VIRGINIA LAW & BUSINESS REVIEW

VOLUME 17 | SPRING 2023 | NUMBER 2

AMERICA'S FIRST CORPORATE PERSON: THE BANK OF THE UNITED STATES, 1789-1812

Jared S. Berkowitz†‡

ABSTRACT

This Article analyzes the centrality of legal personhood within the early American conception of the corporation. At the turn of the 19th century, Congress fiercely debated whether the General Government had the power to charter a national banking corporation, the Bank of the United States (BUS). Legal personhood, the judicial fiction that enables companies to buy, sell, and sue like ordinary individuals, was at the core of this ideological debate. Speeches supporting and opposing the BUS revealed how the corporation was conceptualized within emerging American law. Virginia's James Madison, for example, spoke of the "civil character" and "civil rights" of the corporation. Similarly, New York's John Lawrence warned of the corporation's "individuality" and "irresponsibility." Outside of Congress, legal controversies between individual states and the BUS tested the boundaries of federalism and provided judges with an opportunity to craft an American law of corporations—one that personified the institution while supporting an emerging capitalist economy. This Article reveals how legal personhood was leveraged in the early 19th century and how that history can help us navigate the challenges corporate personhood poses in our contemporary political and economic environment.

† Jared S. Berkowitz is a Lecturer and PhD Candidate in the Department of History at Brandeis University. His main areas of research are United States legal history and the history of American capitalism. He is currently working on a book manuscript that analyzes the ideological, institutional, and political origins of corporate personhood in 19th century American law.

‡ The author would like to thank Emilie Connolly, Gregory Mark, David Schwartz, Andrew Shankman, Ray Solomon, Govind Sreenivasan, Michael Willrich as well as the editors of the *VLBR* for their generous comments and thoughtful critiques of previous drafts of this article.

Copyright © 2023 Virginia Law & Business Review Association

I. INTRODUCTION 206

II. THE CORPORATION IN EARLY AMERICA.. 209

III. CONGRESSIONAL DISCOURSE ON THE INCORPORATION QUESTION, 1790-1791 213

IV. DRAFTING AN AMERICAN LAW OF CORPORATIONS 227

V. RENEWING THE 1791 CHARTER 233

VI. CONCLUSION: NATIONAL INCORPORATION AND THE RISE OF DEVELOPMENTAL CAPITALISM... 243

I. INTRODUCTION

THE private sector dominates our imagination when thinking about corporations. The state, if it plays a role at all, is minimized. What we perceive, instead, is a private, publicly traded company like Exxon-Mobil, Microsoft, or Amazon. Although the corporation is, today, the preferred form of private business association, historically this was not the case. The corporation of the early American economy, though sharing the same legal lineage as the modern business association, was in practice a dramatically different institution. To understand the nature, purpose, and function of the corporation within early American political economy, we must jettison contemporary assumptions and expectations about the institution. Doing this allows us to appreciate the extent to which the state was embedded in the American capitalist project. Moreover, it allows us to understand how government—local and state governments in particular—operated in the early years of the republic.

In 1790, the corporation and the state shared a symbiotic relationship. If capitalism is a political economic system that privatizes gain while socializing risk, then the corporation—that legal person with infinite life and limited responsibility—is the institutional vehicle of American capitalist development. Unpacking the early American law of corporations helps reveal why

corporations developed in the United States in a significantly different manner than its common law partner, England.[1]

As Alexander Hamilton assumed the role of Secretary of Treasury under President George Washington, the health of the new nation's economy hung in the balance. The first Congress convened nearly a decade after the war for independence from Britain, but the public debt incurred during the conflict lingered. By 1790 the national debt was $79 million, of which $25 million was state debt.[2] This debt crisis was compounded by a shortage of specie or hard money such as gold and silver. With cash in short supply the economy, at the local and national level, subsisted on worthless continentals, state-issued promissory notes, and other financial instruments of fluctuating and unreliable value.[3]

The debt crisis and the money problem had to be resolved in order for the new nation to compete on the world economic stage. Attracting foreign investment, for federalists like John Adams and Alexander Hamilton, was key to development. To this end, Hamilton issued his "Report on Public Credit in January of 1790" outlining a plan to tackle the nation's financial crisis.[4] For Hamilton, the maintenance of national credit depended on confidence, stability, and centralization.[5] Confidence in American paper. Stability in the flow of specie or hard money, like gold or silver. And centralized banking managed by an American version of the Bank of England. These proposals generated fierce opposition. They inspired spirited debate at all levels of government and ignited a generation of battles in state and federal courts that linked the law of banking and finance with that of corporations. Like the American constitution, the law of corporations was a confluence of British and

---

[1] The corporation was not the dominant mode for doing business among western imperial powers. Partnerships were much more common. But the greatest risks and adventures were still undertaken by chartered corporations like the British East India Company or the South Sea Company. The magnitude of the risk and the status of the proprietor informed organizational choice. *See* Timothy Guinnane et al., *Putting the Corporation in its Place*, 8 ENTER. & SOC'Y 687, 714 (2007).

[2] ANDREW SHANKMAN, ORIGINAL INTENTS: HAMILTON, JEFFERSON, MADISON AND THE AMERICAN FOUNDING 68 (2017). Massachusetts and South Carolina each held the highest estimated debt with $4 million respectively. 1 ABRIDGMENT OF THE DEBATES OF CONGRESS FROM 1789 TO 1856, at 191-92 (Thomas Hart Benton ed., 1857).

[3] On money and banking in the early republic, see SHARON ANN MURPHY, OTHER PEOPLE'S MONEY: HOW BANKING WORKED IN THE EARLY AMERICAN REPUBLIC (2017).

[4] Report from Alexander Hamilton to the Speaker of the House of Reps., 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 65-110 (Harold C. Syrett ed., 1962), https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001.

[5] *Id.*

American legal tradition. Corporations in Great Britain, especially after the South Sea Bubble, were predominantly public institutions like hospitals, universities, and charities.[6] At the turn of the 19th century, the primary mode of doing business among the mercantile European powers was the partnership—not the corporation.[7] As a result, the law of private corporations—the legal rules and customs governing commercial associations—would largely develop in the United States.

This Article reveals the extent to which the concept of legal personhood was embedded within the ideological and constitutional discourse surrounding the chartering of America's first corporate person—the Bank of the United States (BUS).[8] Revisiting the well-travelled history of the Bank debates through the lens of personhood, enables us to challenge the prevailing narrative of corporate constitutional rights. Today, this legal doctrine is a source of controversial power. In the past, however, a different view prevailed, and corporate personhood was not automatically a positive asset. Legal personification of the corporation, during the Bank debates, triggered republican anxieties against chartered institutions; but it also reinforced the utility of the corporation as a vehicle for economic growth. Ultimately, the elasticity of legal personhood in the early nineteenth century, reveals both the potential power of law and of corporations themselves.

---

[6] On corporations in England see 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS (1793); On how the South Sea Bubble stifled corporate development in England see CARLETON BISHOP HUNT, THE DEVELOPMENT OF THE BUSINESS CORPORATION IN ENGLAND, 1800-1867, at 9 (1936). For arguments against corporate exceptionalism, or the idea that corporations were the "decisive factor" in economic development, see Guinnane, *supra* note 1, at 688.

[7] In fact, the United States in the 19th century was an outlier. Without a global trend toward incorporation, the American judges were at the helm of corporate law. The corporation, despite its advantages, was not in fact the preferred form of business association among capitalist nations. *See id.* at 694.

[8] Although the Bank of North America, a corporation chartered by the General Government under the Articles of Confederation, preceded the BUS, I characterize the BUS as "America's first corporate person" for two reasons. First, the idea of "personhood," I will show, was a large part of the conversation surrounding the BUS. Second, it was not until ratification of the Constitution that a centralized national authority truly existed in the United States. On the Bank of North America see Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69 (Richard Beeman et al. eds., 1987); ANDREW SHANKMAN, CRUCIBLE OF AMERICAN DEMOCRACY: THE STRUGGLE TO FUSE EGALITARIANISM & CAPITALISM IN JEFFERSONIAN PENNSYLVANIA 3-4 (2004).

II. THE CORPORATION IN EARLY AMERICA

The early American conception of the corporation was a fusion of British legal concepts and American circumstance.[9] Lawyers, trained in the British Common Law tradition, were well represented within the first Congress and were familiar with 17th and 18th century legal thought from the works of Edward Coke, William Blackstone, and Stewart Kyd. Corporations in 17th century England, as they would be in 18th century America, were creatures of the sovereign. In Great Britain, this meant corporations were bound by royal charters or letters patent that outlined their obligations and privileges proscribed by the Crown and Parliament. Whatever rights corporations had depended on the sovereign's wishes and were specified in the charter.

The 17th century conception of corporations was captured by Sir Edward Coke, Chief Justice of the Court of Common Pleas in England, in one of the earliest legal opinions that wrestled with the nature of the corporation within the British common law. Although the case itself involved a routine legal question of trespass—an unlawful entry upon the land of another—Coke's analysis was unusual. Corporations, Coke explained, "have no souls," are "invisible," and exist only in "consideration of the Law."[10] They were, Coke explained, "*in abstracto*"—in the abstract—and, thus, were mere fictions of the law.[11] The language he deployed revealed a fixation on, or at least a curiosity about, the legal personhood of corporations and the power that flowed from this legal fiction. Given the Latin root of the term corporation—*corpus* or body—Coke's discussion is not entirely surprising but nonetheless intriguing. Notably, the corporate personality, not the corporate body, is what concerned Coke.

The 18th century definition of the corporation was articulated by lawyer turned scholar, Sir William Blackstone, who published a four-volume treatise

---

9 In one of the first Supreme Court cases involving the Bank of the United States, Justice Marshall explained: "[O]ur ideas of a corporation . . . are derived entirely from the English books, we resort to them for aid, in ascertaining its character." Bank of U.S. v. Deveaux, 9 U.S. 61, 88 (1809), *overruled by* Louisville, C & C.R. Co. v. Letson, 43 U.S. 497 (1844).

10 Thomas Sutton, an English barrister, was given a charter by King James I to establish a hospital and grammar school for the poor. Although Sutton had not yet begun construction of the Hospital, the site of the building had been chosen. When two men, Richard Sutton and John Law, were found on the property they were arrested for trespass on the land of the corporation. In their defense, they argued, the corporation did not yet exist because Sutton had yet to perform the charter. The Case of Sutton's Hospital (1612) 77 Eng. Rep. 960; 10 Co. Rep. 23a, *reprinted in* 1 SELECTED WRITINGS OF EDWARD COKE 347, 347-48 (Steve Sheppard ed., 2003).

11 *Id.* at 367.

titled *Commentaries on the Laws of England*.[12] The first volume of Blackstone's treatise tackled "The Rights of Persons."[13] Included within this volume was a chapter addressing corporations or, as Blackstone put it, "artificial persons."[14] Like Coke, Blackstone believed corporations were legal fictions—constructions of the law—existing only by the will of the sovereign and formed by "letters patent" or "royal charter."[15] Most served the interest of the community, such as those formed for the promotion of religion or charitable causes, but others were formed for economic interests like "manufacture" or "commerce."[16] Although Blackstone took care to distinguish corporate—or artificial persons—from "persons in their natural capacities," he did suggest that these "artificial persons" shared the same "identical rights" as natural persons.[17] By the beginning of the 18th century, the boundary between "artificial persons"—corporations—and ordinary individuals—those created by the "god of nature" or biological persons—was still malleable.[18] This left room for American lawmakers to shape this legal fiction into one that would best serve the emerging interests of American capitalism.

At the turn of the 19th century Scottish radical and lawyer, Stewart Kyd, synthesized Coke and Blackstone's thinking about corporations with a treatise of his own.[19] The corporation, for Kyd, was "a collection of many individuals, united into one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested, by . . . law, with the capacity of acting . . . as an *individual*."[20] It was best understood, according to Kyd, as a "political person" capable of "enjoying a variety of franchises" such as the "taking and granting [of] property . . . contracting . . . and of suing and being sued."[21] Moreover the corporation enjoyed a kind of immortality like "the river

12 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (Stanley N. Katz ed., Univ. Chicago Press 1979) (1765).

13 WILLIAM BLACKSTONE, *Of the Rights of Persons*, *in* COMMENTARIES ON THE LAWS OF ENGLAND, *supra* note 12, at 455.

14 *Id.*

15 *See id.* at 461.

16 *Id.* at 459.

17 Blackstone writes "as all per[s]onal rights die with the per[s]on, and, as the nece[ss]ary forms of inve[s]ting a [s]eries of individuals, one after another, with the [s]ame identical rights, would be very inconvenient, if not impracticable; it has been found nece[ss]ary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to con[s]titute artificial per[s]ons, who may maintain a perpetual [s]ucce[ss]ion, and enjoy a kind of legal immortality." *Id.* at 455.

18 *Id.* at 463-64.

19 KYD, *supra* note 6, at 13-18.

20 *Id.* at 13-15.

21 *Id.* at 13.

Thames" despite elements of it that "are continually changing."[22] Although Kyd foregrounded the corporation's personhood even more forcefully than either Coke or Blackstone, the power and privilege incident to corporate status articulated by his treatise remained tied to the sovereign through the charter of incorporation.[23]

Corporations at the beginning of the 19th century were dependent creatures of the state. Charters or letters patent provided the genesis of corporate existence. These were written documents that outlined the boundaries of corporate obligation, privilege, and purpose. Incorporation required action by a sovereign power—the king, parliament, or legislature. Personhood, but not liberty, followed incorporation; in a land of slavery and unfreedom, like the Antebellum United States, corporate law illustrated, in a peculiar way, the limits of personhood and the potential power of legal fictions or law *in abstracto*.[24]

America's first national corporate person was a public institution. The BUS, chartered in 1791 by the first Congress to convene under the new U.S. Constitution, was the product of Hamilton's plan to reinforce the nation's broken economy by funding the public debt. The Bank was Hamilton's brainchild mirroring the Bank of England.[25] On the 1st of February 1791, the

---

22 *Id.* at 18.

23 Corporations were always formed under "special domination." *Id.* at 13. This was the charter or letters patent issued by the crown or parliament outlining the purpose, obligations, and duties of incorporation. *Id.*

24 The personhood—the capacity of having and enjoying rights—of slaves was suspended by the law. The British common law, unlike Roman civil law, had no precedent for the law of slavery. Nonetheless, the colonies quickly established a legal system that perpetuated, protected and—over time—perfected a system of racialized chattel slavery. Historian Paul Finkelman explains that within this system an enslaved African was "a commodity—and not a person" under the law. Paul Finkelman, *Slavery in the United States*, *in* THE LEGAL UNDERSTANDING OF SLAVERY FROM THE HISTORICAL TO THE CONTEMPORARY 105, 114 (Jean Allain ed., 2012). Historian Walter Johnson refers to this as the "chattel principle" of slavery, the idea that enslaved persons could be bought or sold "down the river" at any moment. Walter Johnson, *Introduction* to THE CHATTEL PRINCIPLE: INTERNAL SLAVE TRADES IN THE AMERICAS 1 (Walter Johnson ed., 2004). Married women under coverture—*femme covert*—were also denied personhood under the law when their legal rights were merged with the rights of their husbands. VISA A. J. KURKI, A THEORY OF LEGAL PERSONHOOD 10 (2019).

25 Hamilton's plan to centralize the nation's banking system was largely inspired by England's system of national financing. On the origin of Hamilton's economic thought and financial plan for the United States, see Christian C. Day, *Hamilton's Law and Finance – Borrowing from the Brits (And the Dutch)*, 47 SYRACUSE J. INT'L L. & COM. 1, 12 (2019); Charles F. Dunbar, *Some Precedents Followed by Alexander Hamilton*, 3 Q.J. ECONS. 32, 55-57 (1888), *reprinted in* ECONOMIC ESSAYS 71, 90-91 (O.M.W. Sprague ed., 1904); James O. Wettereau, *The Branches*

bill to incorporate the BUS was sent to the House of Representatives.[26] The question of federal incorporation, the power to charter a national banking corporation, forced Congress to wrestle with the legality of a federally chartered national corporation. Federalism, the division of sovereignty between the general government and the states, was central to the American republican vision and dominated nearly every issue raised at the Philadelphia Convention.[27] Competing visions of republicanism—an irreconcilable ideological conflict that would separate Jefferson, Madison, and Hamilton—threatened the incorporation of the BUS.

The same republican ideology that inspired the colonies to break away from Britain complicated Congress' ability to establish a national economy.[28] The BUS was at once an institution of economic progress and a vestige of monarchical domination. To compete on a capitalist world stage, the United States needed a system of public finance. Without a central bank, like the Bank of North America or the BUS, public finance remained elusive. Central banks, like the Bank of England (BOE), had the power to lend, borrow, and trade in national wealth. This was the kind of state power that Hamilton believed was

---

of the First Bank of the United States, 2 J. ECON. HIST. 66 (1942); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815, at 143-147 (2009).

[26] 2 ANNALS OF CONG. 1940-44 (1791).

[27] A toothless central government was a major defect of the Articles of Confederation, the original organizing document for governing the thirteen colonies after the revolution. Despite this, the power of the General (or national) Government remained controversial at the Philadelphia Convention. Compromises were eventually reached but federalism—the process of balancing power between state and national government—continued to be a constitutional challenge for the new republic. *See* Harry N. Sheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & SOC'Y REV. 663, 666-67 (1980); Steven R. Boyd, *The Contract Clause and the Evolution of American Federalism*, 1789-1815, 44 WM. & MARY Q. 529, 530 (1987), *reprinted in* A NATION OF STATES: FEDERALISM AT THE BAR OF THE SUPREME COURT 83, 84 (Kermit L. Hall ed., 2000); MICHAEL J. KLARMAN, THE FRAMER'S COUP: THE MAKING OF THE UNITED STATES CONSTITUTION 155 (2016).

[28] Nothing was more "British" than the American Revolution. "The colonists revolted," Historian Gordon Wood writes, "not against the English Constitution but on behalf of it." GORDON WOOD, CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 10 (1969). The political and economic ideas that motivated the revolution were inspired by English country politics. Arbitrary power, monopoly privilege, and concentrations of wealth all stood in the way of the horizontally oriented society imagined by the revolutionary class. Corporations, especially the BUS, got in the way of this "egalitarian" vision compromising the achievement of liberty. *See* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 280-81 (1967) (republicanism and the American Revolution); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 516 (1975) (political theory of American constitutionalism); Daniel T. Rodgers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 28 (1992) (republicanism in early American historiography).

necessary to cure the debt crisis and avoid economic catastrophe.[29] But this was also the kind of state power that Jefferson believed threatened the sovereignty of the people by unconstitutionally augmenting the power of the General Government. Jefferson believed that the power of incorporation went far "beyond the boundaries . . . specifically drawn around the powers of Congress" in the Constitution.[30] Permitting the General Government to charter a corporation, in Jefferson's mind, would allow it "to take possession of a boundless field of power, no longer susceptible to any definition."[31] Incorporating the BUS, to Jefferson, set the United States on the path toward tyranny, threatening the republican experiment.

At the turn of the 19th century, two issues, both involving legal fictions, fiercely divided Congress: slavery and incorporation of the Bank of the United States. Although Congress would never reach a compromise on slavery, the incorporation question was resolved along emerging party lines. Outside of committed Federalists, few were prepared to acknowledge the need for a central bank. In the minds of most Anti-Federalists and future Democratic-Republicans, nothing could be more un-republican than a national banking corporation.

III. CONGRESSIONAL DISCOURSE ON THE INCORPORATION QUESTION, 1790-1791

In February of 1791, a bill to establish a national bank, titled "An Act to Incorporate the Subscribers to the Bank of the United States," (the BUS bill) was introduced in Congress. A national bank was not novel in the United States or Great Britain. The BNA had been incorporated under the Articles of Confederation and was headquartered in Philadelphia—a short walk from

---

29 SHANKMAN, *supra* note 2, at 93-95; JONATHAN LEVY, AGES OF AMERICAN CAPITALISM: A HISTORY OF THE UNITED STATES 74-75 (2021).

30 THOMAS JEFFERSON, OPINION OF THOMAS JEFFERSON, SECRETARY OF STATE, ON THE SAME SUBJECT (1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 91, 91 (M. St. Clair Clarke & D.A. Hall comp. 1832).

31 *Id.*; By contrast, Hamilton believed the power of incorporation was "incident to sovereignty" and, therefore, without a doubt could be exercised by the General Government consistent with the spirit of the Constitution. ALEXANDER HAMILTON, OPINION OF ALEXANDER HAMILTON, ON THE CONSTITUTIONALITY OF A NATIONAL BANK (Feb. 23, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 30, at 95-96.

where Congress was debating the future of its successor.[32] Although evidence of the national power to charter a national corporation was a few short strides from the capitol, the BUS's passage under the new constitution was far from certain in 1791.

The Bank bill established a national corporation named "the Bank of the United States." The institution had 25 directors, 25 thousand shares with a par value of $400 and a maximum authorized capital of $10 million.[33] Under the proposed charter, no single individual—person, partnership, or corporation—could purchase, subscribe to, more than $1000 of BUS stock. And, unlike most state banks at the time, BUS stock was reliable. Each share represented $100 of specie—gold or silver—and the remaining $300 was public debt at an interest rate of 6%.[34] Philadelphia would be the headquarters of the Bank which operated under a renewable twenty-year charter that was set to expire on March 4, 1811. The Bank would manage the nation's monetary supply, hold deposits of government loans, maintain an emergency sinking fund, and put the nation's capital toward "productive" use by providing loans for "trade and industry."[35] As a corporation, the Bank also had the capacity to buy and sell property, appear in court, and enter into contracts like ordinary individuals. Partnerships, unlike corporations, dissolved upon the death of one or more partners.[36] Corporations, by contrast, continued, making them a preferable investment for long term ventures, an element that was especially attractive for foreign investors.[37] Despite the benefits, lauded by Hamilton, that central banking offered the new country, Hamilton's proposal faced an obstinate Congress that opposed the Bill on ideological, constitutional, and practical grounds.

Arguments against the Bank extended from a similar republican ideology that animated the revolution and the same Anti-Federalist logic that led small states to oppose ratification of the 1787 constitution.[38] Power concentrated in

---

32 U.S. CONG., BANK OF NORTH AMERICA: PROCEEDINGS IN CONGRESS ON ITS ORIGINAL INSTITUTION, *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 30, at 9-12.

33 SHANKMAN, *supra* note 2, at 94.

34 Although BUS stock was not entirely payable in specie it was still less of a risk than the uncertain value of notes issued by state banks. *Id.* at 94-95.

35 *An Act to Incorporate the Subscribers to the Bank of the United States*, THE UNIVERSAL ASYLUM AND COLUMBIAN MAG., Feb. 1791, at 123.

36 ROBERT JOSEPH POTHIER, TREATISE ON THE CONTRACT OF PARTNERSHIP 101-104 (Owen Davies Tudor trans., 1854).

37 *See, e.g.*, Report from Alexander Hamilton to the Speaker of the House of Reps., *supra* note 4, at 65–110.

38 *See* BAILYN, *supra* note 28, at 19-21 (on republican ideology during the revolutionary period); WOOD, *supra* note 28, at 5-51 (on American republicanism in the early republic); Rodgers, *supra* note 28, at 28 (on historiographical significance of republicanism); PAULINE MAIER,

the hands of large states, among well-connected individuals, or within a sole monarch was indistinguishable from power centralized in a single financial institution. Thus, republicanism—the political ideology rejecting centralized authority and embracing, at least in theory, a horizontally integrated egalitarian society—could not make space for a privileged, aristocratic, institution like a federally chartered corporation. Organized political parties had yet to form but competing visions of the American nation state, the basis for ideological division, emerged shortly after the Philadelphia Convention. For Thomas Jefferson, the fountainhead of early American republicanism, America's future was in land. Jefferson imagined a country composed of independent yeoman farmers.[39] Markets, for Jefferson, were to be self-sustaining networks of small-scale local producers. This vision of a landed white republic conflicted with Hamilton's industrialized, commercial vision for the American republic.[40] Hamilton argued the U.S. economy should be based on manufactures, embrace a globalized market trading in commodities as well as paper. Industrial progress, not agrarian subsistence, was Hamilton's vision for the American republic. The BUS, by stabilizing the nation's finances, was an essential element of Hamilton's vision.[41]

RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-1788, at 70-96 (2010) (on the fight for ratification of the federal constitution); Letters from the Federal Farmer, I and II (Oct. 8 and 9, 1787), *in* THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 266 (Ralph Ketcham ed., 1986) (on anti-Federalist ideology against ratification of the federal constitution).

[39] Jefferson spells out this vision clearly, explaining: "Those who labour in the earth are the chosen people of God." This was the path toward "virtue." THOMAS JEFFERSON, *Query XIX: The Present State of Manufactures, Commerce, Interior and Exterior Trade*, *in* NOTES ON THE STATE OF VIRGINIA 273, 274 (1787). By contrast, "corruption of morals," Jefferson argued, was "the mark set on those, who not looking up to heaven, to their own soil and industry . . . for their subsistence, depend for it on the casualties and caprice of customers." *Id.* Those who ignore the bounties of nature and the opportunities incident to its improvement were doomed to "dependency." "Dependance" [sic], Jefferson wrote, "begets subservience and venality, suffocates the germ of virtue." *Id.* Commerce, for Jefferson, generated an unrepublican kind of dependency. Moreover, industry and manufacture—work that separated man from nature—is the kind of work that should "remain in Europe." *Id.* at 275. Industry, for Jefferson, was synonymous with degeneracy, urbanization, and corruption. Cities and factories were "sores" on the republican vision. *Id.* "A degeneracy in these is a canker which soon eats to the heart of its laws and constitution." *Id.* Farming, husbandry, production of raw material were consistent with republicanism. The trades—"carpenters, masons, smiths"—were not. *See id.*

[40] Despite their disagreements, both visions were compatible with capitalism. Jefferson's, a land based/agricultural capitalism; and Hamilton's a financialized/commercial capitalism. *See* JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: A REPUBLICAN VISION OF THE 1790S (1984); LEVY, *supra* note 29, at 65-94.

[41] Hamilton believed strongly, based on the experience of the European mercantilist powers, that centralized banking was essential to commercial success. *See* Richard Sylla, *From the*

On the incorporation question, lines were drawn across boundaries of region and class. Representatives in the Northeast and upper mid-Atlantic tended to support incorporation of the Bank. The presence of mercantile port cities like Boston, Philadelphia, and New York, that were closely connected to global trade influenced which regions would benefit from a central bank. Southern states, composed of networks of plantations and small-scale farms, were less likely to support the Bank. Although cotton producers had much to gain from the shoring up of the American financial system, they generally opposed a national bank, fearing that any augmentation of national power threatened the institution of slavery.[42] Opponents of the Bank's incorporation emphasized the disproportionate gains for the merchant class, those potential "leeches" of American society, who supported incorporation of the BUS; against the suffering of the working class yeomanry.[43]

Consistent with Hamilton's vision, merchants would benefit overwhelmingly from centralized banking—so much that many in Congress believed their benefit was disproportionate and at the expense of an agrarian class of small farmers and local producers. Representative James Jackson of Georgia explained: "This plan of a National Bank . . . is calculated to benefit a small part of the United States, the mercantile interest only; the farmers, the yeomanry, will derive no advantage from it; as the bank bills will not circulate to the extremities of the Union."[44] In this view, centralized banking would isolate capital geographically and politically. Circulation would only benefit the mercantile regions, port cities like Boston, New York, and Philadelphia, while the interior had little to gain. The BUS, as such, would put public power behind a limited set of interests, benefiting aristocratic, privileged interests engaged in trade, while neglecting a large swath of the nation. In loyal Jeffersonian fashion, James Jackson disregarded the national interest in exchange for the local. This was the essence of the ideological challenge faced by the BUS.

Writings of Alexander Hamilton, 139 DAEDALUS, 125-126 (2010); Andrew Shankman, "*A New Thing On Earth": Alexander Hamilton, Pro-Manufacturing Republicans, and the Democratization of American Political Economy*, 23 J. EARLY REPUBLIC 323 (2003) (exampling development and use of Hamilton's political economic thought).

[42] Increasing the size and scope of national authority triggered the anxieties of slaveholders in the South. If the national government grew, it could usurp the rights of states. So long as "state's rights" were protected, slaveholders believed, the institution of slavery was secure. Daniel M. Mulcare, *Restricted Authority: Slavery Politics, Internal Improvements, and the Limitation of National Administrative Capacity*, 61 POL. RSCH. Q. 671, 671-72 (2008). Southern opposition to internal improvement projects like bridges and canals intensified after 1812.

[43] ABRIDGEMENT OF THE DEBATES OF CONGRESS, *supra* note 2, at 188.

[44] *Id.* at 273.

Constitutional interpretation is an extension of politics. This was as true in the late 18th century as it is today. The BNA, another national corporation chartered under the Articles of Confederation, provided a precedent for both the legality of chartering a national bank and the fierce debate that followed.[45] Consequently, Hamilton's bank faced ideological and legal opposition in Congress. Banking, like slavery, polarized American politics in the early republic. For some the BUS, as an institution, was an illegal monopoly contravening the "spirit of the constitution."[46] By expropriating public monies for the benefit of a privileged few, the BUS was fundamentally unrepublican. Unlike a network of local state banks that could guarantee access to credit for the masses of yeoman farmers and merchant's alike, a centralized national banking institution would—in the minds of strict Jeffersonians—only benefit an aristocratic set of Northern capitalists. Ideology alone, however, could not prevent the bank's incorporation. Numerous elements of the new government could be characterized as unrepublican such as a sole executive, a tyrannical judiciary, and a powerful national government but these were necessary to prevent the crises generated by the loose-knit and ungovernable federation of states under the Articles of Confederation. The legality of a national Bank, a federally chartered corporation, was rejected by those who opposed Hamilton's financial plan. Political ideology, in this moment, no doubt informed a genuine constitutional debate.

Thomas Jefferson, for example, believed the BUS was both superfluous and unconstitutional. A national bank was not required to execute Congress' delegated powers such as: to "borrow money," "regulate commerce," and "lay taxes."[47] Since all of this could be accomplished within the pre-existing federalist structure there was no need to expand the general government by incorporating a bank. Even if Congress was determined to "step beyond the boundaries" of power drawn by the Constitution and incorporate the BUS, Jefferson charged, the institution would not pass judicial scrutiny.[48] Hamilton argued that the BUS was constitutional under the "necessary and proper

---

45 To be sure, the BNA was not a guarantee for the BUS. In fact, it inspired equally fierce debate and was killed in 1786 when the PA legislature refused its recharter. *See* Wood, *supra* note 8, at 95-96; SHANKMAN, *supra* note 8, at 4-15 (2004).

46 SHANKMAN *supra* note 8, at 4.

47 Madison was not convinced that a central bank was incidental to any of the delegated powers of Congress. *See* 2 ANNALS OF CONG. 275-76 (1791). Others opposed to the Bill followed suit with similar arguments. Fisher Ames, who supported the bank, thought their reasoning was absurd and refused to believe that the power to charter a national bank was not incidental to Congress's economic powers such as: the power to borrow money, collect taxes, etc. *See* ABRIDGEMENT OF THE DEBATES OF CONGRESS, *supra* note 2, at 278-82.

48 JEFFERSON, *supra* note 30.

clause." Jefferson was unconvinced and instead argued that "a bank" was simply "not *necessary*, and consequently not authorized by this phrase."[49] The themes of Jefferson's opposition—strict construction of the constitution, a limited role for the general government, and decentralized banking—provided an ideological foundation for emerging political parties: Jefferson's Democratic-Republicans—intellectual heirs of the Anti-Federalist critics—and Hamilton's Federalists. Political ideologies ebbed and flowed but the words of the constitution would not change. Of course, this did not (and does not) mean that the meaning of those words was "fixed" at the Philadelphia Convention.[50] Context would, and continues to, illuminate the constitution's meaning.[51] Regardless of the interpretive question, the legality of the BUS would depend on the acceptance of an implied set of Congressional power. Constitutionalists like Madison and Jefferson were reluctant to submit to this "doctrine of implication."[52]

On the 2nd of February, Representative James Madison of Virginia led the opposition to the BUS bill.[53] Madison's argument demonstrated a knowledge of but not an affinity for the major works of enlightenment political economy like Adam Smith's *Wealth of Nations*.[54] Although Madison conceded the advantages of a national banking system, he rejected that anyone other than merchants and the state itself could benefit from this institution.[55] The republican solution to such an economic crisis, was a decentralized banking system that could more equitably distribute the benefits of public finance. Like Rep. Jackson (GA), Madison rested the ideological opposition on the divergence between British and American political culture. In a country with a centralized economic system that ultimately concentrated wealth and power in the monarchy, a central bank—like the Bank of England (BOE)—was well suited.[56] But in a republican society, like that founded in the United States, designed to weave together competing strands of geographic, political, and

---

[49] Politics and legality each contributed to Jefferson's, "Opinion on the Constitutionality of a National Bank." *Id.*

[50] On the problem of originalism see JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 3-22 (1996); JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Michael S. Lewis, *Evil History: Protecting Our Constitution Through an Anti-Originalism Canon of Constitutional Interpretation*, 18 U. N.H. L. REV. 261, 288-289 (2020).

[51] On legal history and constitutional interpretation see RAKOVE, *supra* note 50, at 3-22.

[52] ABRIDGEMENT OF THE DEBATES OF CONGRESS, *supra* note 2, at 275-76.

[53] *Id.* at 274-78.

[54] *Id.* at 274.

[55] *Id.* at 274-75.

[56] *Id.* at 275-76.

economic interests—a centralized banking institution chartered by the general government was unsuitable. For the reasons that the BOE worked in England, Madison claimed, the BUS would fail in the United States.

If ideology failed to prevent Congress from chartering a banking corporation, Madison and other opponents believed the constitution would. Those opposed to Hamilton's financial plan were confident that the fundamental law of the nation did not grant Congress the power to charter private corporations, rendering the BUS an unconstitutional and illegal extension of national power. At the convention the Framers took care to limit and illuminate those powers specifically delegated to the national government. The power to incorporate was not among them. For Madison, strict construction protected the republican experiment and required the rejection of any implied powers for the national government. Incorporation of a bank, a power absent from Congress' delegated power, would be an extraordinary capture by the national government threatening the foundation of federalism. Loopholes that would permit the states to continue incorporating their own banks, even after the establishment of the BUS, did not satisfy Madison:

> If Congress could incorporate a bank merely because the act would leave the States free to establish banks also, any other incorporations might be made by Congress. They could incorporate companies of manufacturers, or companies for cutting canals, or even religious societies, leaving similar incorporations by the States, like State Banks, to themselves.[57]

Concern over the national government's annexation of state sovereignty triggered Madison's anxieties about the delicate balance between federal and state power achieved at the convention.

Madison opposed the national bank on ideological and constitutional grounds. The bill to incorporate the BUS rested on the implied powers of Congress. Article I, Section 8 of the 1790 constitution specifically delegated to Congress the "[p]ower [t]o . . . borrow [m]oney on the credit of the United States . . . regulate Commerce . . . coin [m]oney, [and] regulate the [v]alue thereof."[58] Unconstitutional means, such as the chartering of a banking corporation, should not provide the justification for constitutional ends, like borrowing money or regulating commerce. Implied powers, for Madison, were suspect. This was especially true when it came to the General Government. Awarding the General Government with power outside the boundaries of those delegated to it at the Philadelphia Convention threatened to destabilize

---

57 *Id.*

58 U.S. CONST. art. I, § 8, cl. 1-5.

the republican experiment.[59] Such "latitude of interpretation" was a source of unrepublican power and corruption. Had Madison's argument against the bank been strictly ideological and constitutional it would be unremarkable to the history of the law of private corporations. But his argument changes direction from governmental power and constitutional authority to the nature of corporate institutions. This rhetorical shift jeopardized his case against the BUS bill but revealed much about the nature of corporate institutions.

Charters of incorporation were the founding documents of corporate institutions in the first half of the 19th century. These were legislative acts that gave "birth" to companies and vested a set of individuals with the privileges that followed incorporation such as: personhood, limited liability, and perpetual life.[60] Proprietors would frequently appeal to the legislature for the charters of incorporation. Often the burden of proving that the public would benefit from a particular project fell to the individual incorporators. If the state agreed, a charter was issued. The company was "born," vested with the full slate of corporate privileges—it could buy, sell, and sue just like any "natural" person. The power to incorporate was a power incidental to sovereignty. It was exercised by the monarchies of England, Spain, and Portugal; as well as the empires of Rome.[61] Colonial governments, and later individual states under the Articles of Confederation and the federal constitution, shared in this power to charter corporations.[62] National incorporation, however, because of its association with aristocratic privilege remained troubling. Moreover, whether the power to incorporate, like the power to tax and coin money, was reserved for the General Government was unclear, and this ambiguity set the stage for

---

59 Madison had enormous influence over the Philadelphia Convention. Despite being a nationalist, Federalist, and obvious supporter of ratification he was *not* a supporter of "implied powers." Whether these feelings were linked to the threat that government power, expansion, posed to slavery is unclear. But Madison repeatedly resisted a loose interpretation of delegated powers—consistent with Jefferson—and ultimately believed that the BUS was illegal. *See* MARY SARAH BILDER, MADISON'S HAND: REVISING THE CONSTITUTIONAL CONVENTION (2017) (detailing Madison's influence in Philadelphia and the significance of his convention); JACK N. RAKOVE, A POLITICIAN THINKING: THE CREATIVE MIND OF JAMES MADISON (2017) (writing on Madison's political thought).

60 *Charter*, BLACK'S LAW DICTIONARY (7th ed. 1999).

61 The South Sea Company (1711), The Virginia Company (1603), East India Company (1600) are among Great Britain's most notable chartered mercantilist corporations. *See* JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA (2003). On the corporation in Roman Law see FERDINAND MACKELDEY, HANDBOOK OF THE ROMAN LAW 138-40 (Forgotten Books 2017) (1883); MAX RADIN, HANDBOOK OF ROMAN LAW 266-68 (1927).

62 Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 51-52 (1993).

the BUS debates, leading Madison and others to consider the nature of the power of incorporation and weigh in on the question of corporate personhood early in the nation's history.

The modern American corporation is indebted to Madison's understanding of the institution in the late 18th century. Madison's plea against the bank bill collapsed the boundaries between incorporation and naturalization emphasizing the personhood of the corporation. He argued: "It cannot be denied that the power proposed to be exercised is an important power. As a charter of incorporation, the bill creates an artificial person, previously not existing in law."[63]

Had Madison stopped here the argument would be a mechanical application of the common law of corporations summarizing Coke and Blackstone's musings on the institution. But as Madison continues, one element of corporate privilege takes center stage—personhood: "It [the charter] confers important *civil rights* and attributes which could not otherwise be claimed. It is . . . at least equivalent, to the *naturalization of an alien*, by which certain new *civil characters* are acquired by him."[64] This section of Madison's speech against the bank bill is striking for two reasons. First, if incorporation is analogous to "naturalization," a power expressly delegated by Article I, Section 8 to Congress, then there is no doubt that the power to charter corporations had been delegated to Congress.[65] If Madison was determined to defeat the bill, this was not the argument to make. If his intent was to lay bare the potential of corporate power and defeat the BUS on ideological grounds, then perhaps the argument makes good sense. Second, Madison's reference to "civil rights" and "civil character" incident to incorporation, would seem to collapse the boundaries between artificial and natural persons. The personhood of the corporation, its ability to buy, sell, and sue, was central to Madison's argument against the BUS. Charters of incorporation, under this framework, provided the civil rights and legal personhood that was incidental to incorporation.

Advocates for the bank bill were inspired by the success of national banks in imperial nations like England and persuaded by Hamilton's second "Report on Public Credit" issued on the 13th of December in 1790 calling for the establishment of a national bank.[66] If the United States was to be an industrial,

---

63 ABRIDGEMENT OF THE DEBATES OF CONGRESS, *supra* note 2, at 277.

64 *Id.* (emphasis added).

65 "Congress shall have Power . . . . To establish a uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4.

66 This report is sometimes referred to as Hamilton's "Report on a National Bank." *See* 7 THE PAPERS OF ALEXANDER HAMILTON, SEPTEMBER 1790–JANUARY 1791, at 225–36 (Harold

self-sustaining nation integrated with global trade, then a centralized banking system was essential. Capitalism required capital, and centralized banking was the most expedient method of circulation. The Federalist representative and well-known merchant from Massachusetts, Fisher Ames, unequivocally supported the bank.[67] In support of his position, Ames pointed to the successful economies of nations that had robust national banking systems like England. The benefits of centralized banking were so obvious to Ames that they were not worth poring over. But the legality of establishing a bank was. Although a staunch supporter of the BUS, Ames was a constitutionalist and was willing to forgo the institution if it was beyond the scope of national power. The Constitution itself was silent on whether the general government possessed the power to grant corporate charters or establish a national bank. Text, however, was no obstacle for Ames.

In a speech delivered on the 3rd of February 1791, Ames refuted the major points raised by Madison. On the constitutionality of the BUS, Ames was sympathetic to the "danger of implied power."[68] But the BUS was not, according to Ames, an unprecedented usurpation of national power.[69] Experience, specifically the chartering of the BNA—the BUS's predecessor—under the Articles of Confederation, demonstrated that this power of incorporation was not a sudden expansion of national authority. Moreover, the boundaries of Congressional power were not limited to those specifically delegated by the Constitution. In 1791, this was very much a live debate. Ames declared: "The powers of Congress are disputed. We are obliged to decide the question according to truth. The negative . . . is less safe than the affirmative . . . Not exercising the powers we have, may be as pernicious as usurping those we have not."[70] Limiting Congress' power at a crucial junction, such as the BUS debate, was more dangerous than the risk of expansion.

This prospective vision of national power was consistent with the anxieties expressed at the Philadelphia Convention. Most importantly, one of the central flaws within the Articles of Confederation was a weak, hamstrung national government. The idea that the Constitution prohibited Congress from

C. Syrett ed., 1963), https://founders.archives.gov/documents/Hamilton/01-07-02-0227-0003.

67 Jefferson abhorred Fisher Ames almost as much as Hamilton, referring to him as the "paper man" because of his merchant adventures and connections to commercialism. *See* SAMUEL ELIOT MORISON, THE INDIA VENTURES OF FISHER AMES 1794-1804, *reprinted in* 37 PROCS. AM. ANTIQUARIAN SOC'Y 14, 14 (1927). Ames profited dearly through his connections to the BUS.

68 2 ANNALS OF CONG. 1952-60 (1791).

69 *Id.*

70 *Id.*

incorporating a bank, when it had done so under the Articles, was a dangerous absurdity that threatened Congressional authority and undermined the purpose of a new framework of government.[71]

Ames' speech on the House floor wrestled with the problem of national power, but it also included discourse on the nature of corporations. It was Madison, after all, who first raised the issue of corporate personhood in the BUS debate.[72] Ames had to address that portion of the argument if he was going to provide a thorough refutation. Corporate personality, individuality, legal identity—these were attractive privileges that followed incorporation. Ames explained: "a corporation, as soon as it is created, has certain powers, or qualities, tacitly annexed to it . . . such as . . . its individuality, its power to sue and be sued."[73] Ames was now addressing personhood—the corporation's ability to buy, sell, and sue—as one of the central consequences of incorporation. Although he does not go as far as Madison, who associated incorporation with naturalization, Ames thoughts are another piece of the discourse surrounding the BUS that reveal the nature of the corporation in the early republic.

As the House resumed consideration of the bank bill the following day, Theodore Sedgwick of Massachusetts stepped in to reinforce the legality, utility, and necessity of a national bank.[74] Troubled by the resistance to implied powers raised by Jefferson, Madison, and Jackson, Sedgwick crafted an argument emphasizing the Constitution's inherent flexibility as a governing document. It was not a code of practice in the civil tradition. Instead, it was a charter outlining the fundamental purposes of government and the duties and

---

71 9 JOURNALS OF THE CONTINENTAL CONGRESS 1774-1789, at 920 (Worthington Chauncey Ford et al. eds., 1907) (showing an engrossed and corrected copy of the Articles of Confederation with amendments adopted); *Records of the Continental and Confederation Congresses and the Constitutional Convention*, NAT'L ARCHIVES, https://www.archives.gov/research/guide-fed-records/groups/360.html (Aug. 15, 2016); *see also* KLARMAN, *supra* note 27, at 41–48 (noting the flaws of the Articles of Confederation); *see generally* WOOD, *supra* note 28, at 354-63 (describing the drafting of the Articles of Confederation and the desire to maintain the sovereignty of the states).

72 *See supra* notes 53-65 and accompanying text.

73 2 ANNALS OF CONG. 1955 (1791).

74 Sedgwick was responding to arguments raised in Congress not that those would soon circulate upon the President's request. During the remaining weeks of February, in response to G. Washington's request for briefing, opinions were prepared on the constitutionality of the BUS bill by Attorney General E. Randolph (Feb. 12), Secretary of State T. Jefferson (Feb. 15), and Secretary of the Treasury A. Hamilton (Feb. 23). Randolph and Jefferson opposed the BUS. Hamilton, of course, defended the bill. Together the documents illustrate the rich constitutional discourse that emerged out of the incorporation question. *See generally* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, *supra* note 30.

obligations of each branch. It captured the ends, Congress itself would be left to determine the means. Sedgwick emphasized the absurd consequence of Congress not having the power to charter a bank stating: "[T]he Constitution had expressly declared the ends of legislation; but . . . had left the means to the honest and sober discretion of the Legislature."[75] This distinction between means and ends represents the essence of implied powers. Sedgwick explained: "From the nature of things this must ever be the case; for otherwise the Constitution must contain not only all the necessary laws under the existing circumstances of the community, but also a code so extensive as to adapt itself to all future possible contingencies."[76] For the Framers to have delegated in such specificity the sole powers of each branch of government would have been absurd. Had that been the case, the government would have had no ability to adapt to changing circumstances over time—something the Framers themselves were eager to build into the revised constitution.

> The great ends to be obtained as means to effectuate the ultimate end—the public good and general welfare—are capable, under general terms, of constitutional specification; but the subordinate means are so numerous, and capable of such infinite variation, as to render an enumeration impracticable, and must therefore be left to construction and necessary implication.[77]

For Sedgwick, the legality of the BUS rested on the delegated powers of the legislature, not implied powers. Sedgwick concluded: "Congress has . . . the power to lay and collect taxes, but to do every thing subordinate to that end . . . the objects, the means, the instruments, and the purposes, are left to . . . the Legislature."[78] The means under consideration was the chartering of the BUS, which was a presumptively valid exercise of constitutional power. If the Constitution called for the ends, then it implied the means. Article I delegates to the legislature the power to regulate commerce, borrow money on the credit of the United States, and regulate the value of money—all of which are dependent on centralized, national banking.[79] If the Constitution had any meaning at all, Sedgwick explained, then implied powers must be acknowledged where they so clearly meet the intended ends of the document.[80] Most striking about Sedgwick's presentation is how he managed to assuage the anxieties of

75 2 ANNALS OF CONG. 1962 (1791).
76 *Id.*
77 *Id.*
78 *Id.*
79 U.S. CONST. art. I, § 8, cl. 1-5.
80 2 ANNALS OF CONG. 1962 (1791).

implied powers. The "doctrine of implication" was not unlimited; instead, it was closely tethered to the express powers of Congress. Implication was to be invoked where Congress had to think creatively to craft the best means to exercise their constitutional duties. Implication, under this model, was not a justification for the usurpation of non-delegated powers—hopefully soothing some of the fears of the Bank's opponents.

Representative John Lawrence of New York followed Sedgwick in support of the Bank bill. While summarizing the objections of Elias Boudinot, Lawrence explained the House had considered what "rights" the company would enjoy as a consequence of incorporation.[81] Those typically associated with corporate personhood—the rights and capacity to buy, sell, and sue—were chief among those attributes. "Every individual citizen had an undoubted right to purchase and hold property . . . to dispose of this property . . . to lend his money on legal interest . . . to exercise every power over his property that was contained in the bill."[82] Here Lawrence emphasized the property rights that corporations share with individuals—those economic rights that transform a set of individual proprietors into a creature of the market. Lawrence distilled the three essential qualities of the corporation in the course of the debate: (1) "individuality," (2) "irresponsibility," and (3) "durability."[83] By "individuality," Lawrence was referring to the "one legal artificial body, capable by a fictitious name of exercising the rights of an individual"—the personhood of the corporation.[84] By "irresponsibility," Lawrence was referring to the doctrine of limited liability. A scheme of risk distribution through which an individual person may not be "answerable" or liable beyond their individual investment in the company.[85] Lastly, "durability" refers to the corporation's "political existence," whether in perpetuity or for a fixed term.[86] One of the chief advantages the corporate form had over the more widely utilized partnership was that the institution outlasted the death of a single member. In a partnership, by default, the association dissolves with the death of one or more partners, making it a much riskier entity to securitize.[87] `

After considering the ideological and legal stakes of national incorporation, Lawrence turned his attention to the political. Jackson, Madison, and Boudinot each had suggested that the BUS would only serve the merchant class. As a

81 *Id.* at 1970-79.
82 *Id.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*

national institution, the BUS was geographically and politically isolated from the masses of small-scale yeoman, farmers, and local producers in the interior regions of the states as well as those settlers pushing west on the periphery.[88] They argued that networks of decentralized state banks would better meet the needs of the masses of Americans. For Lawrence, this was a myopic view of national banking that favored local interests at the expense of the entire nation.[89] What benefited the national economy—those commercial and merchant interests that were abhorred by former anti-federalists and emerging Jeffersonian Democratic-Republicans—promised to benefit or at least act in concert with the interests of the agricultural class.[90] Nonetheless, this 'nationalist' view was precisely what opponents to the BUS found inconsistent with republican ideology. The BUS, a federally chartered banking corporation and America's first corporate person, was fundamentally unrepublican and perpetually unconstitutional for these men. The Bank bill passed 39 to 19. Among those thirty-nine yea votes, only three were cast by Southern representatives.[91] The South overwhelmingly opposed the bank bill, setting the stage for a number of key legal controversies that would arise when the Bank began operating. Despite the political and intellectual heft behind the opposition, it remained the minority view.

National interest coupled with a broad view of Congressional power carried the day. The Bank bill was signed into law by President George Washington on the 25th of February 1791, chartering America's first corporate person.[92] The Bank was the country's first national corporation, headquartered in Philadelphia, with satellite branches operating across the individual states. The banking corporation enjoyed personhood—the ability to buy, sell and sue—along with those essential characteristics, articulated by John Lawrence, that followed incorporation, such as "individuality," "durability," and "irresponsibility." [93]

Washington's signature, however, was not the last word concerning the legality of the Bank, nor did it help reconcile the sectional and partisan division that surfaced during the debate. Instead, like most products of politics, it was a

---

88 On the nature of state power in the early republic and the genesis of American state capitalism, see generally Andrew Shankman, *Toward a Social History of Federalism: The State and Capitalism to and from the American Revolution*, 37 J. EARLY REPUBLIC 615 (2017).

89 2 ANNALS OF CONG. 1969-70 (1791).

90 *Id.*

91 R. K MOULTON, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANKS OF THE UNITED STATES, FROM THE TIME OF ESTABLISHING THE BANK OF NORTH AMERICA, 1781, TO OCTOBER, 1834: WITH NOTES AND COMMENTS 16–17 (1834).

92 2 ANNALS OF CONG. 2021 (1791).

93 2 ANNALS OF CONG. 1971 (1791).

compromise. The first charter would expire in twenty years and require renewal by Congress. This primed opponents of the BUS, who knew well that the debate in 1791 was only their first act.[94] However, before Congress would get a second chance to defeat the BUS, opponents took to the courts. Two possibilities existed to defeat the bank: judicial review and state taxation. If the Supreme Court found the charter unconstitutional, it could be nullified. Alternatively, if the states could tax the BUS, they could undermine its profitability and perhaps even tax it out of existence.[95]

IV. DRAFTING AN AMERICAN LAW OF CORPORATIONS

Under the 1791 charter, the BUS appeared in federal court on six occasions.[96] Among those cases, two helped define the corporation in American common law: *Bank of the United States vs. Norwood* (1803) and *Bank of the United States vs. Deveaux* (1809). *Norwood* involved a dispute over the endorsement of a promissory note that led the court to acknowledge the corporation's ability to act as a natural person.[97] More consequential of the two, however, was *Deveaux*. There Justice John Marshall weighed in on whether the corporation was a "citizen" for purposes of federal court jurisdiction under the Judiciary Act of 1793.[98]

---

[94] For opponents of the Bank this was good news. The renewal of the charter would come after the "Jeffersonian Revolution" of 1800. Jefferson's vision, for a moment, appeared to be winning at least rhetorical battle. *See* DREW R. MCCOY, THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA (1980); JAMES ROGER SHARP, AMERICAN POLITICS IN THE EARLY REPUBLIC: THE NEW NATION IN CRISIS (1993).

[95] The issue of state taxation of federal entities boiled over in McCulloch v. Maryland, 17 U.S. 316 (1819). Before *McCulloch*, states believed they had a reasonable chance to defeat the BUS through taxes. This was the essence of the conflict that erupted in Bank of U.S. v. Deveaux, 9 U.S. 61 (1809), *overruled by* Louisville, C & C.R. Co. v. Letson, 43 U.S. 497 (1844). Historians agree on the significance of *Deveaux* but diverge on the role of personhood. Adam Winkler, for example, argues that "corporate personhood" played "little role" if any in the BUS victory. *See* Adam Winkler, Bank of the United States v. Deveaux *and the Birth of Constitutional Rights for Corporations*, 43 J. SUP. CT. HIST. 237 (2018). Nonetheless, the case reveals the willingness of judges to manipulate the common law in the interest of economic institutions like banking corporations. In *Deveaux*, Marshall crafted an "associational view" of the corporation that enabled the BUS to appear in federal court. *See* Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 AM. J. COMP. L. SUPP. 49, 53–55 (1990).

[96] Not every case involving the BUS wrestled with legal status or issues of constitutionality. Many involved forgeries. *See* Levy v. Bank of the U.S., 4 U.S. 234 (1802). The legality of the Bank was finally settled, after the charter's belated renewal in 1816, by John Marshall in *McCulloch*. *McCulloch*, 17 U.S. at 396.

[97] Bank of U.S. v. Norwood, 1 H. & J. 423, 426 (C.C.D. Md. 1803).

[98] *Deveaux*, 9 U.S. at 73.

In *Norwood*, Stone, Vaughan, & Co. had endorsed a promissory note to the Bank of the United States.[99] Samuel Sterett, a notary and agent for the BUS, aware that the defendants were insolvent at the time of endorsement, refused payment on the note and provided a formal notice of protest by mail.[100] The issue for the Supreme Court to determine was whether Sterett actually had the authority to protest the note on behalf of the BUS and, if so, whether his mailing provided legally sufficient notice.[101] Aligning with the BUS, the Court explained: "It has been objected that the plaintiffs, being a corporate body, cannot act by agent without authority by deed. This objection has no force. The bank may *act* as a natural person."[102] The facts of the case may have been mundane but the law developed in the case was formidable. *Norwood* stood for the proposition that "[a] corporation may do acts in *pais* [without an order of the court or in writing] otherwise than by deed."[103] Put differently, the entity may act as a natural person. Here the "personhood" of the BUS prevented the commission of a fraud on the Bank providing further assurance of the value of those notes issued by the BUS.

More robust and consequential for corporate theory, however, was the second federal controversy: *Bank of the United States vs. Deveaux*. In 1805, shortly after the BUS began operation, Georgia levied a tax on the Bank's Savannah branch.[104] The Bank, a federal entity, refused to pay the state's tax,[105] believing it was unconstitutional under the Supremacy Clause of the federal Constitution that made national law, laws produced by Congress as well as decisions of the Supreme Court, the "supreme Law of the Land."[106] Georgia state officers disagreed and broke into the Savannah bank to seize property in satisfaction of the tax.[107] In response, the BUS exercised its personhood and sued the GA tax collectors for intruding upon and stealing their private property.[108] The BUS, an object of scorn in Georgia, would not have fared well in Georgia's state court system. But suing in federal court was not yet a certainty for corporate litigants and required some legal imagination. Both the briefings filed and the opinion issued in *Deveaux*, offer rich insight into the nature of the corporation

---

[99] *Norwood*, 1 H. & J. at 426.
[100] *Id.* at 423-24.
[101] *Id.* at 425-26.
[102] *Id.* at 426 (emphasis added).
[103] *Id.* at 423.
[104] Bank of U.S. v. Deveaux, 9 U.S. 61, 63 (1809), *overruled by* Louisville, C & C.R. Co. v. Letson, 43 U.S. 497 (1844).
[105] *Id.*
[106] U.S. CONST. art. VI, cl 2.
[107] *Deveaux*, 9 U.S. at 63.
[108] *Id.*

in early 19th century American law. *Deveaux* raised broad questions of federalism and jurisdiction that depended upon the court's analysis of the relationship between corporations and the law.[109] The answers provided by Chief Justice John Marshall formed the early boundaries of corporate personhood.[110]

Federal courts were established under the authority of Article III of the 1789 Constitution, but the details of judicial power were sparse. Jurisdiction was broad, extending from admiralty and maritime disputes to questions of national law. Private citizens could avail themselves of these federal courts if the dispute were between "citizens of different states" or "between a state and citizens of another state."[111] Lawyers today call this "diversity" jurisdiction. Although corporations were endowed under most charters with legal personhood—the ability to buy, sell, and sue—where they could exercise those rights, specifically where they could sue, was still an unsettled question.

State courts, like state banks in the early 19th century, were apprehensive of national power. The Georgia tax, if challenged in the Georgia court, was presumptively valid and would have been upheld, hindering the Bank's purpose early in its career. Charles Binney, the lawyer representing the Bank, knew this well and was determined to pry open the doors of the federal district courts for corporations. To accomplish this, Binney needed a basis for jurisdiction and, he believed, "diversity of citizenship" was the answer. The BUS, Binney argued, was not just a person but a "citizen" of Pennsylvania residing in Philadelphia; and Peter Deveaux, one of two tax collectors, were both citizens of Georgia residing in Savannah.[112] Predictably, the Georgia circuit courts dismissed for lack of jurisdiction.[113] But, fortunately for the Bank, their appeal was accepted by the Supreme Court of the United States.

Two legal issues were presented to the Marshall Court: the first, as Charles Binney, counsel for the BUS, framed them, was "whether a body politic [a corporation], composed exclusively of citizens of one state, can sue a citizen of another state in the circuit court of the United States;" and, if so, whether the BUS enjoyed a "right to sue in that court."[114] The first issue was a formal, procedural question of jurisdiction to determine if the Bank could avail itself

---

[109] *See id.* at 63-64.

[110] *Id.*

[111] U.S. CONST. art. III, § 2, *amended by* U.S. CONST. amend. XI.

[112] *Deveaux*, 9 U.S. at 62. The case arose after Peter Deveaux and Thomas Robertson broke into the Savannah branch to steal the amount owed to the State under the tax. In response, the BUS sued for trespass and trover.

[113] Bank of U.S. v. Deveaux, 2 F. Cas. 692 (C.C.D. Ga. 1808), *rev'd* 9 U.S. 61 (1809).

[114] *Deveaux*, 9 U.S. at 63.

of the federal court system or if the matter should be disposed of in state court. The second was a substantive question that asked if the Bank had a legal right to sue, like an ordinary individual. The substantive issue forced the Court to consider what, under prevailing legal thought, the corporation was and, depending on the nature of this entity, whether it held any rights or privileges that would enable the institution to sue in a federal court. Simply put, the Supreme Court had to determine whether the corporation—an abstract, artificial, legal construction—was a "citizen" for purposes of diversity jurisdiction. This procedural question drew the Court into unfamiliar territory of corporate theory. These were not altogether novel legal questions, but to answer them would require the justices to craft an American common law definition of the corporation while assessing whether the corporation was, for the purposes of jurisdiction, a citizen.

The law, Binney believed, was on his side. He opened his argument with a genealogy of the corporation that captured a sense of the discourse on the house floor in 1791.[115] Binney began with Stewart Kyd's definition of the corporation: "What is a corporation[?] . . . It is a collection of many individuals united into one body, under a special name, having perpetual succession . . . an artificial form, and vested, by . . . the law, with the capacity of acting in several respects as an individual."[116] Under this definition, the BUS was an entity apart from its incorporators.[117] It was an "artificial form" capable of acting as an "individual" for specific purposes, though certainly not a "natural" person with constitutionally protected privileges and immunities.[118] As Binney continued, however, the boundary between natural and artificial dissolved. "A corporation as a 'faculty' has no 'local habitation,'" Binney explained, "though it has a 'name.'"[119] Incorporation was a state act, and Binney reasoned that the corporation's legal status, governed by its charter, was a kind of license. He continues by explaining, "If it is an *ens rationis* [in thought] only, it cannot be said to reside anywhere; and it certainly occupies nothing; yet habitancy, residence, and occupation may be predicted of a corporation."[120] The corporation had to be more than a mere "faculty," right or license. In fact, Binney argued: "The residence and inhabitancy of the particular members have

---

115 *Id.*

116 *Id.* at 64.

117 On separate entity status and the role of the Marshall court in facilitating corporate development, see Margaret M. Blair, *How* Trustees of Dartmouth College v. Woodward *Clarified Corporate Law* (Vand. Univ. L. Sch., Working Paper No. 21-19, 2021).

118 *Deveaux*, 9 U.S. at 64.

119 *Id.* at 65.

120 *Id.*

been taken into consideration, and have been deemed to impart these characters to the corporation."[121] The citizenship of the corporation's members should determine the citizenship of the corporation.

The rights of members, Binney implied, were not extinguished upon incorporation. If residency, for jurisdictional purposes, of incorporators extends to the corporation, then what other individual attributes should follow? In particular, would the civil or natural rights of individual incorporators extend to the artificial entity as well? Put differently, what rights do individuals concede when associating as a corporation? Binney next reframed the procedural question of jurisdiction as a substantive question: "But it is not more a question of jurisdiction [procedural] than of right [substance]. If you cannot inquire who are the members of a corporation, whenever a right depends upon the question of citizenship, that right cannot be enjoyed by a corporation."[122]

Next, Binney argued that incorporation does not suspend an individual's legal rights.[123] He explained that incorporation "is a privilege conferred on a number of *individuals*. The corporate body is the *form* . . . . The individuals are the *substance*. [The corporation] is a *fiction* of law; the individuals are the *real* parties."[124] By arguing that natural persons are "the *substance*" of the corporation, Binney suggests that individual rights and privileges pass to the entity. Like the organization of persons into a commonwealth, here incorporated individuals relinquished certain rights and privileges while reserving those "natural" rights that cannot be alienated to the state. Binney explains: "So a man, by entering into civil society, acquires the privilege of being protected by the society; and he renounces the privilege of seeking, by his own force, redress for his wrongs . . . . But he does not renounce the privilege of defending himself against personal violence."[125]

Marshall was persuaded by Binney's analysis and even found constitutional support for it. "[T]he term citizen," Marshall explained, "ought to be understood as it is used in the constitution."[126] The problem was, however, that the Constitution in 1789 did not define "citizen" or provide a basis for national citizenship. This afforded Marshall—as a Supreme Court Justice—the opportunity to provide the meaning through interpretation.[127] Under the

---

[121] *Id.* at 65. Faculty is a kind of license or privilege delegated by governmental power.
[122] *Id.* at 69.
[123] *Id.* at 79.
[124] *Id.*
[125] *Id.* at 80.
[126] *Id.* at 91.
[127] Before the 14th Amendment, ratified in 1868, there was no constitutional basis of national citizenship. There was a law of naturalization, but citizenship was predominantly a

Constitution, Marshall argued, the term "citizen" described "the real persons who come into court, in this case, under their corporate name."[128] The Bank's ability to sue in federal court, Marshall believed, should be measured by the citizenship of its individual members, not the entity's physical Pennsylvania headquarters.[129] Moreover, Marshall argued that the corporation, as a construction of the law, was not in itself a citizen stating: "That invisible, intangible, and artificial being, that mere legal entity, a corporation . . . is certainly *not* a citizen; and, consequently, cannot sue or be sued in the courts of the United States."[130] The reasoning in *Deveaux* was powerful but puzzling, as though Marshall was reluctantly opening the doors of the federal courts to corporations.

After *Deveaux*, the corporation's legal status remained fluid. From the perspective of corporations, Marshall's opinion was helpful but indeterminate. As a corporation, the BUS enjoyed neither residency nor citizenship under the federal constitution. Corporations, at the turn of the 19th century, were entirely dependent on the state. They enjoyed no more liberty than a *femme covert*—a married woman under the coverture of her husband—or an enslaved person under the law.[131] At best, *Deveaux* stood for a kind of imputed citizenship for corporations. The Bank's individual members, those natural persons who were property-owning white men, certainly were citizens. For Marshall, this citizenship was imputed to the corporation leading him to conclude that "the character of the individuals who compose the corporation" determined citizenship.[132] For better or worse, the doors were now open to the federal courts for corporations.

---

relationship between an individual and their state. *See* Gerald L. Neuman, *Citizenship*, *in* THE OXFORD HANDBOOK OF THE U.S. CONSTITUTION 587 (Mark Tushnet et al. eds., 2015).

128 *Deveaux*, 9 U.S. at 91.

129 *Id.*

130 *Id.* at 86 (emphasis added).

131 Henry Clay had a more perilous view of the power of incorporation than Marshall. He believed, similar to Madison, that the power to incorporate was so consequential that it must be limited to the states. In his "Speech on the Bill to Recharter the Bank of the United States," delivered in 1811 during the fight to renew the Bank's charter, Clay shows how national incorporation was an encroachment on state power. If the state could empower an "artificial body" with the capacity to buy, sell, sue and contract; then the state would soon empower slaves, infants, and married women to the same. This invited the national government to intrude upon property rights thus threatening the institution of slavery. *See* Henry Clay, Speech on the Bill to Recharter the Bank of the United States (Feb 15, 1811) *in* 1 THE PAPERS OF HENRY CLAY: THE RISING STATESMAN 527, 532 (James F. Hopkins ed., 1959); Shankman, *supra* note 88, at 639-41 (writing on slavery and government power).

132 *Deveaux*, 9 U.S. at 92.

Historian Adam Winkler argues that this was an example of Marshall's willingness to "pierce the corporate veil" and protect the rights of individuals without considering the rights of the separate entity, the corporation.[133] This interpretation, however, emphasizes Marshall's legal reasoning without considering the relationship between the courts and corporations. The legal fiction of "corporate personhood" is what enabled the corporation to appear, as a litigant, in the first place. To minimize the role of "personhood," is to narrow the relationship between law and capitalism. Although the Court in *Deveaux* did not explicitly hold that corporations were citizens, the ruling recognized a powerful form of jurisdictional citizenship for the institution, albeit through the citizenship of its proprietors. To be sure, Marshall fell short of conceding all constitutional privileges and immunities passed from member to entity—this would fully negate the corporate veil. Nonetheless, the BUS—at least the Savannah, GA branch—survived because of its personhood—its ability to avail itself as a litigant of the federal court.[134] Had Marshall rejected jurisdiction, the Georgia opinion upholding the tax would have stood, and states could have begun taxing various branches of the Bank. Instead, Marshall kept the gates of the federal courts open to corporations where they would enjoy preferential treatment so long as nationalist, federalist-minded judges like Marshall remained on the bench.

V. RENEWING THE 1791 CHARTER

By 1809 the BUS had survived judicial scrutiny and state taxation, but its charter was still due to expire in March of 1811. Without Congressional action, that charter would lapse, causing the Bank to lose its corporate privileges and wind up its business. The expiration of the charter still hovered as a threat against the first corporate person. In May of 1810, political economist Mathew Carey warned of the "pressing necessity" to renew the

---

133 Winkler, *supra* note 95, at 254 (arguing that "veil piercing" not "corporate personhood" protected the BUS).

134 Historians diverge on whether *Deveaux* represents a triumph of corporate personhood or an application of a different legal theory, "piercing the corporate veil." Adam Winkler, for example, argues this case and many corporate "rights" cases that followed were examples of veil piercing, looking beyond the corporate form to the individual proprietors, not corporate personhood. *See* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863 (2007). Although corporate personhood or "separate entity status" did not determine the question of citizenship, it enabled the BUS to defend itself against encroaching state regulation. Personhood, nonetheless, made the fight against the GA tax possible and protected the BUS from being taxed out of existence by the states.

charter and the "fatal consequences" of indecision.[135] The idea that "state banks" would be able to assume the functions of a centralized national bank was, according to Carey, a "miserable delusion" at best and a great "deception" at worst.[136] Congress needed to act swiftly and decisively to avert economic catastrophe by renewing the charter. Unfortunately for the Bank, despite precedent and experience, the political landscape was not on its side. James Madison, leader of the opposition in 1791, was now President and much of the popularity surrounding Hamilton's economic plan dissolved among those in power.

Politics and ideology again threatened the Bank's recharter and set the stage for another spirited debate on corporations and republican principles. Like the incorporation debate, discourse on renewal of the BUS charter provides valuable insight into the nature of both corporate power and the problem of federalism in the early republic. Supporters, particularly those in the "commercial cities" of Philadelphia, Boston, and New York were cognizant of the charter's impending expiration and began pressuring Congress in December of 1810 to renew, or at least begin serious consideration of the problem, to prevent impending "evils" that would follow the BUS's failure.[137] The stakes of renewal in 1811 were higher than incorporation in 1791. Further complicating the conversation was the threat of war with Great Britain and the fact that the BUS, by design, had become a principle institution within an increasingly complex national economy. Should the charter lapse, many like political economist Mathew Carey predicted, economic catastrophe would follow.[138]

In January of 1811 talks on renewing the charter intensified. The usual objections surfaced—raising issues of legality, ideology, and expediency. The precedent and success of the first Bank of the United States held little weight for its opponents, many of whom were Jeffersonian Republicans. For

135 The Philadelphia economist and writer, Mathew Carey, predicted that the calling up of debts as a result of the Bank's closure would cause economic catastrophe. *See* MATHEW CAREY, DESULTORY REFLECTIONS UPON THE RUINOUS CONSEQUENCES OF A NON-RENEWAL OF THE CHARTER OF THE BANK OF THE UNITED STATES 3 (2d ed. 1810).

136 *Id.* at 4.

137 David Lenox, *Bank of the United States Memorial*, NAT'L INTELLIGENCER, Dec. 22, 1810, at 2, https://www.gale.com/primary-sources; *Bank of the United States*, NAT'L INTELLIGENCER, Dec., 29, 1810, at 2, https://www.gale.com/primary-sources.

138 The most immediate impact of the failure to renew the charter of the first bank was the inability to adequately finance the War of 1812. On the challenges of waging a war without a central bank, see Lisa R. Morales, The Financial History of the War of 1812 (May 2009) (Ph.D dissertation, University of North Texas) (available at UNT digital library; https://digital.library.unt.edu/ark:/67531/metadc9922/).

opponents, the charter's expiration provided an opportunity to correct a legal wrong and realign constitutional practice with the ideals of the revolution. Representative William A. Burwell, from Virginia, led the opposition to the BUS bill in the House of Representatives. On the 16th of January 1811, Burwell, channeling Madison, expressed concern about the constitutionality of national incorporation and the risk it posed to the "harmony" achieved in Philadelphia in 1787.[139] The "dreadful evils" and "material shock" predicted by supporters of the BUS was not persuasive for Burwell. The greater risk surrounding renewal was the old trope of government power and the destabilizing effect of expanding national authority.[140] "Sound policy," Burwell argued, required staying within the rigid confines of the constitution's text.[141] The constitution gave "no authority to Congress to incorporate a bank and endow the stockholders with chartered immunities."[142] The doctrine of implication, the constitutional theory that the BUS bill depended upon, threatened the republican experiment. Burwell explained: "The power to establish a bank," the power to incorporate, "cannot be deduced from general phrases [such as]: 'to provide for the common defense and general welfare' because they merely announce the object for which the General government was instituted."[143] These were not clauses designed to augment national power but restrictive phrases crafted to preserve a balance between federal and state sovereignty. Any power founded by implication was, for Burwell and other opponents of the Bank, presumptively and perpetually suspect.

Opposition to the bank in 1811, like opposition in 1791, hinged on republican ideology. Incorporation was a legal process that vested a distinct set of individuals with rights and privileges unavailable to individuals. The process was perceived by old guard republicans like William Burwell, Thomas Jefferson, and James Madison, as fundamentally inconsistent with republican values.

---

[139] While most historians emphasize how economic interests and class antagonism influenced the Framers during the Philadelphia Convention, recently historian Max Edling analyzed the role of national unity. The federalist system, balancing power between the General Government and the states, itself was a product of the need to preserve unity between competing regional interests. *See generally* MAX M. EDLING, PERFECTING THE UNION: NATIONAL AND STATE AUTHORITY IN THE U.S. CONSTITUTION (2021) (emphasizing the economic and class struggle); CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES (1913); WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (2008); KLARMAN, *supra* note 27. Representative Burwell's argument against the bank echoed these concerns. *See* 22 ANNALS OF CONG. 580-81 (1811).

[140] *Id.* at 580.

[141] *Id.* at 581.

[142] *Id.*

[143] *Id.* at 582.

During the debates concerning renewal of the charter, Burwell explained: "The nature of incorporation is . . . a distinct class of political power, that, before they [the proprietors] can be converted into means incidental to an object without the jurisdiction of the General Government, they must be shown to be absolutely necessary."[144] Government by incorporation should not become an avenue to sidestep the constitution's delegation of powers. National incorporation, thus, should be invoked with extreme discretion and only when incidental to a legitimate object of government power. Incorporation should only be implemented when "absolutely necessary."[145] The constitutionality of the BUS, for Burwell, depending on whether a bank itself was necessary for the general government to sufficiently govern.

New York's Jonathan Fisk responded to Burwell's impassioned plea against renewal of the charter by emphasizing the stakes of irresponsible tinkering with the national economy. Fisk feared anything short of renewing the charter would drag the country toward another critical period.[146] The BUS bill had to be renewed, according to Fisk, because the nations finances were tethered to its success. For Fisk, the BUS was neither repugnant to republicanism nor the constitution. Banks are not "hostile to Government and dangerous to liberty."[147] Instead, they "form a barrier to tyranny and oppression."[148] Ownership and control, the corporate governance of the BUS, were hedges against corruption. The republican critiques of Madison, Jackson, and now Burwell were misguided. Fisk explains: "A bank owned by Government, and under its command, would be an engine dangerous to the people. But when owned by *individuals*, neither the people nor the government have anything to fear . . . . It is then dependent on both for its business, prosperity, and usefulness."[149] This dependency itself, for Fisk, was a safeguard against corruption.

Moreover, the constitutionality of the BUS was settled by reason and experience. Congress's passage of the bill in 1791 settled the constitutional question for Fisk. Refusing to renew the charter, was not a patriotic act in defense of American ideals, but instead a shortsighted and selfish political

---

144 *Id.* at 584.

145 *Id.*

146 The first critical period led states to enact debt relief statutes that jeopardized the interests of foreign and domestic creditors triggering a nationwide economic crisis that exposed one of many weaknesses in the Articles of Confederation. *See* WOOD, *supra* note 28, at 404; KLARMAN, *supra* note 27, at 74.

147 22 ANNALS OF CONG. 601 (1811).

148 *Id.*

149 *Id.* at 602 (emphasis added).

exercise jeopardizing the union. Perhaps Fisk was speaking past Congress, confident that the bank would be renewed, and trying to capture the ear of President Madison to guarantee his signature by channeling *Federalist No. 10*.[150] Failing to renew the BUS at this juncture, put factional interest before national interest, something that Madison—despite his distaste for the bank—would surely oppose. Tellingly, Fisk continued:

> When I advocate a continuance of the present system, I advocate the interest of the farmer, the mechanic, and even the laborer, who alone must suffer most severely, by the experiment of breaking up this bank and [the] present system of paper credit.[151]

Despite early critiques that the BUS benefited only those mercantile interests of society, all had benefited from the BUS through its reinforcement of the national economy. The life of the bank demonstrated that the institution assisted far more than just the merchant class and Congress now had an obligation to renew the charter. Now was not the time for political "experiment" or dogmatic posturing. Fisk continued his passionate call for Congress to act decisively in support of the BUS:

> When we look around us we find the political passion of man rising to madness; long established Governments breaking up their strong foundations, and the world almost deluged with blood and warfare; we alone stand upon the narrow isthmus of peace and prosperity.[152]

The stakes of renewal demanded Congress to act ethically and look outside party interests. Although renewal of the charter remained uncertain, Fisk's fervent plea raised the stakes of the debate. The career of America's first corporate person was closely calibrated to the future of the nation. Fisk's warning was clear but not definitive, and arguments against the bank persisted.

Throughout January, the BUS debate raged on. Constitutional arguments from 1791 were resuscitated and fused with renewed passion and vigor. The incorporation question once again turned Jefferson's "Southern agrarians" against Hamilton's merchants and entrepreneurs. State banks were another source of antagonism against the BUS, frustrated as they were by the national

---

[150] In Federalist No. 10, Madison elaborated on the dangers of self-interested factions and how mechanisms contained in the new constitution promised to mitigate their power. *See* THE FEDERALIST NO. 10 (James Madison).

[151] 22 ANNALS OF CONG. 611 (1811).

[152] *Id.* at 616.

bank's monopolistic control over the country's supply of specie.[153] Although the arguments of supporters and opponents of the Bank were largely unchanged, the political landscape was dramatically different. Political parties, to the dismay of George Washington and James Madison had calcified within national politics. The Jeffersonian Revolution of 1800 signaled to many that the BUS would not survive its scheduled expiration. To representatives like William Burwell of Virginia this was a near guarantee of the bill's veto. This view, however, placed ideology ahead of experience. The BUS, between 1791 and 1810, had achieved much of what Hamilton promised in 1789, and the nation's finances was now intricately tied to its fate, alarming many Jeffersonian Republicans.

As debate continued, legislators grew exasperated. Many hoped the charter would simply expire while tabling the issue to avoid endless bickering. Still there were those like Virginia's David S. Garland, who wanted the "legislative axe" to fall swiftly and called for an immediate vote on the future of the BUS.[154] This sentiment was widely shared among Southern states that opposed the BUS, believing it to be a tyrannical institution controlled by foreign interests.[155] Continued argument was an opportunity to remind their colleagues of the republican principles at stake upon which the country was founded and the constitution was written. As the fate of the national bank, and the national economy, hung in the balance, their discourse continued to reveal much about the nature of early American corporations. New York's Peter B. Porter opposed the BUS bill on grounds of federalism arguing that national incorporation "assumes the exercise of Legislative powers which belong exclusively to the State Governments."[156] The chartering of corporations had long been left for the states to exercise not the general government to usurp through expansive interpretations of the constitution. Powers like

[153] Historian Gordon S. Wood explains there were "two principal sources" of opposition to the BUS: Jeffersonian Southern agrarians and Hamiltonian industrialists. Unsurprisingly those whose livelihood was supported by paper money—traders, merchants, and entrepreneurs—favored the BUS, while those who lived off the land abhorred the BUS as well as all other banking institutions. Equally important were state banks, a formidable enemy of the BUS. Wood explains how the BUS's ability to exchange state bank notes for specie restricted the lending power of these small institution. WOOD, *supra* note 25, at 294-95.

[154] 22 ANNALS OF CONG. 674 (1811).

[155] *Bank of the United States*, RALEIGH REG., Nov. 22, 1810, at 2, https://www.gale.com/primary-sources.

[156] 22 ANNALS OF CONG. 627 (1811).

incorporation, Porter believed, were considered part of the "internal concerns" of states well beyond the scope of federal authority.[157]

Porter's claims, like those of Madison and Ames in earlier debates, included a discussion of the nature of the "abstract idea of a corporation."[158] To contravene Hamilton's case for the constitutionality of the Bank, Porter invoked his understanding of the corporate form "as a fiction of the law, a mere political transformation of . . . individuals from their natural into an artificial character, for the purpose of enabling them to do business . . . ."[159] This emphasis on the political nature of the corporation highlights the connection between the institution and the state. At the beginning of the 19th century, incorporation was a political act facilitating development, commerce, and trade. Chartering, the legislative process that established both public and private corporations, was state capitalism in action. Chartering connected the corporation to the state and put public power behind private ambition only when that ambition aligned both with national policy as well as constitutional authority. The corporation, in this era, was entirely dependent on government. The state held nearly complete control of these institutions. Porter explains: "[W]hen this political association [the corporation], this legal entity, is once formed, it becomes subject to the laws of the State in which it happens to be placed."[160] Regulation, the subjection of the institution to state sovereignty, was built into the chartering process. Porter then asks, alluding to limited liability: "What are some of the legal effects of this incorporation?"[161] This Porter found troubling: "[I]f the law be what it is said to be, and what I believe it to be, *summa ratio*, then, I pronounce this doctrine [limited liability] not to be law; for nothing can be more preposterous in principle than to say, that a man may, by his own act, avoid the force of an obligation which the law has made universal and unqualified."[162] The corporation, as understood by Porter and others during the BUS debates, remained a creature of the state closely linked to market society. Incorporation of the BUS in 1791 was developmental capitalism in action at the national level.[163]

---

157 *Id.* at 629 ("The individual States have therefore reserved to themselves the exclusive right of regulating all their internal, and, as I may say, municipal concerns, in relation both to person and property.").

158 *Id.* at 632.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* at 632-33.

163 On the use of the state as a vehicle of capitalist development, *see* LOUIS HARTZ, ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860, at 37-126 (1948); DANIEL J. ELAZAR, THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION

Regional opposition to the BUS remained strong even two decades later. The most vitriolic voices against the national banking corporation came from southern states like Virginia and Kentucky. In late January, as debate in the House began to unravel, Kentucky's Joseph Desha, delivered a dramatic speech against renewal. For Desha the decision to renew the charter was not easy, republican values were at stake.

> [T]he question is . . . whether we will foster a viper in the bosom of our country, that will spread its deadly venom over the land, and finally affect the vitals of your republican institutions; or, whether we will . . . apply the proper antidote, by refusal to renew the charter, thereby checking the cankering poison . . . of foreign influence, that has . . . brought our Government almost to the brink of ruin.[164]

Members of Congress during the early national period saw themselves as stewards of republicanism. Debates were frequently tied to the values of the revolution and even seemingly mundane decisions—like incorporation of a national bank—presented fundamental challenges to republican values. For representatives like Desha it was ideology, not legality, that determined whether the charter should be renewed.[165] Precedent, utility, implication had no place among the most obstinate strands of Jefferson's Democratic-Republican party.

The corporate form, for some opponents of the national bank, was inherently unrepublican and deepened their ideological opposition to renewal. Representative Garland challenged this assertation. Not "all corporation are anti-Republican," Garland explained, instead this was a "naked assertation . . . unsupported by any kind of evidence."[166] It was not the act of incorporation that challenged republicanism, but rather the object of incorporation. "The propriety of granting acts of incorporation is made to depend on the object to be accomplished . . . republicanism has *nothing* to do with the present question."[167] Invoking republicanism to defeat legislation incompatible with one's personal politics elevated self-interest above the interests of country—

IN THE NINETEENTH CENTURY UNITED STATES 25-35 (1962); JOHN LAURITZ LARSON, INTERNAL IMPROVEMENT: NATIONAL PUBLIC WORKS AND THE PROMISE OF POPULAR GOVERNMENT IN THE EARLY UNITED STATES 49-223 (2001).

164 22 ANNALS OF CONG. 651 (1811).

165 Though to be sure, Desha believed permitting the national government to charter corporation was presumptively unconstitutional and illegal. Like other Jeffersonian Republicans, Desha was a strict constructionist. Nonetheless, republican virtue was what guided his legal thought and provided the catalyst for his rejection of the national bank. *See id.* at 651-63.

166 *Id.* at 757.

167 *Id.* (emphasis added).

violating an ethical principle and important value of representative democracy. Garland challenged those who leaned on "republicanism" with religious dogmatism to defeat the Bank: "[T]he word 'republicanism' is used in this House as a kind of watchword, without any appropriate meaning or application to the subject under consideration."[168] Republicanism, as it was being used in the Bank debates, for Garland was circular reasoning that failed to settle the question of incorporation.

By the third week of January, after exhaustive rounds of debate, the House of Representatives remained divided on the question of renewing the BUS charter. Congress found itself deadlocked, squabbling over ideology and the constitutionality of national incorporation.

Eight weeks before the charter was due to expire, Congress was still undecided. Congress punted, with sixty-five yeas and sixty-four nays, they achieved a narrow victory to postpone the bill.[169] At the close of January the future of the BUS was uncertain.

As the charter neared its expiration, Henry Clay, the senator from Kentucky, became one of the Bank's most ferocious and influential opponents. On the 15th of February Clay delivered a speech against the "Bill to Recharter the Bank of the United States."[170] Clay's speech, like others in Congress, built upon the scaffolding of the ideological opposition to the BUS provided by Madison, Jefferson, and Jackson two decades earlier. The potency of Clay's rhetoric, like Madison, Porter, and Fisk, reveals how the representatives perceived the nature and scope of the corporation within early national political economy. Clay asked:

> What is a corporation such as the [Bank] bill contemplates? It is a splendid association of favored individuals, taken from the mass of society, invested with exemption and surrounded by immunities and privileges.[171]

This sweeping definition emphasizes the social and legal privileges that accompany incorporation. Like Porter, Clay objected to an inherently unrepublican institution. One that by its nature was aristocratic, exclusive, and distinct from the people. The privileges of incorporation, awarded by the state, were problematic for Clay. Among the most troubling privileges of incorporation, for Clay, was legal personhood and the power that followed both for the institution and the General Government:

---

168 *Id.*
169 *Id.* at 826.
170 Clay, *supra* note 131, at 532.
171 *Id.*

> If Congress have the power to erect an artificial body and say it shall be endowed with the attributes of an individual—if you can bestow on this object [the corporation] of your own creation the ability to contract, may you not, in contravention of state rights, confer upon slaves, infants and *femes covert*, the ability to contract?[172]

Clay was objecting to the Bank bill because of the powers and privileges of personhood: the ability to buy, sell, contract, and to sue. Moreover, Clay no doubt captured the attention of a powerful audience that would certainly oppose the BUS—the slave power. National incorporation, if constitutional, presented an existential crisis for the union because it threatened slavery.

Government power could not be hidden behind a corporate veil. Clay made this inordinately clear; it was as though the BUS bill carried the potential to destabilize the racial and patriarchal social order in early America. This was about more than centralized banking or the constitutionality of implied powers for Clay. The BUS debate was about the future of slavery, the maintenance of federalism, and social harmony. Government power, especially national power, was presumptively suspect to opponents of the bank and it was the corporation's synthesis of state power as well as legal personhood that rendered the institution particularly threatening for men like Clay, Burwell, and Porter. With the charter due to expire on the 4th of March 1811 and without comprise on the horizon, the bill lapsed and the Bank of the United States wound up operations. The national bank was defeated by inaction in 1811 just as tensions between the United States and England were about to boil over. Republicans, historian Gordon Wood explains, had just killed "the best instrument for borrowing money and financing a war," as the likelihood of war with England grew increasingly high.[173]

---

172 *Id.* (emphasis added).

173 WOOD, *supra* note 25, at 673. The failure of Congress to renew the BUS charter frustrated Gallatin's plan to finance the war through a combination of revenue surpluses and government loans. Without the BUS, internal taxation was the only option to fund a war. The financial risk posed by the death of the BUS led some opponents of the BUS, like Henry Clay, to rethink the utility of the institution. After the War of 1812, Clay supported the BUS—as well as corporations generally—as avenues to achieve his broad political economic vision known as the "American System." DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848, at 270-272 (2007) (writing on Henry Clay's "American System" and how the War of 1812 influenced his political transformation). On the War of 1812 and the problem of finance, see J.C.A. STAGG, THE WAR OF 1812: CONFLICT FOR A CONTINENT 53 (2012).

VI. Conclusion: National Incorporation and the Rise of Developmental Capitalism

The BUS debates between 1791 and 1812 revealed the process of national incorporation in action at the turn of the 19th century. The corporation, in this moment, was a creature of the state subject the authority of the national constitution and limited in scope by the corporate charter. In 1791 the American economy teetered on the brink of collapse. Money was scarce and specie scarcer. Unfunded public debt, most of which accrued during the war for independence and was held by foreign creditors threatening national security as well as the national economy. At the state level commercial activity was often fulfilled through a series of negotiable paper, state bank or promissory notes, which held inconsistent, unreliable, and speculative value.[174] The problem of debt—at the personal, state, and national levels—threatened the stability of the new nation.[175] The Constitutional Convention itself was convened in response to economic failures under the Articles of Confederation.[176] Alexander Hamilton, as Washington's Secretary of the Treasury, used the crisis as an opportunity to galvanize a nationalist economic plan. Centralized banking based on the experience of countries like England, Italy, and Germany, according to Hamilton, could resolve their present crisis. In response, Congress chartered the first corporate person.

The corporation, with its personality, durability, and limited liability—those essential characteristics captured by John Lawrence during the first debate—became the vehicle for this national vision. Hamilton's "Report on Public Credit" presented the case for a national bank by highlighting the public benefits of centralized banking. The BUS was chartered to resolve the debt crisis, the money shortage, and attract foreign investment. But, to be sure, the BUS had its enemies and the first charter had its limitations. Protracted and

---

174 *See generally* CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM (2015) (detailing the political construction of money and its relation to the state).

175 On the significance of debt in the early republic, see generally BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE (2009); SCOTT REYNOLDS NELSON, A NATION OF DEADBEATS: AN UNCOMMON HISTORY OF AMERICA'S FINANCIAL DISASTERS (2012).

176 Scholars beginning with Professor Beard during the Progressive Era emphasized the class interests that motivated the Framers to scrap the Articles of Confederation in exchange for the Constitution in 1787. *See* BEARD, *supra* note 139, at 19-51. Tensions between creditors and debtors threatened to fracture of the republican experiment evidenced by internal insurrections such as Shay's Rebellion in western Massachusetts as well as other debtor led revolts throughout the thirteen states. *See id.*; HOLTON, *supra* note 139, at 179; KLARMAN, *supra* note 27, at 74-86.

vigorous debate in the press and the legislature as well as Congress' unwillingness to renew the charter in 1811, show how Washington's signature did not settle the question of the Bank's constitutionality. Its limited term set the stage for later political economic conflicts and this continued debate reveals how the corporation was imagined and re-imagined throughout the early national period.

No other associational form could have met these challenges as effectively. A partnership was too risky because the association could dissolve with the death of a single partner. Individuals, acting as general proprietors without the benefit of limited liability, would be personally responsible for mismanagement of national funds—this would have discouraged loans for internal improvements and other risk filled endeavors. Moreover, without the ability to buy, sell, and sue—without the attributes of personhood central to the corporation—the BUS would have been easily defeated by the states, jeopardizing the security of the national economy.

During the debate on the first BUS charter in 1791, representative John Vining of Delaware explained that incorporation "is nothing more than [the] constituting [of] a body with powers to effect certain objects in a combined capacity, which an individual may do in his individual capacity, agreeable to the usage and customs of common law."[177] What Vining was emphasizing was that by virtue of the common law, the BUS and other chartered institutions were not the corrupt, monopolistic, associations imagined by their opponents. Instead, the Bank was doing collectively what individuals alone could not. The Bank was a creature of the national government designed to fulfill a legitimate governmental purpose—managing the nation's wealth and averting economic catastrophe. Moreover, the corporation, as a chartered institution, was controlled by the state.[178] Sovereignty, vested in the people under the constitution and entrusted to Congress, guaranteed that this was a republican institution undertaking republican obligations. Invoking "republicanism" to defeat the BUS, as many did, including the Kentuckians, Clay and Desha, was misguided. Their grievances against the BUS and the corporation generally were more applicable to what the American corporation would become by the end of the 19th century. Over the course of next hundred years the corporation transformed from a creature of the state to a creature of American capitalism—unregulated, tyrannical, and monopolistic.

---

177 2 ANNALS OF CONG. 2007 (1791).

178 The extent of corporate privileges, powers, and obligations are a "gift . . . of state legislatures." *See* 2 JOSEPH STANCLIFFE DAVIS, ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 16 (1917).