Bank charter had a sue-and-be-sued clause among its provisions the Court partly relied on this clause for its holding—and this holding was partially in tension with *Bank of the United States v. Deveaux*—uncertainty exists about the basis of federal jurisdiction for federal corporations today. See supra notes 123–25. 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. Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 86–92 (1809). 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. See supra notes 123–25.

Osborn, however, 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 sued" clause. 22 U.S. (9 Wheat.) at 807, 823–24 (noting the hypothetical of a bank charter and also asking rhetorically whether "a being, thus constituted, [has] 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 gone out of its way to preserve it. Am. Nat'l Red Cross v. S.G., 505 U.S. 247, 251 n.3 (1992) (expressly declining to address federal jurisdiction based on the federal nature of the corporate charter and deciding the case on other grounds); see also Keifer & Keifer v. Reconstruction Fin. Corp., 306 U.S. 381, 394 (1939) (constructively finding federal jurisdiction without a "sue and be sued" clause based on "[t]he legal position" of the entity).

Several substantive issues were intertwined with the jurisdictional questions as well. First, *Osborn* indicated that, as ideas of corporate autonomy emerged, federal corporations could not be citizens based on new theories of corporate personhood, reinforcing the idea that federal corporations were entirely different subjects than state-chartered private corporations.[304] Second, *Osborn* held that despite having a majority ownership which was private, a federal corporation would not automatically become a "private" creature.[305] Finally, while insisting on this federal status, *Osborn* held that, at least in this case, agents of the corporation were not "officers" within the meaning of the Constitution—but neither were they "contractors."[306] In other words, federal corporations could be outside the bounds of agency law without becoming "private" entities.[307]

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.

1. Personhood

Because federal corporations never attained 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

There is 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 Wayne attested that Chief Justice Marshall regretted his holding in *Deveaux*. David P. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, at 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.

[304] *Osborn*, 22 U.S. (9 Wheat.) at 826–28.

[305] Id. at 859–60.

[306] Id. at 866–67.

[307] Id. at 859–61, 866–67.

form of corporate citizenship which "flips" which side of the Constitution they are bound by.[308]

When *Osborn* arose, contemporary ideas of corporate personhood did not yet exist.[309] However, *Dartmouth*'s creation of autonomous, private status had foreshadowed its eventual development.[310] The one case that 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.[311] *Osborn*, however, had partially displaced *Deveaux*.[312] 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, "This 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."[313] 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."[314] Nowhere did *Osborn* entertain corporate citizenship.[315] 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.

2. 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 when it was

[308] Under reverse incorporation, the rights that have now attached to private state-chartered corporations would attach to federal corporate "citizens" as well. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the Fourteenth Amendment's Equal Protection Clause is incorporated against the federal government through the Fifth Amendment's Due Process Clause).

[309] See Louisville, Cincinnati & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 554 (1844) (holding that citizenship is determined by the place of incorporation, not the members of the corporation).

[310] See supra notes 246–48.

[311] Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 67 (1809).

[312] See supra notes 123–24.

[313] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 823 (1824)

[314] Id.

[315] Id. at 826–28.

majority-held by private shareholders.[316] 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.[317] 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.[318] 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.[319] 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."[320]

Today, a majority private share might constitute a transformative event, meaning that a federal corporation is "private."[321] To the *Osborn* Court, this was nonsensical. Despite the fact that the Bank of the United States had only a twenty percent government stake, the *Osborn* Court insisted this threshold did not transform a federal corporation into a "private" entity.[322]

3. 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 had the Bank been a federal agency.[323] In doing so, the Court made clear that federal

[316] Id. at 859–60.
[317] See supra Section III.B.
[318] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819).
[319] *Osborn*, 22 U.S. (9 Wheat.) at 824–25.
[320] Id. at 825, 860; see History of Central Banking, supra note 92.
[321] 28 U.S.C. § 1349.
[322] *Osborn*, 22 U.S. (9 Wheat.) at 859–60; see History of Central Banking, supra note 92.
[323] *Osborn*, 22 U.S. (9 Wheat.) at 866–67.

corporations existed outside the remit of what would later form the basis for administrative law.[324] 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."[325]

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.[326] By arguing that the protections of public law (in this case, immunity from state taxation) automatically went hand in hand with "officer" status, counsel for Osborn hoped to show that the Bank was private—and therefore subject to state power, not federal.[327]

Counsel's argument, however, contained an errant assumption that the Court was quick to point out, namely 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.[328] In this way, arguments made by Osborn's counsel prefigure the "fundamental" approach to contemporary analysis described in Part I, under which federal corporations can only be cognized as either agencies or private corporations.[329]

The Court reiterated that agents of the Bank did not equate to "officers of government."[330] Importantly, the Court also emphasized that there was no converse implication: *not* being an "officer" did not mean one was then a "contractor."[331] In reply, Chief Justice Marshall pointedly rejected the language of "public" and "private."[332] He noted that counsel "contended[] that the directors' . . . resemblance to contractors [was] more perfect than

[324] Id. Compare id. (concluding that agents of the Bank were not federal "officers"), with Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946) ("That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency . . . ."), and Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015) (holding that Amtrak "is the Government," and therefore, its board members must "satisfy basic constitutional requirements").

[325] *Osborn*, 22 U.S. (9 Wheat.) at 866–67.

[326] Id.

[327] Id. at 772, 775–77.

[328] Id. at 866–67 ("The appellants rely greatly on the distinction between the Bank and the public institutions, such as the mint or the post office. The agents in those offices are [as the appellants argued] officers of government, and are excluded from a seat in Congress.").

[329] See supra Paragraph I.A.2.i.

[330] *Osborn*, 22 U.S. (9 Wheat.) at 866–67 ("It will not be contended, that the directors, or other officers of the Bank, are officers of government.").

[331] Id. (refusing to entertain the appellants' argument that "[t]he connexion of the government with the Bank, is likened to that with contractors").

[332] Id. at 859–61.

it is."[333] This could not be, he opined, because the Bank "was not created for its own sake, or for private purposes."[334]

Chief Justice Marshall stood firm on the existence of federal corporations as an independent object of legal analysis. Referring to the Bank as "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*.[335] Chief Justice Marshall simply reiterated that "[i]t has never been supposed that Congress could create such a [private] corporation."[336]

IV. FEDERAL CORPORATIONS IN THE SUN

Section IV.A shows how excavating the power described in Parts II and III has implications for the doctrine and use of federal corporations today. Section 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 to 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 incorporation today except its confusion.[337]

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 potentially poised to revisit the law of federal incorporation—a turn that would figure into its general reworking of administrative law—the interventions this Article makes

[333] Id. at 866–67.
[334] Id. at 860.
[335] Id. at 867.
[336] Id. at 859–60.
[337] Leazes, supra note 5, at 3 ("[A]lthough heed has been paid to the phenomenon of federal corporations, it is still an area needing extensive work in regard to the boundaries of their activities."); McDiarmid, supra note 5, at 5 ("Legal questions raised by the government corporation are numerous, and many remain unsolved.").

come at a critical juncture; placing the law of federal incorporation on clearer footing could also help avoid future doctrinal incoherence.[338] In particular, it may aid the Court in not invalidating constitutional federal corporate activity based on the mistaken understanding that federal corporations are "agencies."

The understanding of the corporate power that this Article lays out also offers Congress and the executive branch a clearer outline of the possibilities within their policymaking 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.[339] 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 toward making possible important economic activity today.[340] Reviving the concept of federal incorporation

[338] See supra Subsection I.B.2.

[339] The Congressional Research Service has issued reports in an attempt to clarify the corporate power for Congress. See, e.g., Kosar, supra note 42, at 1 (discussing various categories of quasi-governmental entities and examining their legal characteristics, behavior, and functions).

[340] 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. See, e.g., William Jennings Bryan, Address at the Chicago Conference on Trusts (Sept. 16, 1899), *in* Chicago Conference on Trusts: Speeches, Debates, Resolutions, List of the Delegates, Committees, Etc. 496, 506–08 (Franklin H. Head ed., Chicago, Lakeside Press 1899) (advocating for a federal statute requiring a license for state corporations to engage in commerce beyond the home state's border); Ralph Nader, Mark Green & Joel Seligman, Constitutionalizing the Corporation: The Case for the Federal Chartering of Giant Corporations 71–85 (1976); Accountable Capitalism Act, S. 3348, 115th Cong. (2018) (sponsored and drafted by Sen. Elizabeth Warren).

Despite arousing perennial interest from academics and legislators alike, these proposals have all been summarily rejected. See Melvin I. Urofsky, Proposed Federal Incorporation in the Progressive Era, 26 Am. J. Legal Hist. 160, 176 (1982) (noting that between 1901 and 1914, proposals for federal licensing or chartering were put before the House at least twenty-four times, but 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 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

detailed here would, of course, potentially limit the flexibility Congress has previously enjoyed, constraining the credit bump that federal corporations benefit from and limiting accounting and other benefits that the lack of attention currently enables.[341] 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 subsidization—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's expansive legislative powers have long been recognized as part of modern Commerce Clause jurisprudence,[342] the possibility that these powers will come into question—as they did in *NFIB v. Sebelius*—suggests that alternative constitutional understandings of federal legislation may become increasingly important in coming years.[343] The understanding of the corporate power this Article lays out offers Congress the ability to independently articulate the rationale for its activities based on constitutional law—independent of increasingly unstable twentieth-century precedent.

This Section 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.

1. 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.[344] As the Marshall Court

regulate; such an interpretation of federal incorporation could replace Congress's bespoke capacity (both with respect to taking over state corporations and creating them) with unintended uniformity requirements for federal corporations as well.

[341] See supra Section I.B.

[342] United States v. Darby, 312 U.S. 100, 125–26 (1941).

[343] NFIB v. Sebelius, 567 U.S. 519, 561–63 (2012).

[344] See supra note 90; supra Paragraph I.A.2.i.

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.[345]

Specifically, early doctrine is crystal clear that federal corporations should be understood as locked into a governmental relationship with the Bill of Rights.[346] Federal corporations should also automatically have federal jurisdiction.[347] Consequently, (1) the choose-your-own-adventure state action doctrine currently offers, (2) the potential implications that corporate personhood holds for federal corporations based on reverse incorporation, and (3) the use of jurisdictional confusion to keep federal corporations out of court, are unconstitutional on a close reading of the early case law of federal corporations.

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, with its case law on jurisdiction, and with its current trajectory with respect to corporate personhood.[348] 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.[349] 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.[350]

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.[351] Federal corporations have always been primarily financial—not administrative—devices.[352] When the Court articulated it, the idea of a "constitutional"

[345] Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 860–61 (1824).

[346] See supra Subsection III.C.1.

[347] See supra Section III.C.

[348] See supra Paragraph I.A.2.ii (state action); supra Paragraph I.A.2.iii (jurisdiction); supra Section III.A (personhood).

[349] See supra Subsection I.A.2; supra Paragraph I.B.2.ii.

[350] See supra Paragraph I.A.2.iii; supra Subsection III.C.1.

[351] See supra Section III.C.

[352] United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927); see also McDiarmid, supra note 5, at 8, 28 (emphasizing the financial uses of federal corporations);

purpose was, in the context of federal incorporation, intertwined with federal financial stability.[353] It was distant from both twentieth-century ideas concerning "public" goods and the (mostly Progressive Era) assumption that the public/private divide inherently aligned "public law" (or constitutional law) with those goods—if, indeed, they could be clearly located.[354] 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.[355]

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.[356]

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

Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015) (Alito, J., concurring) (indicating without deciding that rulemaking authority might be outside the scope of federal corporate power and is better understood as administrative).

[353] See, e.g., Brewer, supra note 142, at xiii–xxii (describing the symbiotic relationship between constitutions and state-backed financial forms, which had more to do with stability and power than "public good"); North & Weingast, supra note 143, at 804–06 (describing constitutional law as a background condition for financial stability); Desan, supra note 143, at 11. Of course, this is not to deny the important role—and debates over—the role of public-oriented concepts such as the commons or civic virtue in early republican thought. For a discussion on developing ideas of "public" in legal thought (much of which emerged at the local, not federal level, involving municipal land distribution), see, e.g., Hartog, supra note 195, at 7. For a discussion of republican thought more generally, see, e.g., Joyce Appleby, Inheriting the Revolution: The First Generation of Americans 27, 32 (2000).

[354] For a discussion of the problems with defining "public" and its progressive roots, see Nikhil Menezes & David E. Pozen, Looking for the Public in Public Law, 92 U. Chi. L. Rev (forthcoming 2025) (manuscript at 2–3) (on file with author) (referring to the foundational Progressive Era thinker Walter Lippman and his "phantom" public as a jumping-off point for the search for defining the concept, which would often serve as a rationale for regulation).

[355] In contesting claims that the New Deal administrative state is "unconstitutional," legal historians have produced a wealth of literature describing nineteenth-century forms of administration. Compare Philip Hamburger, Is Administrative Law Unlawful 1–13 (2014) (arguing that there is no quasi-originalist case for administrative law), with William J. Novak, The People's Welfare: Law and Regulation in Nineteenth-Century America, at ix–x (1996) (arguing that concerns with modern state power and public institutions cannot be solved by a "return" to nineteenth-century minimal government and laissez-faire economics because there were, in fact, institutions that served as a proto-administrative state at the time).

[356] See Froomkin, supra note 5, at 588.

substantive activity that might be prohibited based on existing private-law rules.[357] They also have more financial flexibility than private state-chartered corporations. While private-law corporations must choose a corporate form which then dictates fiduciary duties and budgeting requirements, federal corporations have no similar restrictions.[358]

Finally, unlike state corporate law—under which the charter itself becomes, 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.[359]

2. 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.[360] 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.

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.[361] The early law of federal incorporation suggests

[357] E.g., Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 520–22 (D.C. Cir. 2015) (holding that the SEC cannot require companies to adhere to certain disclosure requirements).

[358] Leazes, supra note 5, at 48; see supra Subsection I.A.1.

[359] Today, this is simply legislative prerogative, but it derives from *quo warranto*. See supra note 255; supra Section III.A.

[360] See supra Paragraph I.B.2.ii; Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 398 (1995).

[361] See supra Sections III.B–C. These cases cannot persuasively be distinguished from the Court's current analysis based solely on the fact that they involved a bank; 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.

that the current Court should decline to extend this definition further.[362] The Marshall Court's logic might also help us better understand existing uses of the term "agency" to comprehend federal corporations.

To square existing case law with the law described in Part III, we might understand prior cases which used the word "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 the "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, but not in the sense of the latter.

3. Alternative Rationales for Federal Legislation

Recognizing the corporate power opens up new terrain for how both 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.[363] The scope of activity that these clauses authorize has expanded in the past century.[364] Yet one constraint remains: federal endeavors flowing from these clauses are generally thought of as regulatory, not creative.[365] 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.

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[362] See supra Section III.C.

[363] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 83, 160–61, 201 (1824).

[364] United States v. Darby, 312 U.S. 100, 125–26 (1941). But see United States v. Lopez, 514 U.S. 549, 567 (1995) (striking down school gun regulations that are not related to interstate commerce); United States v. Morrison, 529 U.S. 598, 617 (2000) (finding that federal civil remedies for the victims of gender-motivated violence as part of the Violence Against Women Act are unconstitutional under the Commerce Clause). Compare id. (holding Congress exceeded its power under the Commerce Clause), with Gonzales v. Raich, 545 U.S. 1, 29 (2005) (stating that Congress may criminalize local cannabis production and use regardless of state laws to the contrary).

[365] Even the Spending Clause is "regulatory" in that federal funds are often granted to states conditionally. See, e.g., South Dakota v. Dole, 483 U.S. 203, 207 (1987).

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."[366] 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.[367] Significantly, the corporate power allows federal corporations to do this without relying on an executive order or emergency powers.[368] 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.[369] The Affordable Care Act, for example, might be understood as a constructive federal corporation.[370] As the current Court revisits formerly stable areas of twentieth-century jurisprudence, it may be important for Congress to expound on its own action in independent but constitutionally grounded ways.

[366] See supra Section III.B.

[367] For a discussion regarding housing, see Caitlin B. Tully, Housing Costs Threaten Democracy, Democracy J. (Mar. 5, 2024, 11:34 PM), https://democracyjournal.org/arguments/housing-costs-threaten-democracy/ [https://perma.cc/6Z23-FYKW].

[368] See Press Release, White House, President Biden Announces First Two Infant Formula Defense Production Act Authorizations, Am. Presidency Project (May 22, 2022), https://www.presidency.ucsb.edu/documents/white-house-press-release-president-biden-announces-first-two-infant-formula-defense [https://perma.cc/KS39-TF44] (exercising federal corporate power through Defense Production Act authorizations).

[369] See supra Paragraph I.B.2.iii.

[370] Id.

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.[371]

Today, this general disfavor is expanding in at least two directions. With respect to powers, the Roberts Court—despite fashioning itself in Chief Justice Marshall's image—disfavored Chief Justice Marshall's "structural" interpretation in *Sebelius*, the 2012 case upholding the Affordable Care Act on the basis of the tax power rather than the Commerce Clause.[372] Meanwhile, although the Ninth Amendment clearly protects unenumerated rights,[373] skepticism about unenumerated rights is currently affecting previously established rights, not just yet-unrecognized ones.[374] 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.[375]

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

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[371] U.S. Const. amends. IX, X; see Primus, Essential Characteristic, supra note 2, at 419 (referring to this long-standing disfavor and arguing against its validity); Bork Nomination, supra note 10, at 248–50.

[372] NFIB v. Sebelius, 567 U.S. 519, 561–63 (2012); see also Black, supra note 2, at 1–98 (discussing "structural interpretation"); Bobbitt, supra note 20, at 74 (elaborating on structural interpretation).

[373] U.S. Const. amend. IX.

[374] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2257–58 (2022); Gersen, *Roe*, supra note 9.

[375] *Dobbs*, 142 S. Ct. at 2257–58; see Caitlin B. Tully, The Liberal Giant Who Doomed *Roe*, Slate (June 25, 2023, 7:00 PM) [hereinafter Tully, Liberal Giant], https://slate.com/news-and-politics/2023/06/john-hart-ely-dobbs-roe-legacy.html [https://perma.cc/QF9H-G4S3] (observing that Justice 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, New Yorker (June 20, 2022) [hereinafter Gersen, Privacy], 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).

This Section addresses two important criticisms that might be made of the corporate power: first, that the corporate power requires overlooking significant political controversy during the Founding—and therefore that it is illegitimate—and second, that justifying it now justifies legal opacity as a normative principle. Then, this Section discusses the interpretive implications that the existence of 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, why, although rights and powers are in certain ways analytically distinct, the possibility of discussing unenumerationism across both is not on shaky ground; and finally, what methodological implications this unenumerated power holds for how we think about unenumerated powers and rights in the future.

1. 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.[376] 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.[377] 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

[376] See supra Introduction. For discussion of originalism and realism, see Ablavsky, supra note 55, at 1119–27. For a discussion of fusion as aspirational legal history, see Fishkin & Forbath, supra note 56, at 484–87. For a discussion of realism, see, e.g., Doerfler & Moyn, supra note 55; Levinson, supra note 55; Fallon, supra note 57, at 1427; Gienapp, Second Creation, supra note 10, at 1–12.

[377] See, e.g., Rakove, supra note 3, at 355; Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68; Brest et al., supra note 1, at 27–59.

executive branch have been doing for the last two hundred years do not provide us with a more democratic understanding either of the law or of its history.

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* was 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 Chief Justice 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 actual 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 was debated, both sides must have had equal credibility, and therefore, 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, first, one of two parties subscribed to those ideas and, second, they were litigated.[378] Law-politics fusionism may thus encourage legal reasoning that struggles to hold up in the face of unpredictable majority/minority dynamics.[379]

Just as the corporate power does not condone antidemocratic 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

[378] See J.M. Balkin, Agreements with Hell and Other Objects of Our Faith, 65 Fordham L. Rev. 1703, 1733 (1997) (discussing the formulation of "on the wall").

[379] See Farah Peterson, Our Constitutionalism of Force, 122 Colum. L. Rev. 1539, 1540–41 (2022) (discussing the consequences of fusionism in the constitutional context).

this way for it to be constitutional.[380] When scholars problematize lawyerly opacity, they often do so without going so far as to call it illegitimate.[381] But more importantly, identifying the corporate power hardly undermines the ideal of transparency. Rather, it advances it.

2. Unenumerated Constitutionalism in Court

As the current Court considers whether to reverse constitutional decisions that upheld 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 rights 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 decision in *Dobbs*.[382] But the holding of *Dobbs* largely turned on the Court's baseline presumption against unenumerated rights.[383] The *Dobbs* Court relied on originalism and, in particular, the

[380] See supra note 61 (discussing the difference between statutory canons, which do have rules against hidden meaning, and constitutional law). 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 Judgment require Secrecy." U.S. Const. art. I, § 5, cl. 3.

[381] As scholars have observed, transparency itself is often ill-defined and not an inherent good (or evil). See David E. Pozen, Seeing Transparency More Clearly, 80 Pub. Admin. Rev. 326, 327 (2020); Mark Fenster, The Opacity of Transparency, 91 Iowa L. Rev. 885, 889 (2006) (asserting that "transparency's status as a legal obligation for government entities in the United States and as an individual right for American citizens is remarkably vague" (citations omitted)).

[382] See, e.g., Reva B. Siegel, The History of History and Tradition: The Roots of *Dobbs*'s Method (and Originalism) in the Defense of Segregation, 133 Yale L.J.F. 99, 101–03 (2023); David H. Gans, This Court Has Revealed Conservative Originalism to Be a Hollow Shell, Atlantic (July 20, 2022), https://www.theatlantic.com/ideas/archive/2022/07/roe-overturned-alito-dobbs-originalism/670561/. Within this discussion, there has been a great deal of nuance about what "originalism" means.

[383] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245 (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." (citing Roe v. Wade, 410 U.S. 113, 152–53 (1973))).

"history and tradition" test as carve-outs from this baseline presumption against unenumerated legal rights or powers, or what we might call "unenumeration."[384]

The corporate power, however, makes both the presumption against unenumeration and the carve-outs 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.[385] Both commitments undergird Justice Alito's suggestion that constitutional rights cannot exist if they rely on several constitutional provisions at once as *Roe* did to explain the presence of a new constitutional concept.[386] But the existence of the corporate power suggests, at the level of general constitutional interpretation, that when the Warren (or Burger) Courts engaged in what one might term "interprovision" interpretation, they were following in the footsteps of the Marshall Court—and the Framers—as well.[387]

Scholars have tended not to develop whether or how what many have termed the Marshall Court's "structural" interpretation relates to the Warren and Burger Courts' "interprovision" approach.[388] This is largely

[384] Id. at 2247, 2278.

[385] The anti-legitimacy arguments grew largely from arguments first made by John Hart Ely. See supra note 12; see also Tully, Liberal Giant, supra note 375 (discussing Ely's arguments); Melissa Murray & Katherine Shaw, *Dobbs* and Democracy, 137 Harv. L. Rev. 728, 737 (2024) (explaining the campaign to delegitimize *Roe*).

[386] *Dobbs*, 142 S. Ct. at 2245 (stating that *Roe* is bad law because it finds abortion rights to "spring from no fewer than five different constitutional provisions"). But see Gersen, Privacy, supra note 375 (noting the logical flaws behind the current Court's silo-ing of First Amendment and Fourth Amendment privacy).

[387] Of course, *Roe* was decided by the Burger, not Warren, Court. The precise relationship between these approaches deserves further detailed work to address the concern that the Warren Court found unenumerated rights by combining existing constitutional rights (its "interprovision" approach), whereas, as described in this Article, the corporate power does not obviously depend on other constitutional provisions (though its residual presence can be seen in them).

For present purposes, however, observe that the result of both—in "privacy," an autonomous, coequal legal right that no longer depends on prior constitutional clauses for understanding, and in the corporate power, an autonomous constitutional power that similarly does not depend on sister constitutional clauses for intelligibility (though of course both might be discussed in relation to them)—is analogous.

[388] For a prominent discussion of the Marshall Court and structural interpretation that explains the Marshall and Warren Courts as having inherently distinct problems of interpretation, see Bobbitt, supra note 20, at 155–56. But see Charles L. Black, Jr., The Unfinished Business of the Warren Court, 46 Wash. L. Rev. 3, 8, 12 (1970) (connecting the Warren and Marshall Courts as sister courts (with the Warren Court defining "citizenship"

because "structural interpretation" is often equated with implications alone—with "ends"—rather than with stand-alone rights or powers.[389] 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 on 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.

Second, and on a more granular level, the corporate power also poses difficulties for both the anti-unenumeration presumption and the related carve-out. *Dobbs* indicated something approaching a sliding scale test for unenumeration: (1) the more like a taxonomical right an unenumerated right appears (the more "nameable" the unnamed right), and (2) the more independent it is from enumerated rights, the less credible it is.[390] Once a right passes this threshold, the anti-unenumeration presumption applies. Then, "history and tradition" provides a carve-out which protects some unenumerated rights, but not others.[391]

Courts and litigators might be tempted to cast the corporate power that this Article excavates as part of our "history and tradition." While it would be possible to craft a brief that followed such a formula drawing on the Marshall cases discussed here and the long practice of federal incorporation this Article outlines, doing so would provide only a partial and, as this Article contends, imperfect picture of why the corporate power is constitutional.

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. The past, here, helps us identify what a corporate power might look like—but a dictionary entry today might similarly help us understand a foreign concept. With respect to the corporate power's contemporary

and the Marshall Court "nationhood"), though not fully building out how they addressed silence as ahistorical or exportable constitutional law). See also Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 769 (1999) (observing "intratextualism" in Chief Justice Marshall's jurisprudence, which he distinguishes from "structural interpretation," nevertheless noting that "an intratextual analysis rides to Warren's rescue" in *Bolling v. Sharpe* and that "this is *McCulloch* talk").

[389] See, e.g., Chemerinsky, supra note 1, at 120–21, 155; Stone et al., supra note 1, at 66–68.

[390] *Dobbs*, 142 S. Ct. at 2247, 2278–80.

[391] Id.

constitutionality, it is equally important that it can be clearly identified as distinct from existing bodies of law today, and in doing so, clarifies rather than muddies existing legal activity.

This is before getting to the fact that because of the twentieth-century confusion surrounding the power and the friction it demonstrates between legal practice and public or cultural meaning, it fits awkwardly into—if it is not impossible to map it onto—the Court's new rubric both at the Founding and throughout its history.[392]

If deployed, in other words, the criteria *Dobbs* wielded against privacy rights might well fell a creation of the Marshall Court, too. Even if they did not and courts were to understand the corporate power as legitimate based on its "history and tradition," doing so would, ironically, misunderstand both the Marshall Court and the Framers alike. Both demonstrated, in their embrace of a "silent" power, an awareness and even fundamental interpretive commitment to the fact that coequal unenumerated rights and powers exist in the Constitution—ones that can be articulated through interpretation based not on originalism or taxonomic textualism, but on other, presentist modes of interpretation, so long as clarity about the parameters of such a right or power can also be achieved in this manner. Both possible results suggest that the Court's current presumption against unenumeration is overbroad, and that limiting the acknowledgement of unenumerated rights or powers to those found in our "history and tradition" misunderstands both our constitutional law and our constitutional history.

The interpretive unity of both the Marshall and Warren Courts on the question of unenumeration transcends disagreements about Federalist politics and the particular legal climate of the 1960s. 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.

Both Courts articulated fully unenumerated rights or powers which exist independently of single enumerated clauses in the Constitution. Rather than offering a way to prevent endorsing "bad" or "judge-made" law, the presumption against unenumeration itself produces perverse

[392] Id. (employing history and tradition).

results. As a result, we should reconsider relying on it at all. By extension, general scholarly presumptions against unenumerated rights, addressed below, deserve reconsideration as well.

3. Rights and Powers, Together

It is almost certain that some will question the rightness of this Article's consideration of rights and powers together given the important ways in which they are distinct—the one often understood as a check on the other. Thanks largely to Alexander Bickel's "countermajoritarian difficulty," scholars often start with the assumption that courts interpreting "rights" pose a greater, and certainly different, problem than the problem of powers; to uphold "rights," courts usually[393] strike down legislation. Because doing so means using their comparatively antidemocratic power against a presumptively "democratic"—or at least, representative—branch, Bickel suggested that courts must always justify such power, a premise that has itself been embraced in judicial doctrine, with its "tiers" of scrutiny.[394]

We tend to equate congressional action, by contrast, with presumptive democratic legitimacy which courts must not be too hasty to strike down. Few worry that Congress might not have enough power—when its members can coordinate amongst themselves to use it.[395] As a result, at least when it comes to the ontological problems of jurisprudence, not only historical fears of federal power and the possibility that courts might have to limit it, but also conversely the problem of whether Congress does, in fact, have powers that an activist Court might wrongly seek to limit, have, in recent decades, been largely eclipsed by the paradigm example scholars use to illustrate judicial activism: the Warren Court's rights expansion.

This makes analyzing both as a matter of "unenumerated law" less obvious than it might otherwise prove. Without undermining other important distinctions between rights and powers that might rightly be made, as a problem of analysis, rights and powers are arguably not dissimilar when it comes to the matter of how to articulate their existence:

[393] Of course, courts have other capabilities as well—for example, their equitable powers.

[394] Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 4 (1962). But see Pamela S. Karlan, The New Countermajoritarian Difficulty, 109 Calif. L. Rev. 2323, 2324 (2021) (arguing that it is not enough to scrutinize courts for their minoritarian tendencies—legislatures might exhibit them as well).

[395] But see Primus, Essential Characteristic, supra note 2, at 417–26 (surveying the narrowing of Congress's power based on enumerationist arguments in recent jurisprudence).

doing so demands the ability to articulate an abstract concept with limitations, prerogatives, and in relation to existing areas of law, relying on—as with all constitutional law—modes of constitutional interpretation that are otherwise legitimate. This is before getting to more substantive arguments, which might, of course, vary on a case-by-case basis without disrupting the first-order similarity. In this sense, the problems of legibility and application that exist in many areas of the law are no different as between unenumerated rights or powers. It is not surprising, then, that the Framers—a generation of legal thinkers comfortable with an unenumerated power that might relate to enumerated powers and constitutional text in less than linear ways—might have embraced the Ninth Amendment alongside the Bill of Rights. In all likelihood, they assumed that future generations would also be capable of articulating unenumerated rights or powers from between these coordinates.

4. 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.[396] 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.[397] 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

[396] Following 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 most recent result was Lori B. Andrews, Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning, 11 Harv. J.L. & Tech. 647 (1998).

[397] Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 205–06 (1890).

exist in the Constitution in the present.[398] When making non-historical arguments, it is commonplace to argue for judicial "principles" instead of positive rights or powers—even when, in essence, one is advocating for substantive rights.[399]

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.[400] Today, we operate in an interpretive universe that is increasingly defined by four coordinates: originalism, taxonomic textualism, precedent, and process.[401] 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 long-standing rights that no one has suggested we should find unconstitutional such as several underlying desegregation, was itself

[398] See, e.g., Risa L. Goluboff, The Thirteenth Amendment and the Lost Origins of Civil Rights, 50 Duke L.J. 1609, 1640 (2001); Amy Dru Stanley, Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights, 115 Am. Hist. Rev. 732, 735 (2010); Rebecca J. Scott, Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge, 106 Mich. L. Rev. 777, 781 (2008).

[399] Compare Frank I. Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. Pa. L. Rev. 962, 966 (1973) (acknowledging the uphill battle that "minimum-income rights" face, but considering the question of whether they might be argued to exist as a valid inquiry), and Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I, 1973 Duke L.J. 1153, 1162–63 (arguing for a "general right of judicial access"), with Martha T. McCluskey, Constitutional Economic Justice: Structural Power for "We the People," 35 Yale L. & Pol'y Rev. 271, 271–72 (2016) (casting what is essentially an argument for economic rights as a jurisprudential "principle"). See Richard M. Re, "Equal Right to the Poor," 84 U. Chi. L. Rev. 1149, 1152 (2017) (similarly defining an "equal right principle" for judges); see also Liza Batkin, Note, Wealth-Based Equal Process and Cash Bail, 96 N.Y.U. L. Rev. 1549, 1549, 1553 (2021) (proposing a "general principle" to shore up what Batkin terms "wealth-based equal process doctrine").

[400] For a rare example of such methodological innovation after the late 1980s, see Amar, supra note 388, at 788–90; see also Siegel, supra note 382, at 101–02 (noting that historicizing originalism to counteract current legal understandings erases, methodologically, the idea that any other form of legal method has ever had authority). For a discussion of the current difficulties with constitutional theory, see Caitlin B. Tully, Does Constitutional Law Have a Future?, 2022 Mich. St. L. Rev. 427, 431–32.

[401] One might add "purposivism" to this list, though it applies more in the statutory context. See, e.g., Note, The Rise of Purposivism and Fall of *Chevron*: Major Statutory Cases in the Supreme Court, 130 Harv. L. Rev. 1227, 1229–30 (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.

defended through and built on modes of argument which sit firmly outside of such circumscribed methodological norms.[402]

There is something of a renaissance afoot that aims to reengage with a variety of features of constitutional law.[403] The corporate power 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 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

[402] See, e.g., Charles L. Black, Jr., The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 421 (1960); Laurence H. Tribe, Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 Harv. L. Rev. 1, 2 (1973).

[403] See, e.g., Presidential Comm'n on the Sup. Ct. of the U.S., Final Report 6–9 (2021), https://www.presidency.ucsb.edu/sites/default/files/documents_with_attached_files/376063/168144.pdf [https://perma.cc/5D9Z-9HUQ]; Daniel Hemel, Can Structural Changes Fix the Supreme Court?, 35 J. Econ. Persps. 119, 120 (2021); David E. Pozen & Thomas P. Schmidt, The Puzzles and Possibilities of Article V, 121 Colum. L. Rev. 2317, 2319–20 (2021); Karlan, supra note 394, at 2324. Increased public attention has also been paid to departmentalism. See, e.g., The Ezra Klein Show, Liberals Need a Clearer Vision of the Constitution. Here's What It Could Look Like., N.Y. Times, at 8:06 (July 5, 2022), https://www.nytimes.com/2022/07/05/opinion/ezra-klein-podcast-larry-kramer.html (featuring an interview with Larry Kramer about popular constitutionalism).

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 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 Court's turn toward treating constitutional text as "taxonomy": an interpretive mode recognizing only rights or powers expressly mentioned.

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

Federal Corporations in the United States of America (1788–2008)[404]

Name	Date Created	Date Abolished	Authority
African Development Foundation	1980	Permanent	22 U.S.C. § 290h
National Railroad Passenger Corporation ("Amtrak")	1971	Permanent	49 U.S.C. § 24101
Atlantic and Pacific Railroad Company	1866	1880[405]	Act of July 27, 1866, ch. 278, 14 Stat. 292

[404] With limited exceptions, this list generally excludes towns or municipal corporations (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; and honorific federal charters (such as that held by the Boy Scouts of America or the Gold Star Wives). For a discussion of federal charters in the banking industry, see Menand & Ricks, supra note 33, at 1383–85. For a comprehensive list that is inclusive of these additional entities through 1944, see Senate Comm. on the Judiciary, 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 Appendix 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. The federal corporations listed in the Appendix are taken from several sources. E.g., U.S. Gen. Acct. Off., supra note 90, at 2–3 (providing a broad account of the complexity of government corporations and their definitional vagueness); McDiarmid, supra note 5, at 48 (observing and individually surveying thirty-eight federal corporations); Harry S. Truman, Message to the Congress Transmitting Corporation Supplement to the Budget for 1947 (May 2, 1946), *in* American Presidency Project, https://www.presidency.ucsb.edu/documents/message-the-congress-transmitting-corporation-supplement-the-budget-for-1947 [https://perma.cc/73H6-MGWT] (last visited Feb. 11, 2025) (addressing the status of government corporations established because of the Great Depression or World War II in connection with the annual budget); S. Rep. No. 80-30, at 4–13; O.R. McGuire, Some Problems Arising from Government Corporations, 85 U. Pa. L. Rev. 778 (1937).

[405] The Atlantic and Pacific Railroad is now jointly controlled by the Saint Louis–San Francisco Railway and the Atchison, Topeka, and Santa Fe Railway. See Legend and Legacy: 175 Years of BNSF and Counting, BNSF Ry. (Feb. 12, 2024), https://www.bnsf.com/news-media/railtalk/heritage/175th-anniversary.html [https://perma.cc/FUR7-NWMF].

Name	Date Created	Date Abolished	Authority
Bank of the United States (first)	1791[406]	1811	Act of Feb. 25, 1791, ch. 10, 1 Stat. 191
Bank of the United States (second)	1816	1836	Act of Apr. 10, 1816, ch. 44, 3 Stat. 266
Carnegie Foundation for the Advancement of Teaching	1906	Permanent	Act of Mar. 10, 1906, ch. 636, 34 Stat. 59
Central Bank for Cooperatives	1933	1989[407]	Act of June 16, 1933, ch. 98, tit. 3, 48 Stat. 257, 261
Central Pacific Railroad Company	1862	Permanent[408]	Act of July 1, 1862, ch. 120, 12 Stat. 489

[406] According to Alexander Hamilton, several federal corporations were chartered prior to the chartering of the Bank, "namely, in the erection of two governments; one northwest of the River Ohio, and the other southwest—the last independent of any antecedent compact." Hamilton, supra note 262, at 655–58, 668; see, e.g., Act of Aug. 7, 1789, ch. 8, 1 Stat. 50 (making rules and regulations for the Northwest Territories).

[407] The Central Bank for Cooperatives became "CoBank," which still exists. See Our History, CoBank, https://www.cobank.com/corporate/history [https://perma.cc/9S38-2L69] (last visited Feb. 11, 2025).

[408] The Central Pacific Railroad Company "was leased to Southern Pacific [Railroad]" in 1885, formally merging with Southern Pacific Railroad in 1959. Ellen Terrell, Completion of the Transcontinental Railroad, Libr. of Cong. (Apr. 2024), https://guides.loc.gov/this-month-in-business-history/may/completion-transcontinental-railroad [https://perma.cc/FWD2-HNYD].

Although the Southern Pacific Railroad is sometimes included in discussions of federal corporations, it had a California charter and was not formally chartered by the federal government, though it was aided by a federal land grant similar to that granted to the Atlantic and Pacific Railroad, which was incorporated by Congress. See Santa Clara County v. S. Pac. R.R. Co., 118 U.S. 394, 399 (1886); The Southern Pacific Story, S. Pac. R.R. Hist. Ctr., https://splives.org/the-southern-pacific-story/ [https://perma.cc/DB8R-THVH] (last visited Feb. 11, 2025). The Katy Railroad (Missouri-Kansas-Texas) and the Frisco (St. Louis-San Francisco) were similar land-grant railroads. See Augustus J. Veenendaal, Jr., The Encyclopedia of Oklahoma History and Culture: Missouri, Kansas and Texas Railway, Okla. Hist. Soc'y, https://www.okhistory.org/publications/enc/entry?entry=MI046 [https://perma.cc/UVS4-HPQM] (last visited Feb. 11, 2025); About the Frisco Railroad, Frisco Archive, http://frisco.org/mainline/about-the-frisco-railroad/ [https://perma.cc/39MD-GKCS] (last visited Feb. 11, 2025). For terms of the Southern Pacific Grant, see Act of July 27, 1866, ch. 278, § 18, 14 Stat. 292, 299; United States v. S. Pac. R.R. Co., 146 U.S. 570, 593 (1892).

Name	Date Created	Date Abolished	Authority
Choctaw, Oklahoma and Gulf Railroad Company	1894[409]	1904[410]	Act of Jan. 22, 1894, ch. 14, 28 Stat. 27
Commodity Credit Corporation	1933[411]	Permanent	Exec. Order No. 6340 (Oct. 16, 1933)
Communications Satellite Corporation ("COMSAT")	1963	2000[412]	Act of Aug. 31, 1962, Pub. L. No. 87-624, tit. 3, 76 Stat. 419, 423
Community Financial Institutions Fund	1994	Permanent	Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, 108 Stat. 2160
Corporation for National and Community Service	1993	Permanent	National and Community Service Trust Act of 1993, Pub. L. No. 103-82, 107 Stat. 785
Consolidated Rail Corporation ("Conrail")	1976	1987[413]	45 U.S.C. § 741

[409] The Choctaw, Oklahoma and Gulf Railroad Company was created to take over the preexisting and distressed Choctaw Coal and Railway Company. See Steven L. Sewell, The Encyclopedia of Oklahoma History and Culture: Coal, Okla. Hist. Soc'y, https://www.okhistory.org/publications/enc/entry?entry=CO001 [https://perma.cc/BLC8-6DFH] (last visited Feb. 11, 2025). 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 Feb. 18, 1888, ch. 13, 25 Stat. 35; see also Choctaw, Okla. & Gulf R.R. Co. v. Mackey, 256 U.S. 531, 535 (1921) (describing the terms of the 1888 grant).

[410] The Choctaw, Oklahoma and Gulf Railroad Company was leased to the Chicago, Rock Island and Pacific Railway Company (an Illinois state charter) for a term of one hundred years. See Preston George & Sylvan R. Wood, The Railroads of Oklahoma, Ry. & Locomotive Hist. Soc'y Bull., Jan. 1943, at 7, 40–42.

[411] The Commodity Credit Corporation was chartered by the federal government but with a state charter. Exec. Order No. 6340 (Oct. 16, 1933), *reprinted in* 2 The Public Papers and Addresses of Franklin D. Roosevelt 404, 404–07 (Samuel I. Rosenman ed., 1938).

[412] COMSAT merged with Lockheed Martin Corporation. See Tim Smart, Lockheed to Acquire Comsat for $2.7 Billion, L.A. Times (Sept. 21, 1998, 12:00 AM), https://www.latimes.com/archives/la-xpm-1998-sep-21-fi-24934-story.html.

[413] Conrail was privatized through an initial public offering ("IPO") in 1987. See Goldman Sachs Leads Historic Conrail IPO, the Largest Public Offering to Date, Goldman Sachs, https:

Name	Date Created	Date Abolished	Authority
Corporation for Public Broadcasting	1967	Permanent	47 U.S.C. § 396
Corporation of Foreign Security Holders	1933	N/A[414]	Securities Act of 1933, ch. 38, tit. 2, 48 Stat. 74, 92
Defense Homes Corporation ("DHC")	1940	1942	Pursuant to Act of Oct. 14, 1940, ch. 862, 54 Stat. 1125, the President directed the incorporation of the DHC.[415]
Disaster Loan Corporation	1937	1945	Act of Feb. 11, 1937, ch. 10, 50 Stat. 19
Electric Home and Farm Authority	1936	1942	Act of Mar. 31, 1936, ch. 163, 49 Stat. 1186
Emergency Fleet Corporation ("EFC")	1917	1936	Pursuant to Act of Sept. 7, 1916, ch. 451, § 11, 39 Stat. 728, 731, Congress created the EFC through a charter in the District of Columbia.[416]
Export-Import Bank[417]	1934	Permanent	12 U.S.C. § 635
Farm Credit System Insurance Corporation	1987	Permanent	Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. 3, 101 Stat. 1568, 1608 (1988)
Farmers' Home Corporation	1937	1946	Act of July 22, 1937, ch. 517, § 40, 50 Stat. 522, 527

//www.goldmansachs.com/our-firm/history/moments/1987-conrail-ipo [https://perma.cc/4N9S-X83T] (last visited Feb. 11, 2025).

[414] Dissolution not found.

[415] President Franklin D. Roosevelt directed the incorporation of the DHC in a letter to the Secretary of Treasury on October 18, 1940. U.S. Dep't of the Treasury, Final Report on the Reconstruction Finance Corporation 106 (1959).

[416] U.S. Shipping Bd., First Annual Report 6–7 (1917), https://www.maritime.dot.gov/sites/marad.dot.gov/files/docs/outreach/history/historical-documents-and-resources/7481/ussbannualreport1917.pdf [https://perma.cc/E75D-7ASG].

[417] 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. Exec. Order No. 7365, Dissolution of Second Export-Import Bank of Washington, D.C., Am. Presidency Project (May 7, 1936), https://www.presidency.ucsb.edu/documents/executive-order-7365-dissolution-second-export-import-bank-washington-dc [https://perma.cc/B86D-273K] (last visited Apr. 10, 2025).

Name	Date Created	Date Abolished	Authority
Federal Agricultural Mortgage Corporation ("Farmer Mac")	1988	Permanent	Agricultural Credit Act of 1987, Pub. L. No. 100-233, tit. 4, 101 Stat. 1568, 1622 (1988)
Federal Crop Insurance Corporation	1938	Permanent	7 U.S.C. § 1503
Federal Deposit Insurance Corporation	1933	Permanent	Banking Act of 1933, ch. 89, 48 Stat. 162
Federal Farm Credit Banks	1916	Permanent	The Federal Farm Loan Act, ch. 245, § 3, 39 Stat. 360, 361 (1916)
Federal Farm Loan Board	1916	Permanent	The Federal Farm Loan Act, ch. 245, § 3, 39 Stat. 360, 360 (1916)
Federal Farm Mortgage Corporation	1934	1961	Federal Farm Mortgage Corporation Act, ch. 7, 48 Stat. 344 (1934)
Federal Financing Bank	1973	Permanent	12 U.S.C. § 2283
Federal Home Loan Mortgage Corporation ("Freddie Mac")	1970	2008[418]	Emergency Home Finance Act of 1970, Pub. L. No. 91-351, 84 Stat. 452
Federal Housing Administration	1934	Permanent	National Housing Act, ch. 847, § 1, 48 Stat. 1246, 1246 (1934)
Federal National Mortgage Association ("Fannie Mae")	1938	Permanent[419]	National Housing Act, ch. 847, tit. 3, 48 Stat. 1246, 1252 (1934)

[418] Freddie Mac is now under conservatorship. See Collins v. Yellen, 141 S. Ct. 1761, 1776 (2021).

[419] Fannie Mae has been publicly traded since 1968. See History, Fannie Mae, https://www.fanniemae.com/about-us/who-we-are/history [https://perma.cc/2WQK-SDR9] (last visited Feb. 11, 2025).

Name	Date Created	Date Abolished	Authority
Federal Prison Industries, Inc.	1934	Permanent[420]	Exec. Order No. 6917 (Dec. 11, 1934)
Federal Savings and Loan Insurance Corporation	1934	1989	National Housing Act, ch. 847, § 402, 48 Stat. 1246, 1256 (1934)
Federal Surplus Commodities Corporation	1933[421]	1942[422]	Delaware Charter
Financing Corporation ("FICO")	1987	2019	Federal Savings and Loan Insurance Corporation Recapitalization Act of 1987, Pub. L. No. 100-86, § 302, 101 Stat. 552, 585
Food Administration	1917	1920	Exec. Order No. 2679-A (Aug. 10, 1917)
Freedman's Savings and Trust Company	1865	1874	Act of Mar. 3, 1865, ch. 92, 13 Stat. 510
General Education Board[423]	1903	1960	Act of Jan. 12, 1903, ch. 91, 32 Stat. 768
Government National Mortgage Association ("Ginnie Mae")	1968	Permanent	Housing and Urban Development Act of 1968, Pub. L. No. 90-448, § 802, 82 Stat. 476, 536

[420] Federal Prison Industries became "UNICOR" in 1977. See UNICOR's 90 Years of Impact, Fed. Bureau of Prisons, https://www.bop.gov/resources/news/20240620-unicor-s-90-years-of-impact.jsp [https://perma.cc/2BXV-H3NV] (last updated June 20, 2024, 5:08 PM).

[421] The Federal Surplus Commodities Corporation was chartered by the federal government but with a state charter. See C. Roger Lambert, Want and Plenty: The Federal Surplus Relief Corporation and the AAA, 46 Agric. Hist. 390, 391 (1972).

[422] The Federal Surplus Commodities Corporation was consolidated into the Agricultural Marketing Administration without affecting corporate powers. Exec. Order No. 9069, 7 Fed. Reg. 1409 (Feb. 25, 1942).

[423] The General Education Board was backed by John D. Rockefeller, Sr., who contributed one million dollars to its initial capitalization. See Teresa Iacobelli & Barbara Shubinski, "Without Distinction of Race, Sex, or Creed": The General Education Board, 1903–1964, Rockefeller Archive Ctr. (Jan. 5, 2022), https://resource.rockarch.org/story/the-general-education-board-1903-1964/ [https://perma.cc/D4XR-YGZ4].

Name	Date Created	Date Abolished	Authority
Grain Corporation	1917[424]	1927	Exec. Order No. 2681 (Aug. 14, 1917); Exec. Order No. 3087 (May 14, 1919)
Group Hospitalization, Inc.	1939	Permanent	Act of Aug. 11, 1939, ch. 698, 53 Stat. 1412
Home Owners' Loan Corporation	1933	1951	Home Owners' Loan Act of 1933, ch. 64, 48 Stat. 128
Inland Waterways Corporation	1924	1963	Act of June 3, 1924, ch. 248, 43 Stat. 360
Lake Erie and Ohio River Ship Canal Company	1906	N/A[425]	Act of June 30, 1906, ch. 3933, 34 Stat. 809
Legal Services Corporation	1974	Permanent	Legal Services Corporation Act of 1974, Pub. L. No. 93-355, tit. 10, 88 Stat. 378, 378
Loomis Aerial Telegraph Company	1873	N/A[426]	Act of Jan. 21, 1873, ch. 45, 17 Stat. 412
Maritime Canal Company of Nicaragua	1889	1899	Act of Feb. 20, 1889, ch. 176, 25 Stat. 673
National Banking System	1863	1913[427]	Act of Feb. 25, 1863, ch. 58, § 5, 12 Stat. 665, 666
National Bolivian Navigation Company	1870	N/A[428]	Act of June 29, 1870, ch. 168, 16 Stat. 168
National Corporation for Housing Partnerships	1968	Permanent	42 U.S.C. §§ 3932, 3937

[424] The Grain Corporation was chartered by the federal government but with a state charter. United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 6 (1927).

[425] Dissolution not found.

[426] Dissolution not found. This corporate charter was granted to Mahlon Loomis, an inventor attempting to create a wireless telegraph. See Mahlon Loomis—First Wireless Telegrapher, Sw. Museum of Eng'g, Commc'ns & Computation, https://www.smecc.org/mhlon_loomis.htm [https://perma.cc/AQH3-CEDJ] (last visited Feb. 11, 2025). While there is no record of its dissolution, it is obsolete today given the nature of its chartered purpose.

[427] The National Bank was dissolved with the creation of the Federal Reserve. See History of Central Banking, supra note 92.

[428] Dissolution not found.

Name	Date Created	Date Abolished	Authority
National Credit Union Administration Central Liquidity Facility	1979	Permanent	12 U.S.C. § 1795b
National Life Assurance and Trust Association	1870	N/A[429]	Act of June 23, 1870, ch. 152, 16 Stat. 165
National Park Foundation	1967	Permanent	Act of Dec. 18, 1967, Pub. L. No. 90-209, 81 Stat. 656
Neighborhood Reinvestment Corporation	1978	Permanent	Neighborhood Reinvestment Corporation Act, Pub. L. No. 95-557, 92 Stat. 2115 (1978)
Northern Pacific Railway Company	1864	1970[430]	Act of July 2, 1864, ch. 217, 13 Stat. 365
Office of the Coordinator of Inter-American Affairs	1941	1946	Exec. Order No. 8840 (July 30, 1941)
Overseas Private Investment Corporation	1969	2019[431]	Foreign Assistance Act of 1969, Pub. L. No. 91-175, tit. 4, 83 Stat. 805, 809
Pacific Development Company	1940	1943	Delaware Charter
Panama Railroad Company	1855; 1904[432]	1979	N/A

[429] Dissolution not found.

[430] Having survived multiple reorganizations, the Northern Pacific Railway Company merged with and became the Burlington Northern Railroad (a private entity) in 1970. See BNSF Ry., The History of BNSF: A Legacy for the 21st Century 4, https://www.bnsf.com/bnsf-resources/pdf/about-bnsf/History_and_Legacy.pdf [https://perma.cc/FS4L-J42G] (last visited Feb. 11, 2025).

[431] The Overseas Private Investment Corporation is now the International Development Finance Corporation. See U.S. International Development Finance Corporation Begins Operations, U.S. Int'l Dev. Fin. Corp. (Jan. 2, 2020), https://www.dfc.gov/media/press-releases/us-international-development-finance-corporation-begins-operations [https://perma.cc/NHQ2-D64R].

[432] In 1904, the Panama Railroad Company was purchased from France by President Theodore Roosevelt, at which point the stock was entirely held by the Secretary of War. Panama Canal Purchase Act of 1902, ch. 1302, 32 Stat. 481. Prior to that purchase, the United

Name	Date Created	Date Abolished	Authority
Pennsylvania Avenue Development Corporation	1972	1996	40 U.S.C. § 872
Pension Benefit Guaranty Corporation	1974	Permanent	Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4002, 88 Stat. 829, 1004
Railway Express Agency	1918	1975	Transportation Act, 1920, ch. 91, 41 Stat. 456[433]
Reconstruction Finance Corporation	1932	1957	Reconstruction Finance Corporation Act, ch. 8, 47 Stat. 5 (1932)
Resolution Funding Corporation	1989	Permanent	Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 511, 103 Stat. 183, 394
Resolution Trust Corporation	1989	1995	Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 501, 103 Stat. 183, 363
Rubber Development Corporation	1942	1947	Delaware Charter[434]
Rubber Reserve Company	1940	1945	N/A[435]

States held a concession to cross the Isthmus of Panama with New Granada (what became Colombia and Panama) in the Mallarino-Bidlack Treaty of 1846. Treaty with New Granada, New Granada-U.S., Dec. 12, 1846, 9 Stat. 881. This concession allowed a group of private American investors to secure the rights to create the Panama Railroad Company, which became operational in 1855. See Contract Between the Republic of New Granada and the Panama Rail-Road Company, Embracing the Amendments Applied for by the Company, and Adopted by the Act of Congress at Bogota, of June 4th, 1850 (New York, Lambert & Lane 1850), https://digitalcollections.library.vanderbilt.edu/islandora/object/islandora%3A930 [https://perma.cc/M7M8-5MT8].

[433] The Railway Express Agency was created by a forced merger of four existing private companies under the authority of the Interstate Commerce Commission in 1918. 49 U.S.C. § 5 (1958); Consolidation of Express Cos., 59 I.C.C. 459 (1920).

[434] The Rubber Development Corporation was held by the RFC. See Records of the Reconstruction Finance Corporation, Nat'l Archives, https://www.archives.gov/research/guide-fed-records/groups/234.html [https://perma.cc/8P9A-TC8T] (last visited Feb. 11, 2025).

[435] The Rubber Reserve Company was organized under the RFC. Rubber Reserve Company, Synthetic Rubber Division, Office of Rubber Reserve, General Records of the General

Name	Date Created	Date Abolished	Authority
Rural Telephone Bank	1971	Permanent	Act of May 7, 1971, Pub. L. No. 92-12, § 401, 85 Stat. 29, 30
Saint Lawrence Seaway Development Corporation	1954	Permanent	Act of May 13, 1954, ch. 201, 68 Stat. 92
Securities Investor Protection Corporation	1970	Permanent	15 U.S.C. § 78ccc
Small Business Administration	1953	Permanent	Small Business Act of 1953, ch. 282, tit. 2, 67 Stat. 230, 232
Smaller War Plants Corporation	1942	N/A[436]	Act of June 11, 1942, ch. 404, § 4, 56 Stat. 351, 353
State Justice Institute	1984	Permanent	42 U.S.C. § 10702
Student Loan Marketing Association ("Sallie Mae")	1973	2004[437]	Education Amendments of 1972, Pub. L. No. 92-318, § 133(a), 86 Stat. 235, 265
Subsistence Homestead Corporation	1933	1936	National Industrial Recovery Act, ch. 90, § 208, 48 Stat. 195, 205 (1933); Exec. Order No. 6209 (July 21, 1933)
Sugar Equalization Board	1918[438]	1926	Delaware Charter
Synthetic Fuels Corporation	1980	1986	Energy Security Act, Pub. L. No. 96-294, tit. 1, 94 Stat. 611, 616 (1980)

Services Administration 1942–1950; RG 234, https://www.archives.gov/files/records-mgmt/rcs/schedules/independent-agencies/rg-0234/n1-234-12-003_sf115.pdf [https://perma.cc/7XVN-RJ8X] (last visited Apr. 10, 2025).

[436] Dissolution not found.

[437] Sallie Mae was privatized in 2004. Press Release, U.S. Dep't of the Treasury, Treasury Announces Successful Privatization of Sallie Mae (Dec. 29, 2004), https://home.treasury.gov/news/press-releases/js2173 [https://perma.cc/5AC4-A22X].

[438] The Sugar Equalization Board was chartered by the federal government but with a state charter. Fed. Sugar Refin. Co. v. U.S. Sugar Equalization Bd., 268 F. 575, 584 (S.D.N.Y. 1920).

Name	Date Created	Date Abolished	Authority
Tennessee Valley Authority	1933	Permanent	16 U.S.C. § 831
Texas Pacific Railroad Company	1871	1976[439]	Act of Mar. 3, 1871, ch. 122, 16 Stat. 573
Union Pacific Railroad[440]	1862	Still active[441]	Act of July 1, 1862, ch. 120, 12 Stat. 489
United States Freehold Land and Emigration Company	1870	N/A[442]	Act of July 8, 1870, ch. 224, 16 Stat. 192
United States Housing Authority	1937	1947[443]	Act of Sept. 1, 1937, ch. 896, 50 Stat. 888

[439] The Texas Pacific Railroad was acquired by the Missouri Pacific Railroad (not a federal corporation) in 1928, after which it continued to operate independently, and they ultimately merged in 1976. Texas and Pacific Railway Company, Britannica Money (Apr. 18, 2025), https://www.britannica.com/money/Texas-and-Pacific-Railway-Company [https://perma.cc/ENH5-VN7J]; Timeline—MP and Predecessors, Mo. Pac. Hist. Soc'y, https://mopac.org/mopac-history-post/timeline-mp-and-predecessors/ [https://perma.cc/4BCQ-SDM7] (last visited Apr. 18, 2025).

[440] The related "sinking fund," chartered in 1878, was also an early federal corporation. The sinking fund was a stand-alone legal entity into which returns (a five percent 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 1893, and the sinking fund was retired. Act of May 7, 1878, ch. 96, § 5, 20 Stat. 56, 58–59; see also John P. Davis, The Union Pacific Railway, 8 Annals Am. Acad. Pol. & Soc. Sci. 47, 58–60 (1896) (describing the operation and drawbacks of the sinking fund).

[441] The Union Pacific Railroad fell into bankruptcy in 1893 and was purchased by private investors who renamed it the Union Pacific Railroad Company in 1897. See Post-Construction, Union Pac., https://www.up.com/heritage/history/overview/post-construction/index.htm [https://perma.cc/UE3K-LP6X] (last visited Feb. 11, 2025).

[442] Dissolution not found. However, the United States Freehold Land and Emigration Company still existed in 1880. See U.S. Freehold Land & Emigration Co. v. Gallegos, 89 F. 769, 770 (8th Cir. 1898).

[443] The United States Housing Authority was consolidated with the Housing and Home Finance Agency. Harry S. Truman, Statement by the President on the New Housing and Home Finance Agency (Aug. 7, 1947), *in* Harry S. Truman Libr. Museum, https://www.trumanlibrary.gov/library/public-papers/173/statement-president-new-housing-and-home-finance-agency [https://perma.cc/J8HW-CVNF] (last visited Feb. 11, 2025).

Name	Date Created	Date Abolished	Authority
United States Housing Corporation	1917[444]	1920	Exec. Order No. 2889 (June 18, 1918)
United States Enrichment Corporation	1992	1998[445]	Energy Policy Act of 1992, Pub. L. No. 102-486, tit. 9, 106 Stat. 2776, 2923
United States Spruce Production Corporation	1917[446]	1919	Washington State Charter; Act of July 9, 1918, ch. 143, 40 Stat. 845, 888
United States Railway Corporation	1974	1986	45 U.S.C. § 741
Utah and Northern Railway Company (Territories of Utah, Idaho, and Montana)	1878	1889	Act of June 20, 1878, ch. 362, 20 Stat. 241
Valles Caldera Trust	2000	Permanent	Valles Caldera Preservation Act, Pub. L. No. 106-248, § 106, 114 Stat. 598, 603 (2000)
Virgin Islands Corporation	1949	1965	Virgin Islands Corporation Act, ch. 285, 63 Stat. 350 (1949)
War Assets Administration	1946	1949	Exec. Order No. 9689 (Jan. 31, 1946)
War Finance Corporation	1918	1939	War Finance Corporation Act, ch. 45, 40 Stat. 506 (1918)

[444] The United States Housing Corporation was chartered by the federal government but with a New York charter. U.S. Dep't of Labor, 1 Report of the United States Housing Corporation 10–15 (1920), https://archive.org/details/waremergencycon00corpgoog/page/n5/mode/2up [https://perma.cc/B7QP-REXE].

[445] The United States Enrichment Corporation was privatized through an IPO in 1998 and is now operating as "Centrus Energy." See 100 Million Shares of USEC Stock Sold, Nuclear Eng'g Int'l (Aug. 27, 1998), https://www.neimagazine.com/news/100-million-shares-of-usec-stock-sold/ [https://perma.cc/5MNS-EUNP]; History, Centrus, https://www.centrusenergy.com/who-we-are/history/ [https://perma.cc/F89G-7429] (last visited Feb. 11, 2025).

[446] The United States Spruce Corporation was chartered by the federal government but with a state charter. Clallam County v. United States, 263 U.S. 341, 343 (1923).

Name	Date Created	Date Abolished	Authority
Washington and Alexandria Turnpike Company	1808	N/A[447]	Act of Apr. 21, 1808, ch. 50, § 2, 2 Stat. 485, 486
Washington and Boston Steamship Company	1870	N/A[448]	Act of May 4, 1870, ch. 75, 16 Stat. 97
Washington Bridge Company	1808	1868	Act of Feb. 5, 1808, ch. 15, § 2, 2 Stat. 457, 457
Washington Canal Company	1802[449]	1807	Act of May 1, 1802, ch. 41, § 9, 2 Stat. 175, 176

[447] Dissolution not found.
[448] Dissolution not found.
[449] Extended in 1809. See Act of Feb. 16, 1809, ch. 17, § 3, 2 Stat. 517, 518.