The Court and the Corporation: Jurisprudence, Localism, and Federalism

Gregory Mark, DePaul University

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The most conspicuous attribute of American corporate law, especially when compared to the law of virtually every other country, is that it is the product not of the national government but of the state governments. For much of this century, this feature of American constitutional federalism was held to be a pernicious one, whether the author of the critique was journalist, justice, or legal academic. In the past few years, however, the legal academic and judicial, if not the popular, conception has dramatically altered. Whereas the traditional critics saw the federal structure re-
suiting in a "race to the bottom" in which shareholders and the public were subject to ever greater exploitation as states loosened their corporate codes in a competition to attract charter revenues, the revisionists saw such competition as a "race to the top," resulting in more efficient rules of corporate governance which redounded to the benefit of shareholders in the first instance and then to the political economy more generally. Indeed, one of the leading scholars in the field has singled out competitive federalism as the key to the success of American corporate law, arguing, "The genius of American corporate law is in its federalist organization."

Few of the proponents of the race to the top have explored the history of charter competition, whereas it is an explicit theme of most of the race to the bottom literature. Neither proponents nor opponents of the race have, however, asked why a system of competitive federalism exists in the first place. Indeed, opponents of the race might well concede the claim that the system is one of genius, though they would recharacterize it as an evil genius rather than a beneficent one. Nonetheless, proponents and opponents appear to take the genius as given. Moreover, with some exceptions, the focus of inquiries into competitive federalism, whether historical or not, is on corporate codes, rather than systems of corporate law which include the codes as well as the work of the courts, both

paradigmatic example of successful competition is inadvertent and owes a great deal to the ways in which competitive choices were foreclosed by the universalizing jurisprudence of early Supreme Court cases.

4 The seminal article in what has become a rich literature was authored by then professor, now judge, Ralph Winter. See Ralph K. Winter, State Law, Shareholder Protection, and the Theory of the Corporation, 6 J Legal Stud 251 (1977).

5 Roberta Romano, The Genius of American Corporate Law 1 (AEI Press, 1993). Professor Romano's claim is itself historically contingent, based on, or at least facilitated and legitimated by, other phenomena. Perhaps the corporate product of America's governmental structures appears to be the work of genius because it is, for all intents and purposes, unique among the important economies of the world. More likely, however, American corporate law appeared in 1993, and appears today, in a flattering light because the American economy is comparatively successful, both when compared with the relatively stagnant economies of the other great market powers, Japan and Germany, and with the collapsed economies of the formerly centrally planned economies, especially the Soviet Union. Perhaps also the federalist organization appears to have been a factor in the resurgence of America's economy following the relative doldrums of the 1970s. Certainly the vision of devolutionary genius more than coincides with the scholarly attention (in the form of the public choice school) to the beneficial effects of a governmental regime in which units of government are said to compete with one another for the attention, affection, and capital of individual human beings.

6 A conspicuous exception is Henry A. Butler, Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges, 14 J Legal Stud 129 (1985).
in corporate common law and in the interpretation of corporate codes. Thus, while the origins of the American business corporation have been extensively explored, almost no one has asked, much less answered, questions about the origins of this key attribute of corporate law, nor have the forces that shaped the competition into the system that Professors Cary and Romano, and Judge Winter and Justice Brandeis, and many others, variously described been much explored.

The closest thing to an explanation in the literature is Professor Conard’s of some twenty years ago, and it is limited to only one aspect of the systems of corporate law. He claimed, “The historical reasons for the extreme multiplicity of corporate codes in the United States are not difficult to discover.” He rightly observed that the Constitution “says nothing” concerning corporations, which were “a very minor business of government in 1787.” He also asserted that if the Founders thought about corporations at all they would have assumed that both levels of government could and would charter them, but that “the effect of . . . saying nothing was to permit the states to continue granting corporate status under the doctrine of reserved powers.” Unfortunately, the Founders did think about corporations; not a lot, to be sure, but enough so that we know that the power to charter was contested ground. And, while business corporations—or corporations more generally—were not a central concern of the Founders, they were a growing concern, one which quickly became much more important. Finally, in a system in which both state and federal governments could charter corporations, the assumption that the power was reserved to the states, especially in the face of what turns out to have been a mixed historical practice and countervailing claims, is itself problematic.

Examination of the historical record suggests something quite different from Conard’s explanation. Rather than being easy to discover as integral to the federal plan, or even as a logical outgrowth of a federal system, the historical reasons for a multiplicity of corporate law regimes are fairly difficult to discern. Indeed, corporate federalism seems almost to be a product of sheer accident—less
politely put, dumb luck, perhaps good, perhaps bad, but luck nonetheless. That we accidentally have a system of state corporate law in which states compete in producing corporate law regimes is not to mean that the accident must be viewed negatively, as we might view an airplane crash, but rather that we must try to understand that the competition for corporate charters is neither part of the plan of our federal system nor a necessary result of federalism, but rather is the result of an amalgam of actions and inactions that left the potential governance structure of the corporate economy up for grabs for a considerable period. That amalgam included a legacy of localism where both business and corporate entities were concerned, a legacy that warred with the commercial and national-ist ambitions of a certain sector of society, one prominently embodied in the Supreme Court.

This essay suggests that our understanding of the history of corporate federalism should be informed by four distinct phenomena. First, corporations were not a particularly important business entity at the time of the Revolution, the Constitution, or for a few years after. They did, however, quickly grow in importance. Moreover, they were conceived as an important legal phenomenon in many other areas of social organization. Thus, the federal structure of corporate law is based not so much on corporations as business entities but on corporations as entities created for business as well as for other functions. In making this claim, I am obviously not saying anything very new either to the historical or the legal communities about the importance of the corporation as an organizational form, though I believe the observation that it has an impact on our understanding of the federal character of our law is novel. Second, corporations were perceived as local phenomena. Again, I do not think the observation itself is new. Nonetheless, no explanation currently exists for why Americans should have had that perception, nor does one exist for why it should have continued, especially in the face of a nationalizing economy. I believe the perception derives from at least two phenomena, probably more. In the aftermath of the Revolution centralized political authority was distrusted by the people, and thus the states were seen as the most legitimate focus of political authority. Also, localism was reinforced by the nature of the business corporations that actually became part of the national economy in the early nineteenth century. Third, in trying to understand the history of corporate law it is a
mistake to focus solely on corporate codes. We must also look to the role of the courts, which decided what the appropriate jurisprudential vision of the corporation should be, what the rules for interpreting corporate charters should be, and what terms should fill the gaps in corporate charters. Thus, fourth, to the extent that nationalists manifested an understanding of the growing integration of the nation's economy, their efforts ran counter to the competition supposedly inherent in the federal structure. Since Congress never assumed its potential role in corporate law, what action took place took place in the courts. The only national court was the Supreme Court, and its efforts to understand the business corporation in a federal structure manifested a desire not just for legitimating the national power to incorporate, but also for uniformity in the governance of corporations, especially in managerial conduct and in the interpretation of charters. In this effort the nationalist justices carefully juxtaposed the rhetoric of localism with ingenious claims involving the universalism of corporate law. It is the Court's role in the nascent period of America's corporate law that, ultimately, narrows and focuses the competitive realm of state charter competition. Using its powers under the Contracts Clause, as well as other powers, the Court defined what corporations were, then explained how to interpret corporate charters, and finally set about to create rules of corporate governance themselves.

In this essay, I wish to make several claims about the origins and early development of corporate federalism. First, corporate chartering is not a power allocated either to the federal government or to the states. Second, the attention paid to incorporation by the Founders reinforces the view that neither the federal government nor the states could lay sole claim to the power to incor-

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10 In exploring the role courts played, we should avoid anachronism. While the federal courts today play a small role in formulating corporate law (except for securities law, of course), their historical role is of much greater significance.

11 Willard Hurst made this claim more generally some years ago, arguing "There were institutional reasons why the Court, rather than Congress, led in protecting multi-state areas of economic maneuver. It was a bold step when the Court originally seized the initiative to define public policy of such scope. But once it had done this, the Court was better adapted than the Congress for the detailed protection of private freedom." James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* 50 (University of Wisconsin Press, 1956). Though many of Hurst's claims in that classic work have been subject to criticism and revision, this claim about the governmental preferences of Americans has not been one of them.
porate. The actual record of incorporation before the nineteenth century doubly reinforces that view. Third, to the extent that the existence of corporations themselves suggests that incorporation was a state and not a national function, their creation by states was dictated not by the existence of federalism, but by the role played by corporations in the political economy of the United States (as opposed to England). They served local, not national, ends, and national ends seemed not to require corporations—with, of course, a notable exception. Finally, despite the localism of enterprise in America, the Supreme Court, while paying lip service to localism, strove at every opportunity to legitimate national incorporation, to protect corporations created by states from subsequent attacks by their creators, and to universalize corporate law to counteract the seeming perversities of local interpretation which might threaten corporate, hence economic, development. Under Chief Justice Marshall, the impetus was nationalist and mercantile. Under Chief Justice Taney, the impetus was market liberalism, a market liberalism contained within the nationalizing framework set up by Marshall's Court. The Court thus narrowed the range of choices available for corporate law by limiting what states could do with charters, by insisting that charters be interpreted uniformly and in a certain way, and by expanding and universalizing the common law of corporate governance.

I. Options

Apparently, very little thought was given to the question of incorporation at the time of the Revolution or in the years leading up to the Constitution. At least we have few records suggesting much thought was given to incorporation. Rather, assumptions were carried forward. Those assumptions were, however, weakly grounded in both the theory of state sovereignty and the practice of incorporation. Moreover, they were carried forward with a casualness that seems, in retrospect, astonishing.

When the colonies separated from England they became states, states that already conceived of themselves as sovereign in virtually every sense and whose sovereignty was embodied in each state's legislature. As Gordon Wood put it, "[W]hen the Americans came in 1776 to erect their own confederated empire, most did so with an overwhelming conviction, as Samuel Adams told the Carlisle
Commission in 1778, ‘that in every kingdom, state, or empire there must be, from the necessity of the thing, one supreme legislative power, with authority to bind every part in all cases the proper object of human laws.’” Creation of bodies corporate and politic had, of course, been a sovereign legal prerogative since time immemorial. The sovereign power to create corporations thus devolved from England to the former colonies, not in their confederated form, but to each of the former colonies specifically, and within the structures of the new state governments, to the legislatures. This devolution was so uncontroversial that one strains to find anyone who even bothers to comment that it had happened. Indeed, the best evidence that it happened is that the state legislatures immediately took over where the crown had left off, granting charters to corporations of all varieties. Chief Justice Marshall seemed to confirm—under the circumstances to say that he legitimated it would be going too far—such a transfer of authority with as much casualness as the devolution itself in speaking for the Court in *Dartmouth College*. In announcing that the charter of the college was a contract between the crown and the trustees of the college, he addressed New Hampshire’s role as successor to the crown in a parenthetical to the Court’s conclusion, noting, “This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties.”

While Revolutionary belief in the states and in their legislatures certainly fixed a vision of state legislative sovereignty in the Revolutionary mind, colonial experience may have abetted the belief that the states would be the creators of corporations. Even though the ultimate sovereign power had resided with the crown, the practice in colonial America had been that, in many instances, the crown’s power, including the power to charter corporations, was delegated to colonial authorities. Moreover, the delegations were such that colonists were in all likelihood only seldom reminded that the ultimate authority to incorporate lay with the crown, for as one of the earliest historians of American corporations has noted, “The delegation of the right to incorporate was seldom ex-

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13 *Dartmouth College v Woodward*, 17 US 518 (1819).
14 Id at 643–44.
licit and practically never comprehensive in terms. As a rule it had to be inferred from more or less general grants or relationships. Thus, at the time of the Revolution colonists who had any experience with the creation of corporations would have witnessed either the local creation of the corporation with only a vague connection with central English authority or would have assumed that the powers of the crown passed to the new states.

With that legacy and with the theoretical understanding of sovereignty prevalent at the time of the Revolution, one might think that no one could suggest that the confederation congress itself had the sovereign power to create corporations. After all, even had the colonial legacy been one of clear English central authority, the Revolution had made central national authority suspect. The Articles of Confederation, in turn, reflected that suspicion. Thus, the Articles of Confederation, with the language of Article II reserving sovereignty to the states and limiting the implied powers of the United States, would seem to have made an interpretation that the confederation congress had the power to incorporate problematic at best. Nonetheless, reality sometimes plays havoc with theory. Before the adoption of the Constitution, the confederation congress did grant a charter of incorporation. While at first glance a single grant may seem unexceptional, it is important to keep in mind that from 1781 until 1790 only thirty-three charters were granted to business corporations at all. Indeed, the congress made the grant in 1781, and from 1781 until 1785 only eleven charters, including the one by the confederation congress, were conferred upon business corporations in the entire country.

More importantly, the power of the confederation congress to undertake such a grant, to a bank, was the source of some debate and concern on more than one occasion in the congress, James Wilson going so far as to suggest that the act of incorporation for a national bank by the congress could not be within the sovereign powers of the states at all and thus was within the confederation’s
powers, despite the lack of delegated authority.\textsuperscript{19} Nonetheless, and despite the reservations of others, even those of so weighty a figure as Madison (who liked the idea of a bank but felt the congress powerless to create it),\textsuperscript{20} the charter was granted. With no mechanism available under the Articles to countermand the incorporation, the bank came into existence. In an abundance of caution, however, and at the urging of the congress, it sought and received state charters to augment its federal charter.\textsuperscript{21} Nonetheless, whatever the stated or unstated federal power, the federal authority had acted to grant a charter.

The ambiguity of the federal power notwithstanding, we ought to look to the state constitutions in the confederation period for the explicit assertion of their sovereign power to create corporations. Even in those constitutions, however, the power was not usually explicit. Of the state constitutions that antedated the federal Constitution, only Pennsylvania's 1776\textsuperscript{22} and Vermont's 1786\textsuperscript{23} constitutions explicitly mentioned the power to create corporations. As a rule, the power to create corporations was considered implicit in the general power to legislate, since charters were acts of legislation. As a sovereign power, however, incorporation was not so integral to state legislative sovereignty then that it had to be specially claimed in the constitutive documents of the states.

Though not explicitly claimed, the power was being increasingly used. Whether directly from English authority, or indirectly in the colonies themselves, only seven businesses were chartered in America before the Revolution.\textsuperscript{24} By comparison with the colonial period, however, the confederation period was a hotbed of incorporation. No business corporations were chartered by the state legislatures during the war, although thirty-two were chartered thereafter and before 1790. To the extent that one can extrapolate


\textsuperscript{20}James Madison to Edmund Pendleton, January 8, 1782, in Gaillard Hunt, ed, 1 The Writings of James Madison 167–69 (Putnam, 1900).

\textsuperscript{21}Id.


\textsuperscript{23}Vt Const of 1786, Chapter II, § IX, in Thorpe, VI Constitutions at 3749, 3755.

\textsuperscript{24}See Davis, 2 Essays at 24 (Table I) (cited in note 15).
from such a small sample, it also appears that the pace of incorporation was quickening. In the four years from 1786 until 1790, two-thirds of the thirty-two state charters were granted; thus the rate of incorporation was twice that of the prior four years.

Despite the quickening pace of business incorporations and notwithstanding the debates over the power of the confederation to charter corporations, as well as the amity with which such important players as Madison viewed institutions such as a national bank, incorporation was not a topic which commanded much attention in the summer of 1787. Which is not to say that it commanded no attention at all. The convention had an Incorporation Committee, chaired by Rufus King. King, evidently, did almost nothing. Incorporation was also briefly discussed at the convention itself. The debate over incorporation, if Madison’s notes are good and sufficient evidence, revolved around a motion by Madison to amend a motion by Franklin to provide the federal government with the power to cut canals. It reflected the ambiguity of earlier debates in the confederation as the early congresses were to reflect the ambiguity in practice. Madison’s amendment provided for the power “to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of the individual States may be incompetent.” Rufus King “thought the power unnecessary” while also suggesting that the states “will be prejudiced and divided into parties” were the federal government to have the power. Interestingly, Wilson presaged a vision of the race to the bottom (and the role of the Supreme Court in the first half of the nineteenth century), claiming, “It is necessary to prevent a State from obstructing the general welfare.” The amendment died nonetheless, receiving the votes of only three states, with eight others voting against it. The death of federal incorpor-

25 Id.
28 Id.
29 Id. The notion that states would be divided, that they would compete for federally incorporated businesses, is apparent in his remarks that follow, in which he noted the “contention” between Philadelphia and New York for a bank.
30 Id (emphasis in original).
31 Id at 725.
ration was, however, greatly exaggerated. The first federal Congress, following Hamilton’s request for a national bank, 32 Jefferson’s opinion that it was unconstitutional, 33 and Hamilton’s rejoinder that the power was implicit insofar as it was a means to achieve a specified constitutional end, 34 created a national bank. 35

This, then, was the pattern that would mark debates about incorporation for some time to come. Claims of the illegitimacy of federal power were met with claims of necessity, and necessity triumphed, at least for a few decades. Assumptions of the legitimacy of state incorporation were met with the reality of constantly shifting state attitudes toward corporations. Thus, a pattern of back and forth, premised on the one hand in visions of the legitimate extent of federal power and on the other in the nature of needed incorporations, was to characterize the understanding of incorporation for decades.

It is a commonplace that the early business corporations were essentially utilities—road and canal companies, for example—or business entities with similar characteristics—banks and insurance companies. The usual understanding has been that almost all business corporations were thus, to borrow a phrase of later importance, businesses affected with the public interest. There is another way of viewing the vast majority, though not all, of the businesses. It is an understanding, however, that would grow as the number of corporate businesses grew and the range of their objects came to include everyday manufacturing and commercial activities. That view held that businesses were essentially local. Of the 317 business corporation charters granted from the colonial period through 1800, almost 80 percent were for highways and local public services. 36 Of the remaining 20 percent, it is not unreasonable to suppose that many, if not most, contemplated local operations only, given the objects for which they were chartered. Of those that did

35 See Bray Hammond, Banks and Politics in America from the Revolution to the Civil War 118 (Princeton, 1957).
36 See Davis, 2 Essays at 24 (Table I) (cited in note 15).
not contemplate local operation, only the largest financial institutions could be said in any meaningful sense to be anything but local. What was true of that period was almost equally true of the first half of the nineteenth century, at least until the integration of railroads came to be a common phenomenon. The vastest majority of business corporations were local. Their physical facilities were usually concentrated in a single place, their employees lived in a limited area, their managers were usually their owners and both owners and employees lived in close proximity to the facilities, and their objects contemplated limited activities and sometimes specified that the activities were to take place in certain locations. They were chartered by states to invigorate local economies.\textsuperscript{37}

Simply because states granted corporate charters and no one questioned the legitimacy of state incorporation did not mean that the role of the states was uncontroversial. State incorporation was controversial not simply because incorporation carried with it a legacy, if not of monopoly, then at least of protections from competition.\textsuperscript{38} State incorporation was also controversial because, to the extent that charters were seen to carry such favors, they were objects of jealousy in the commercial community, whether favors had been granted or not.\textsuperscript{39} Moreover, with the grant of favors came the claims of corruption, from mere favoritism to bribery.\textsuperscript{40} And, finally, of course, despite the fact that charters resembled one another far more than they differed, many—both inside and outside the legislatures—complained that the legislatures were being overwhelmed with petitions for incorporation, their resources of time and energy diverted from more useful enterprises in the face of the insistent pleas of potential corporators.\textsuperscript{41}

Legislative reaction was predictable. When forces favoring cor-

\textsuperscript{37} See, for example, Seavoy at 39–76, 255–74 (cited in note 26) (discussing New York business corporations); John W. Cadman, Jr., The Corporation in New Jersey: Business and Politics 1791–1875 205–39 (Harvard, 1949) (noting in particular that “the manufacturing operations of nearly all the companies were to be carried on in New Jersey,” id at 216).


\textsuperscript{39} Id at 42.

\textsuperscript{40} See Lawrence M. Friedman, A History of American Law 196 (Simon & Schuster, 2d ed 1985).

\textsuperscript{41} Id at 194–95.
porate expansion held power, special charters were granted aplenty. Where reaction set in, sometimes special chartering was simply curtailed, but more often limited forms of general corporate chartering statutes were enacted. Embodied in the reaction, however, were restrictions on corporations—usually concerning capital or longevity—or other regulatory measures, that made incorporation under the statutes less attractive than special incorporation. And, it took some time before states, Ulysses-like, tied legislatures to the mast to avoid returning to regimes of special charters by barring special charters in state constitutions.

Even corporate localism, however, was countered with a contending national vision. The debates over the national banks, among other things, demonstrated that there were those who believed that the country needed business institutions that would operate not just interstate, but on a national scale. Many, Hamilton most notably, also believed in the integration and commercialization of the economy more generally, and sought active intervention by the government on behalf of those goals, in the mercantilist spirit. Still, few thought much about the corporation operating as the engine for such an economy. For example, one reads Hamilton’s Report on Manufactures and discovers not so much as the first word on the corporate form.

The result of all of these factors—the relative rarity of business corporations juxtaposed with the increasing resort to the corporate form for business operations, the conception of business enterprise as essentially a local phenomenon contrasted with the cosmopolitan desire of some to integrate and commercialize the economy, and, of course, the ambiguities of theories and prejudices concerning the relative powers of the states and the federal government being overborne in cases of perceived necessity, such as in the chartering of national banks—left unclear just what courts should do when confronted with questions of the governance of corporate enterprises. Unsurprisingly, then, rather than setting out clearly

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42 See, for example, Cadman at 72–74 (cited in note 37).
43 See, for example, id at 16–17, 25–26, 75–83 & n 211.
44 See, for example, id.
45 See Butler at 153 (Table 1) (cited in note 6).
what the relative roles of the states and the federal government should be, the courts replicated the conflicts. In the Supreme Court, the only organ of the federal government to play a substantial role in this controversy in the period (since, apart from the bank controversy, the congress and the executive did so little), the nationalists were thus confronted with the ambiguous legacy of localism and nationalism that theory and practice had handed to it. Lacking a clear constitutional allocation of power, the Justices generally strained to leave open the possibility of something other than a constricted local vision of enterprise where corporations were concerned.

As I have noted, the power of incorporation was not given in so many terms to the federal government. In fact, given the choice, the Founders refused to include the power. On the other hand, they did not expressly reserve the power to the states. Moreover, their refusal to include the power in the Constitution was grounded not in a deeply considered and informed debate, but rather in quite the opposite—inaction by those charged to consider the matter and an (apparently) abbreviated exchange of views. Nor can it be said that the states jealously staked out incorporation as a sovereign power to be defended against federal encroachment. No one advanced any argument that incorporation was inherently within or was necessarily a state power. Indeed, few states claimed it as a power in their constitutions. Rather, it was a power inferred from the legislative capacity of a government. Incorporation was thus a power coextensive with legislative power. It was, in that sense, simply a constitutionally unallocated power of government.

The theoretical ambiguity of incorporation accompanied an almost equally ambiguous practical legacy. The Articles of Confederation, surely more than the Constitution, appeared to have created a government incapable of chartering a corporation. Nonetheless, faced with the apparent necessity for a national bank, one was chartered by the confederation congress. About a decade later, with a similar, albeit lesser, ambiguity concerning power and legitimacy, the first federal Congress did the same thing.

The necessity of national incorporation simply did not present

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47 The Court, of course, was unable to grant charters itself. What it could, and did, do was to legitimate the exercise of national power and limit the capacity of states to restrict corporate functioning.
itself in very many cases in the early years of the republic. America's mercantilist impulses, best expressed by Hamilton, were insular. That is, unlike England, whose imperial expansion was based on quasi-governmental chartered bodies and whose economic reach was facilitated by chartered trading companies, as America expanded westward, its businesses followed acquisition of new territory and did not facilitate expansion. Even as notoriously commercial as America's agricultural communities were, their trading patterns were segmented and localized. While that meant, as Tony Freyer has so convincingly shown, that the country needed a national commercial law, its need for a national corporate law, absent much apparent need for national corporations, was much less clear.

The localism of the law governing business corporations was also a product of the development of corporate law more generally, that is, the law governing public corporations as well as private nonprofit corporations. While the distinctions between public and private corporations were reasonably clear, and became more so, arguments—apparently quite serious arguments—continued to be made through 1850 concerning whether government ownership imparted a public character to business entities, and similarly that certain functions were necessarily so governmental in character as to render the business corporation a public corporation. Because public corporations created by states were, by definition, local entities, the confluence of a state charter, state ownership, and seemingly government function reinforced an assumption of localism in corporate jurisprudence more generally. Similarly, the eleemosynary corporation seemed to be a peculiarly local enterprise—and it generally was. Hospitals and religious institutions served their localities, as did most other charities, including even educational institutions. Thus, the local focus of public and charitable corporations was reflected in their charters and the law governing their management. While distinctions were drawn between the law governing public and private corporations, they were fewer and narrower than one might expect. Those drawn between charitable and business corporations were almost nonexistent.

But for the occasional federal charter, usually for an eleemosyn-
nary institution, Congress took no steps to nationalize corporate law or to create national companies, other than the bank. There was little demand that it do so. Thus, the localism of American corporate chartering, a relatively weak force at the founding, especially in the face of perceived necessity, grew in strength through inertia. Paradoxically, the Supreme Court, even in its nationalist guise, countenanced that form of localism, though its intent was to facilitate both commerce and corporate actors by trying to protect corporations from their state creators.

II. MATERIALS

The Supreme Court, of course, could only work with the materials it was given. Insofar as corporate law is concerned, its diet was especially meager. Prior to 1850, the Court was faced with only thirty-eight cases in which the word corporation or its derivatives were even mentioned. Nonetheless, the Court seized nearly every opportunity to pronounce on the nature of a corporation, the interpretation of charters, and the governance of the entities.

Before 1850, the first of these cases that the Court heard was decided in 1804, the last in 1849. Unsurprisingly, the number of corporate law cases grew as corporations grew more important in the political economy, with thirty-one of the thirty-eight decided in the last thirty of the fifty-year period. Nevertheless, the most important cases arose throughout the Marshall Court and early in the Taney Court, setting into sharp relief the tension between localism and jurisprudential nationalism.

Of the thirty-eight cases, two dealt with public corporations and thirty-six with private. Of the cases dealing with private entities, thirty-two were ones involving business corporations. Of those, twenty dealt with banks, three dealt with insurance companies,

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49 The Court's nationalist impulses were, of course, constrained not just by the nature and number of cases involving corporations which were appealed to it. Other phenomena, notably slavery, may have limited the Court's efforts to nationalize what were perceived as traditional state functions by many, no matter how weakly those functions were in fact grounded at the state level.

50 Conducting a search for cases using the word incorporation and its derivatives yields many more cases, most of which are irrelevant, as the word is used as a verb, as when one "incorporates by reference." I thus treat the cases using corporation and its derivatives as the definitive sample.
seven dealt with transportation companies, and two dealt with commercial or manufacturing entities. The Court thus had a limited range of cases in which it could advance rules of law that might facilitate economic nationalism.

Because business entities were conceived of as local, the competitive dynamic of modern federalism was still nascent. To the extent that states competed at all, they competed for corporations in their entirety. What competition there was was relatively rare, occurring (generally later than this period) between states which bordered each other, such as New York and New Jersey. Furthermore, rather than a regime of competition, state corporate codes embodied a regime of emulation. The usual pattern was that internal pressures within a jurisdiction—entrepreneurs seeking particular charter terms such as unlimited life or, much more often, legislators seeking relief from the burden of the petitions for corporate charters or, most often, insurgent legislators making an issue of bribery or monopoly terms in charters—would lead to a quasi-general law of incorporation, usually for certain types of enterprises, such as mining companies, or turnpike companies, or banks, or some limited range of business corporations. Neighboring legislatures then simply copied such statutes, not to attract corporations across borders, but to satisfy their own internal demands.

This dynamic was of an entirely different order than the modern regime of competitive federalism. That is, the internal impulses in the states did not always lead to looser or more facilitative terms of incorporation. To the contrary, they often provided for stricter terms than would have been available under individual legislative charters because they responded to multiple political pressures, sometimes pro-corporate and sometimes restrictive or regulatory. Thus, localism did not necessarily lead to codes and charters more facilitative of a competitive and integrated economy. The Supreme Court Justices who believed the law facilitated, or ought to facilitate, the economic integration of the nation decided their cases with this ever-shifting state law background.

With no clear constitutional allocation of the power to incorporate, the Supreme Court was neither directed to nor barred from taking jurisdiction over cases involving corporate law. For

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51 See Cadman at 177–81 (cited in note 37).
52 See Hurst, Legitimacy at 146 (cited in note 38).
the Court to hear such a case, however, corporate law had to involve an issue on which the Court could take jurisdiction, and such issues were generally constitutional. A twentieth-century lawyer might expect such issues to arise under the Commerce Clause.\textsuperscript{53} Nineteenth-century lawyers, however, knew that the Contracts Clause was key.\textsuperscript{54} Thus most, though not all, of the litigation concerning corporate law came before the Court via the Contracts Clause.

III. Outcomes

Given that corporate law is today state law, turning to the Supreme Court for insight into corporate jurisprudence would generally be error. That for the first fifty years of the nineteenth century the Court was a major expositor of corporate jurisprudence alone suggests just how much things have changed and how tentative our assumptions about the naturalness of state domination of corporate law ought to be. In fact, the Court pronounced on topics that would appear to be purely the concern of state corporate law, namely, the theory of the corporation, the rules governing charter interpretation, and the law of corporate objects and managerial conduct. While each of these categories may be distinctly stated, in practice they overlap a great deal and are difficult analytically to separate. Nevertheless, they serve as a sufficient basis through which to analyze what the Court did in the early development of American corporate law. Each category of cases demonstrates that the Court recognized the dominance of state chartering, but each also suggests ways in which the Court sought to limit state interference with corporations in order to facilitate economic development. And, while the Marshall and Taney Courts differed in their approaches, each used appeals to supposedly universal law to counteract state law tendencies to retard the use of corporations for business enterprise. The relative merits of the Marshall and Taney Court approaches to property and development have been well analyzed by others, especially Stanley

\textsuperscript{53} US Const, Art I, § 8, cl 3.
\textsuperscript{54} US Const, Art I, § 10, cl 1.
Kutler, and I do not propose to cover that ground again. Rather, this essay will suggest that the efforts of both Courts resulted in a highly bounded sphere of discretion for state experimentation with what we now regard as the foundations of corporate law. That legacy, while not dictating the outcome of charter competition when it did develop, did point it in the direction of facilitating, rather than regulating, corporate action through corporate law.

A. THEORY OF THE CORPORATION

In the first important corporate case heard by the Court, Head & Amory v Providence Insurance Co., Chief Justice Marshall took the opportunity to point out that while corporations were creatures of the acts that created them, they were equally creatures of the common law that governed them. In making that announcement, Marshall said nothing particularly controversial. By giving the common law a place in the law governing corporations, however, Marshall necessarily left open the use of English precedents to inform American common law and, more importantly, left the Court’s role in determining the common law of corporate governance dependant on the Court’s own common law role. The Court soon took advantage of both vehicles to comment on the nature of corporations.

Some five years later, Marshall took advantage of the assumptions embodied in Head & Amory. Bank of United States v Deveaux; while holding that corporations were not citizens for purposes of establishing the jurisdiction of federal courts, nonetheless held that corporations were aggregates of citizens who did not lose their access to federal courts simply by joining together under corporate name. The Court knew that that was how to understand corporate entities because “our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, [and] we resort to them for aid, in ascertaining its character.” Rather than looking to American cases, and they did exist, which might

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56 2 Cranch 127, 167 (1804).
57 5 Cranch 61 (1809).
58 Id at 65.
59 Id at 64.
have suggested state-by-state variations in the conception of the corporation, Marshall looked to English cases. The corporate party in the case, the Bank of the United States, was, of course, federally chartered, and that might have been the basis on which he looked to English rather than American state cases, though he never said so, whether out of political sensitivity or for any other reason. But, of course, the Bank of the United States was also chartered by several states. Marshall did not even mention those charters, though in so doing he was only following the counsel who argued the case, insofar as the record reveals what they argued. The Court thus casually adopted a single, universal understanding of what constituted a corporation, rather than allowing the states to define the entity. That it would do so, and do so casually, with few questions about the propriety of such a juridical role, suggests how subtly the Court would define the structure of corporate law in the United States.

A decade passed before *McCulloch v Maryland* and *Dartmouth College v Woodward* gave the Marshall Court another chance to theorize on the corporation, though the wait only seemed to allow the Court a chance to build up to extended consideration of the topic in both cases. Briefly, *McCulloch* held, among other things, that Congress had the power to charter corporations as a means to achieve otherwise constitutionally permissible ends. While the power to charter a corporation was not specifically granted to Congress, neither was it denied. Furthermore, nothing in the Constitution by implication reserved the power to the states, not even the Tenth Amendment. In construing the legislative power of Congress, while the Court must notice the bounds of Congress’s authority, within those bounds Congress had the authority to pick means it deemed appropriate to the legislative ends, including the incorporation of business entities to achieve them. Though Congress failed to exercise its legislative imagination, the European, and especially the English, tradition of trading companies, the mercantilist plans of Hamilton and others, and a multitude of textual references, including the powers to create the post office and postal roads, to grant patent and other rights, to maintain the military, and, of course, to regulate commerce, among other powers—all could have served as the basis for further federal incorporations. The Court’s invitation to Congress to act could hardly have been more explicit: "That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been

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60 4 Wheat 316 (1819).
61 4 Wheat 518 (1819).
62 Id at 325.
63 Though Congress failed to exercise its legislative imagination, the European, and especially the English, tradition of trading companies, the mercantilist plans of Hamilton and others, and a multitude of textual references, including the powers to create the post office and postal roads, to grant patent and other rights, to maintain the military, and, of course, to regulate commerce, among other powers—all could have served as the basis for further federal incorporations. The Court’s invitation to Congress to act could hardly have been more explicit: "That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification than other means, has been
and Proper Clause was thus not to be read as constraining, but facilitating Congress's legislative authority. While it was true that the extant examples of business corporations were both local in character and state incorporated, that demonstrated not that incorporation was solely a state function but rather that the corporation was becoming a normal means by which to conduct economic activity. Indeed, so normal that even the confederation congress had thought that incorporation was appropriate. And, of course, where necessity required federal action, it would be unwise to leave the federal government dependent upon a state or the states. Left unsaid, though clearly implicit, was the coda, "even where state authority is clear."

For many reasons, Congress did not pursue the opportunity granted to it by the Court. Many years would pass before a federal charter was again issued for a business corporation, though the Court made clear its willingness not only to sanction federal chartering as a means to legitimate constitutional ends, but also to sanction a host of ancillary activities that those corporations might engage in, even when not directly connected to those ends. Osborne v Bank of the United States presented the question of the constitutionality of the provisions of the bank's charter authorizing it to conduct normal banking functions, the argument for their unconstitutionality being that they were not embodied in the constitutional end of currency regulation. Justice Marshall's rhetoric re-

sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose, that a constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. . . . If a corporation may be employed, indiscriminately with other means, to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations." 4 Wheat at 421–22.

61 Id at 406–12.
62 Id at 411, 435 (discussing, respectively, exercise of sovereign power in creating corporations and the capacity of states to tax their own creations).
63 Id at 423.
64 Id at 424.
65 9 Wheat 738 (1824).
66 The argument that Marshall's rhetoric and jurisprudence are inseparable has been most ably voiced recently. See Christopher L. Eisgruber, John Marshall's Judicial Rhetoric, 1996 Supreme Court Review 439, 440–41 ("Marshall . . . had to address the legitimacy of American law in general, including statutory law. The early judiciary's claim to speak for the American people was contested, but so too were the claims of Congress and the state legislatures. Marshall accordingly approached the legitimacy of judicial review from a different
jecting the argument appears narrow at first glance: “Can this instrument, on any rational calculation, effect its object, unless it be endowed with that faculty of lending and dealing in money, which is conferred by its charter? . . . Those operations give its value to the currency in which all the transactions of the govern-ment are conducted. They are, therefore, inseparably connected with those transactions.” Were one to emphasize the require-
ment of “inseparable connection,” then the limits would indeed have been tight. But that was not what Marshall wrote. The connection only required that the operations “give value” to the cur-
rency, a much looser connection. The Marshall Court was in real-
ity prepared to authorize a wide range of business activity in national corporations, so long as they could plausibly be connected to constitutional ends.

The Court, however, faced no such issues because Congress chartered no other national business corporations. Thus, the Court also faced the parallel problem of the protections available to cor-
porations chartered by the states, and just how to universalize such protections.

Dartmouth College, at first glance, appears to run against the nationalist grain. Not only is it the case in which Marshall fa-
mously announces that a corporation is an artificial and intangible entity, and in so doing clearly establishes the distinction between public and private entities, it is also the case that announces that a corporation is nothing more than what the law that creates it makes of it (and it is usually state law that does the creating). But, of course, the very statement embodied in the case defining what a corporation is, is an effort at creating a uniform understanding for the very purpose of protecting the entities created by the states from their creators. Moreover, the holding is brilliantly circular. After all, the case holds that under the Contracts Clause of the federal Constitution, states may not interfere in their creations because those creations are contracts, not something else, but con-

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709 Wheat at 861–63.
tracts. With one stroke, the Marshall Court thus uniformly defined what corporations were, and in so doing, brought them within the sphere of the Court's subject matter jurisdiction. As if to underline the point, Marshall explicitly noted that one of the vices of the confederation was that the confederation congress was powerless to protect corporate entities from the vagaries of the states. Even Justice Story's concurrence, in which he provides the famous "out" for the states, that is, their power to insert a reservations clause into corporate charters, takes away with one hand what it has just given with the other, for not only does it reduce the state to a contracting party from a sovereign entity, it also creates a presumption against the state—the reservation must be affirmatively stated, it will not be inferred. While Dartmouth College therefore acknowledges that corporations are only what a state makes of them and that a state may create corporations for various purposes—and one should remember, those purposes were overwhelmingly local—it also says that it is the Court that gets to define what corporations are and in so doing circumscribe the very localism of the imperatives that created them.

Following the cases of 1819, a handful of other cases also elaborated at the edges on the contributions of the earlier cases to corporate theory, though in the main they changed nothing of substance. Only one deserves serious mention, and that only briefly. In Briscoe v Bank of the Commonwealth of Kentucky, the Court held that ownership by the state of a corporate entity did not reconstitute its character from private to public. No doubt to Story's consternation—he dissented—the Court used the distinction proclaimed in Dartmouth College to allow states to charter banks with impunity and thereby evade the constitutional restriction on state currency. Even here, however, the Court arrogated to itself—implicitly via the Contracts Clause one supposes—the power to de-

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71 Marshall's definition of corporations was problematic for another reason. Even were it clear that corporations were and had been considered contracts, whether such contracts were covered by the Contracts Clause is itself debatable. At least one historian has recently surveyed both the primary literature and secondary interpretations and has concluded that "Federalists and Antifederalists held a wide range of opinions about the meaning of the clause." See Steven R. Boyd, The Contracts Clause and the Evolution of American Federalism, 1789–1815, 44 Wm & Mary Q 529, 531 (1987).

72 4 Wheat at 651.

73 Id at 675.

74 11 Pet 257 (1837).
fine what a corporate entity was in order to facilitate the activity of the corporation, albeit not for nationalist purposes, for the Court had moved into the Taney era, but nonetheless for purposes thought to facilitate economic activity. In that sense, then, though the vision of what was appropriate judicial facilitation had changed, the underlying claim of the Marshall era, that the Court could define what a local corporate entity was for the purpose of facilitating its activity, remained.

B. CHARTER INTERPRETATION

Interpreting charters was one thing, the rules about how to interpret charters—the meta rules—another. Charters were local, meta rules were universal. *Head & Amory* and *Deveaux* are, once again, the starting places. Though the former announces that the "general" rule is that a corporation may only act in the manner prescribed in the act of incorporation, the latter provides the first exception to the "general" rule. Application of the general rule and its exception, however, meant that the Court did not ask first how states interpreted their own charters. While *Head & Amory* merely affirms a universal rule of interpretation, *Deveaux* goes a step further, creating a universal exception to a general rule. Some things, *Deveaux* announces, are implicit in all charters. They are attributes of corporate existence which need not, therefore, be spelled out. Among such attributes are the right to sue and be sued. One year later the Court gave the "general" rule its complete twist. In *Korn & Wisemiller v Mutual Assurance Society* the Court said that the "general principles" of interpretation could be aided by the words of the charter. Thus, the rules of interpretation to be applied to the charters issued by the states were universal and those rules included general understandings of what constituted corporations and corporate action. Again, the presumption was a nationalizing one in the face of state particularisms, and rather than trying to harmonize the general rules to the specific jurisdiction, the Court worked the other way, harmonizing state law to universal principles. So subtle and so pervasive was this nationaliz-

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75 2 Cranch at 166.
76 5 Cranch at 80.
77 6 Cranch 192 (1810).
ing impulse that, at least in corporate law cases, the record reflects only one case in which state rules of interpretation are even mentioned, and that is in the innocuous and tertiary opinion of Justice Baldwin in *Charles River Bridge v Warren Bridge*. What is more, Baldwin only notices Massachusetts rules of construction after he has noted that all corporations are in need of protection from the state and that they should all be "governed by the same rules of law, as to the construction and the obligation of the instrument by which the incorporation is made." In that case, the Massachusetts rules comported with the universal, mooting the point.

In the cases that followed the three early cases, more and more attributes of the corporation came to be seen as universal, that is, implicit in all charters, including such attributes as limited liability. After several cases had named some of the specific attributes, *Bank of the United States v Dandridge* articulated the general position, noting that certain powers come by implication to all corporations. They included not just those of legal standing, but also the power to act within the political economy and to govern itself. As the Court put it, "To corporations, however erected, there are said to be certain incidents attached, without any express words or authority for this purpose; such as the power to plead and be impleaded, to purchase and alien, to make a common seal, and to pass by-laws." That the Supreme Court would be the agency that might continue to define what corporate powers were, however, still awaited articulation. It was not long in coming. Justice Baldwin's concurring opinion in *Briscoe*, while by definition not the position of the Court, set the stage. He argued that terms could be defined in only one way, regardless of whether one was construing common law, statutory law, or the law of nations, and in this sense there was no localism in the common law.

*Briscoe* was decided in the same term as *Charles River Bridge*. The latter case, famous for its developmental bias in the face of *rentier*
property rights, also made a clear statement about the Court’s role, rather than the states’, in applying the rules for interpreting charters. Indeed, at its heart, that is what the case is about. Taney’s position was clear. In interpreting charters, the Court would not read in exclusive powers. In other words, if a state wanted to create a monopoly or an exclusive privilege, it would have to do so explicitly. He grounded this interpretive position in the public interest. Since exclusive grants restrict individual rights, they must be strictly construed. Furthermore, this rule of construction was also to be applied universally because of the public interest, the public interest in dynamic property.

While Taney’s opinion can be read to say that the Court would not read any implied powers into corporate charters, even though it had previously done exactly that in discovering a host of implied terms, that was not the thrust of the opinion. Nor was it the way future courts would understand Charles River Bridge.

Justice Baldwin reiterated his position from Briscoe in his concurring opinion in Charles River Bridge, with even greater emphasis on its application to corporate law. He argued that corporations of whatever kind, whether public or private, “... are all governed by the same rules of law, as to the construction and the obligation of the instrument by which the incorporation is made. ... No new principle was adopted in prohibiting the passage of a law by a state which should impair the obligation of a contract; it was merely affirming a fundamental principle of law ... by putting contracts under the protection of the constitution[.]” That Baldwin’s universal understanding of legal language was to be the position of the Court, and that Taney’s strict construction did not mean that the Court would not continue to imply terms into corporate contracts was made clear by Justice Woodbury, writing for the Court in Planter’s Bank v Sharp. It meant, in the end, the opposite. The Court would not sanction monopoly by implying terms. It would, however, imply terms where that would encourage entrepreneurialism. Woodbury’s opinion essentially limited

85 Id at 544-47.
86 Id at 544-48.
87 Id at 583.
88 Id.
89 6 How 301 (1848).
Charles River Bridge to an antimonopoly rationale. Woodbury wrote that corporate charters should be interpreted not so that only incidental powers were implied, but that whatever might be deemed necessary by the managers and which was not forbidden was also implied.90 Indeed, it was the role of the judiciary to review corporators’ contracts with the state for incorrectly narrow interpretations. As he put it, “The rights of a party under a contract might improperly be narrowed or denied by a State court, without any redress, if their decision on the extent of them cannot be reviewed and overruled here in cases of this kind[.]”91 From this Taney and McLean dissented, but not nearly so sharply as might have been expected after Charles River Bridge. Their dissent admitted that some implication was inevitable, but that the Court should limit itself to necessary implications.92 Taney thus recognized that his strict constructionism was simply an act of line-drawing. He might not give entrepreneurs as much freedom as Baldwin and others on the Court, but he would give some. Thus, Charles River Bridge deployed the rhetoric of strict construction to kill any inferences of monopoly, but that rhetoric was sharply limited where entrepreneurial freedom would be infringed. Both positions, however, could be harmonized in a universalist and pro-entrepreneurial stand. That Taney did not protest more severely in Planter’s Bank suggests two things. First, Taney believed that businesses were still local community concerns, created in the interests of the community. Second, Taney believed that entrepreneurs should, in the dynamic and technologically driven economy he championed in Charles River Bridge, be given freedom in order that their businesses might best serve those communities.

What was implicit in Taney’s opinion was the same universalizing tendency in every other opinion that had preceded it. The Court was acting like a super common law court, universalizing implications within the contracts that created corporations and universalizing the rules for interpreting the contracts themselves. The Court never retreated from its acknowledgment that corporations were creatures of the states that created them; indeed, that phrase was endlessly repeated. The Court nonetheless progres-

90 Id at 322–23.
91 Id at 327.
92 Id at 338.
sively narrowed its deference to the states' expression of their wills, insisting that if a state wanted something in a corporate charter it had better write it in explicitly, state common law governing corporations, charter interpretation, and contract law notwithstanding.

C. CORPORATE AND MANAGERIAL CONDUCT

The law governing corporate and managerial conduct would appear to have been the area of the law most insulated from the Court's nationalizing impetus, and in some respects that turns out to be true. Nonetheless, even where the internal workings of the corporate enterprise were concerned, the Court created rules of conduct that were both designed to facilitate corporate enterprise and that displayed the same penchant for uniformity exhibited in the more general realms of corporate theory and charter interpretation. I will not attempt to review every case with such attributes but simply pick a few examples.

To begin, again, with Head & Amory, the Court held that while corporate acts must be done as prescribed in the charter, the charters must be read as enabling legislation within the realm of the objects for which the charter was granted.\(^9\) Justice Story took the first step in Bank of Columbia v Patterson's Adm'r, affirming that corporations could act through agents and that corporations need not act always under seal.\(^9\) It was not long before the acts of the agents themselves thus came under the scrutiny of the Court.

Dartmouth College, while acknowledging that the objects for which corporations are created are likely to be local in character, nonetheless held that where private corporations are concerned, the objects of the corporators may be somewhat more expansive than those of the state granting the charter. In the case of Dartmouth College that was especially true. While located in New Hampshire, its location was a fortuity, the donors and founder having more universal aims for the educational institution created by the charter than those that concerned New Hampshire alone.\(^9\) Thus, the Contracts Clause could be invoked to protect a degree

\(^9\) 2 Cranch at 168-69.
\(^9\) 7 Cranch 299, 306.
\(^9\) 4 Wheat at 640-41.
of managerial discretion in the pursuit of the aims of the founders, for the Court recognized that a change in the structure and composition of the governing structure of the college (which is what, after all, New Hampshire was attempting) necessarily altered the managerial role. In other words, the donors and founders, the corporators, contracted for a particular managerial system and were entitled to the fruits of the bargain. Justice Washington was even more explicit, suggesting that the government had little business interfering with that discretion. Justice Story explicitly applied those considerations to the business corporation.

After that, the only limit to the Court's involvement was the fact that few cases arose in which the exercise of managerial discretion was challenged. Several cases hint at expressions of a nascent duty of care and duty of loyalty, but the ownership structure of most corporations made it unlikely that managerial decisions would often be challenged by dissident shareholders; there were too few publicly held corporations, and share ownership was not widely dispersed. When corporate and managerial action was questioned, however, the Court did not hesitate to step in and define, usually expansively, the extent of managerial freedom. Questions arose concerning the discretion of managers in grading roads, the power of directors to ratify the actions of bank officers, corporate liability for the acts of its agents, and concerning similar questions of managerial conduct. In each case the Court looked to a general law of corporations and provided an answer, even when the case arose within a specific jurisdiction and did not involve a federally chartered entity. Moreover, in each case the Court delved deeply into the legitimacy of managerial authority.

96 Id at 663.
97 Id at 665 ("They contracted for a system, which should, so far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves.").
98 Id at 662.
99 Id at 681. Justice Story was not about to leave managers unsupervised. He feared state legislative interference with managers. He did not fear other forms of supervision, especially judicial supervision. Not only did he note the "visitorial" power of the state to check managerial abuse of discretion, id at 673–74, he also explicitly affirmed the chancery power of the courts in the superintendence of managers, id at 676.
100 Gozslay v Corporation of Georgetown, 6 Wheat 593 (1821).
101 Fleckner v Bank of the United States, 8 Wheat 338 (1823).
102 Bank of Metropolis v Gutschlick, 14 Pet 19 (1840).
In the case involving road grading, for example, the question was whether a public corporate charter explicitly authorized the road grading. If it did not, was the act a public corporate version of an *ultra vires* act?\textsuperscript{103} The Court dispatched the case quickly. It held that the officers of the corporation had implicit authority to decide on road grading even though no such power was remotely mentioned in the charter.\textsuperscript{104} It is worth emphasizing just how much this pre-*Charles River Bridge* case meant. Strictly construed, of course, a charter that did not specify a power could not contain it. After all, in this era, often charters were specifically granted for no other purpose than to build a road. To read in such a power was problematic. To say, on the other hand, that the exercise of such a power was implicit in the authority of the managers to facilitate the aims of the public corporation was quite another thing.

And such managerial freedom was not limited to public corporations. In *Fleckner*, the Court made detailed inquiry into the actual duties of bankers in order to discover what might be read into the corporate contract. The Court sought to discover how bank officers defined their discretion\textsuperscript{105} and how that discretion, when exercised in cases at the margin, might be ratified by the bank's directors.\textsuperscript{106} To reiterate, in a regime of strict construction, exercise of certain forms of discretion by bank officers, as opposed to bank directors, would be impermissible. In a regime of charter construction designed to insulate entrepreneurs from the vagaries of legislatures, however, the Court was generous in defining the realm of managerial powers implicit or necessary to the objects for which the corporation was chartered. Having recognized the need for such discretion in the corporate contracts with the state, the Court protected it.

Some five years later, the Court again made an inquiry into the discretion of a bank's officers. In *Minor v Mechanics' Bank of Alexandria*,\textsuperscript{107} the issue again was the implicit authority of bank officers

\textsuperscript{103} 6 Wheat at 597–98.

\textsuperscript{104} Id at 595 ("Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves, who elect the corporate body, and who may therefore be expected to consult the interests of the town.").

\textsuperscript{105} 8 Wheat at 358–60.

\textsuperscript{106} Id at 362.

\textsuperscript{107} 1 Pet 299 (1828).
in the face of charter provisions. Underlying the case were conflicting visions of the public interest in banks.\textsuperscript{108} The Court noted that protection of the public was usually provided for through capitalization limits. Notwithstanding such a protection, however, the Court noted that rules governing fraud also applied to protect stockholders\textsuperscript{109} not just for their protection alone but also for the protection of the public—customers and others—who had a right to rely on the expected integrity of bank officers in the conduct of banking affairs.\textsuperscript{110} The Court then proceeded to fashion a duty of care to govern bank officers. In doing so, the Court cited no holdings of its own or of other courts, but rather created the duty out of the charter itself. If the Court had in other cases read an implicit degree of managerial discretion into the corporator’s contract with the state, it now had begun to read in limits to that discretion. Moreover, it did so on the same grounds as it read in the discretion in the first place, the public interest. And how were the public interest limits of discretion defined? Did the Court actually formulate a standard? Not exactly. The Court looked to the ordinary practice of bankers, how they ordinarily held themselves out to the public, in order to ascertain their legitimate sphere of discretion.\textsuperscript{111} But, the Court limited the discretion, though in a completely unsurprising manner. Should an officer engage in a fraud, any attempt by the directors to ratify the act would be disallowed as unjust.\textsuperscript{112}

Though much has been written about the problem of foreign corporations and jurisdiction,\textsuperscript{113} and it is largely outside of my concern here, it is nonetheless relevant in at least one respect. The rule that a corporation could act in the federal courts because of the citizenship of its corporators assumed that all (or most) of the

\textsuperscript{108} Id at 69.
\textsuperscript{109} Id at 71.
\textsuperscript{110} Id at 70.
\textsuperscript{111} Id at 69–73.
\textsuperscript{112} The common law role of the Court is, at first glance, surprising, until one remembers that before the Civil War Alexandria was part of the District of Columbia. Thus, the local courts were federal courts, and, though the bank had received a federal charter, it was as a local bank. Nonetheless, the Court did not distinguish its common law role in this case from its role in any cases involving national banks or locally chartered banks. See, for example, id at 70 (comparing the case to \textit{Bank of United States v Dandridge}).
\textsuperscript{113} Still the best work is Gerard Carl Henderson, \textit{The Position of Foreign Corporations in American Constitutional Law} (Harvard, 1918).
corporators resided in the same jurisdiction. In other words, for diversity purposes, the Court assumed a degree of localism in the ownership of corporations. That assumption was based in fact: corporations were locally owned, for the most part. But only for the most part. The exceptions began to undermine the rule until finally, in *Louisville, Cincinnati & Charleston Railroad Co. v Letson*, the Court abandoned the fiction, setting the situs of the corporation in the incorporating jurisdiction. In either case, however, it was the ability of the Court to fix a corporation’s location locally that gave it access to the federal (that is, the national) courts. Similarly, in *Bank of Augusta v Earle*, the Court explicitly acknowledged local power to exclude foreign corporations while creating a presumption that unless specifically excluded, a corporation was free to operate in every state in which it was authorized by its charter to do business. In both instances localism was acknowledged as the underlying premise of corporate law, and in both cases the effects of localism were minimized.

*Bank of Augusta* is also important in other respects, though. In understanding how the Court thought about the phenomenon of the growing use of the corporate form, it is an especially useful case. Chief Justice Taney authored the opinion in the case, which was decided two years after *Charles River Bridge*. His opinion, when read in conjunction with the earlier case, demonstrates not just that *Charles River Bridge*’s strict construction rhetoric should itself be read narrowly, as instrumentally facilitative of entrepreneurialism rather than as a doctrinaire attitude toward charters, but also as indicative of how the Court would deal with corporate and managerial conduct. The Chief Justice was even more overtly consequentialist in *Bank of Augusta* than he was in *Charles River Bridge*.

Early in Taney’s opinion for the Court, he noted that not only did the United States have a large and growing number of corporate entities, but that they had come to play an important role in the economy. He went out of his way to suggest that the Court should be careful about the consequences of its holdings for the future of these enterprises. In discussing *Deveaux*, Taney laid the groundwork for abandoning its rationale for corporate access to

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114 2 How 497 (1844).  
115 13 Pet 519 (1839).  
116 Id at 589.
federal courts, and they were purely consequentialist. He hypothesized carrying Deveaux to its logical extreme. Abandoning Deveaux’s willingness to “look to the character of the persons composing a corporation”\textsuperscript{117} for purposes of establishing jurisdiction, he promptly, and logically, abandoned the willingness for other purposes as well, especially contract. He wrote that the principle “has never been supposed to extend to contracts made by a corporation; especially in another jurisdiction.”\textsuperscript{118} Why not? Before answering, it is important to repeat that Taney never considered abandoning Deveaux’s fiction and depriving federal courts of jurisdiction. His extension of Deveaux to the realm of contract was purely hypothesized, done solely to illustrate the dangers inherent in the fiction. Given that he still had paramount regard for the states’ capacity to control their own economies,\textsuperscript{119} such a move was, at least in theory, however, conceivable for him. Nonetheless, Taney noted just what an extension of the logic of Deveaux would mean if carried beyond jurisdiction. “The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation[.].”\textsuperscript{120} The Deveaux fiction consumed itself, in Taney’s understanding, and he would have none of it. The price for access to federal court could not be that of wiping out limited liability.

Implicit in the reasoning was just how much the Supreme Court had come to define corporations and adjust itself to their operations. Having given them access to federal court on a fiction, having defined corporations as local contractual relationships but then having brought those relationships within the jurisdiction of federal courts on the basis of that definition, the Court proceeded to use the jurisdiction to define the role of the corporation in the political economy and the role of managers within the corporation. For example, having decided that limited liability was essentially an inherent component of corporate existence, and having granted access to federal court on the fiction of complete local ownership to protect the rights of the corporators, the Court could not then

\textsuperscript{117} Id at 586.
\textsuperscript{118} Id.
\textsuperscript{119} Id at 586–87.
\textsuperscript{120} Id at 586.
deny an inherent component of corporate existence to the corporators when the fiction was exposed.

Taney, however, could not bring himself, or the Court, to give a limited liability corporation unfettered access to every state in the union, including those engaging in an activity for which the foreign state had refused to charter a corporation to operate within its borders. Such would be to "exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state." This, Taney argued, would lead to a pernicious end, the race to the bottom: "[I]t would deprive every state of all control over the extent of corporate franchises proper to be granted in the state; and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question." Taney, and the Court, thus emphatically rejected the idea that corporations ought to shop for charters.

Bank of Augusta, despite that reservation in favor of localism, in reality ended up giving free reign to interstate operations without countenancing charter shopping. To operate beyond state boundaries, a charter had to authorize the activity, but given comity, unless a state barred the activity of a foreign corporation, it was presumed to be allowed. Thus, even the Taney Court continued the tradition of the Marshall Court: a bow to localism, then the exercise of national power with the intent to facilitate corporate activity, all the while federalizing and universalizing corporate law through Supreme Court pronouncement.

IV. LOCALISM AND NATIONALISM

That the Court attempted to facilitate commerce comes as no surprise. That it may have acted to facilitate the actions of the vehicles of commerce is also not much of a surprise. That the federal structure that we today take for granted as the defining characteristic of American corporate law was honored largely in the breach by the Court in the early years of the country is, I believe, somewhat more surprising. By so acting, the Court also set the parameters for what acceptable changes in the law might be. As

121 Id.
122 Id.
those changes were facilitative of corporate and managerial freedom, the Court limited the range of options that would become available by setting out certain paths for the judicial policing of managerial conduct. Thus, when charter competition actually began, the competition had already been channeled and given a definite direction. States were not completely free to engage in experimentation, for behind every potential tinkering with their creations lay the Supreme Court—with the other federal courts operating under its guidance—always ready to deploy the Contracts Clause and its other powers to limit those experiments. It is thus not surprising that the ensuing competition among the states would be in the direction of ever looser or more facilitative corporate law.