

“AN ARTIFICIAL BEING”: JOHN MARSHALL AND CORPORATE PERSONHOOD

CHRISTOPHER J. WOLFE*

Two of the Supreme Court’s most controversial decisions in recent history—*Citizens United v. FEC*¹ and *Burwell v. Hobby Lobby*²—both relied on a legal concept that was little-discussed in the majority opinions: corporate personhood. Justice Kennedy’s opinion for the Court in *Citizens United* and Justice Alito’s opinion for the Court in *Hobby Lobby* focused on the rights of free speech and the free exercise of religion, more or less accepting that those rights can inhere in corporate persons. Some of the strongest public reactions to these opinions have to do precisely with the fact that they are defenses of the rights of corporate persons and not rights of natural human beings.³

Dissenting opinions in *Citizens United* and *Hobby Lobby* dealt with the issue of corporate personhood at much greater length than the majority opinions. Justice Stevens, in his dissent in *Citizens United*, discussed the original understanding of the First Amendment’s application to corporations. He concluded that the Founders did not believe that the protections afforded to natural persons, like freedom of speech, would extend to corporations.⁴ Justice Ginsburg, in her *Hobby Lobby* dissent, approvingly cited Justice Stevens’s opinion in *Citizens United* as part of her argument that Chief Justice John Marshall and the

* Adjunct Professor of Politics, University of Dallas. Dr. C.J. Wolfe received his Ph.D. in political science from Claremont Graduate University, Class of 2014. The author would like to thank Carson Holloway, Michael Uhlmann, David Upham, and Jonathan Wolfe for their advice and help with the development of this project.

1. 558 U.S. 310 (2009).

2. 134 S. Ct. 2751 (2014).

3. See, e.g., 162 CONG. REC. S152 (2016) (statement of Sen. Elizabeth Warren).

4. *Citizens United*, 558 U.S. at 429 (Stevens, J., dissenting).

Framers did not intend for corporate persons to have the protection of free exercise of religion. Ginsburg wrote:

[T]he exercise of religion is characteristic of natural persons, not artificial legal entities. As Chief Justice Marshall observed nearly two centuries ago, a corporation is “an artificial being, invisible, intangible, and existing only in contemplation of the law.”⁵

Justices Ginsburg and Stevens are not the only ones who have interpreted Chief Justice Marshall’s *Dartmouth College* opinion in this way. Chief Justice Rehnquist in his *First National Bank of Boston v. Bellotti*⁶ dissent made much the same claim about Marshall’s line from *Dartmouth College*.⁷ Whether or not Justice Ginsburg’s quote from *Dartmouth College* actually demonstrates that Marshall was against corporate persons having constitutional rights is an important question. Marshall made restrictive statements about corporate personhood similar to those made in *Dartmouth College* in at least four other opinions he wrote in his tenure on the Supreme Court: *Bank of the United States v. Deveaux*,⁸ *Osborn v. Bank of the United States*,⁹ *Bank of the United States v. Dandridge*,¹⁰ and *Providence Bank v. Billings*.¹¹ The main question of this Article is whether Marshall’s view of corporate personhood necessarily entails a restrictive interpretation of the rights of corporate persons. This Article will argue that Marshall’s statements suggesting a restrictive interpretation of corporate personhood do not entail a restrictive interpretation of their rights, given the context in which those statements were made.

This Article examines the Constitution’s original understanding of corporate personhood by paying special attention to the issues raised by Justices Stevens and Ginsburg.¹² Chief Justice

5. *Hobby Lobby*, 134 S. Ct. at 2794 (Ginsburg, J., dissenting) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)).

6. 435 U.S. 765 (1978).

7. *See id.* at 823–24 (Rehnquist, J., dissenting).

8. 9 U.S. (5 Cranch) 61 (1809).

9. 22 U.S. (9 Wheat.) 738 (1824).

10. 25 U.S. (12 Wheat.) 64 (1827).

11. 29 U.S. (4 Pet.) 514 (1830).

12. Writing in 2012, Ian Speir claimed that:

[T]o date, while a number of scholars have explored the role and conception of the corporation in early American history, few have

Marshall's early precedents, which helped enshrine corporate personhood in Supreme Court case law, will be the main focus of this discussion. Since Marshall's time on the Court, the law has undoubtedly undergone major changes; however, Marshall's opinions serve as a good foundation for such an analysis. Some of these changes concern corporations themselves, such as the addition of state general incorporation laws, which facilitated the tremendous growth of commercial corporations during the remainder of the 19th century,¹³ while others have to do with the ratification and incorporation of the 14th Amendment, such as the extension of equal protection to corporations against state interference found in *Santa Clara County v. Southern Pacific Railroad*.¹⁴

Section One briefly evaluates the original intent of the constitutional clauses concerning corporate personhood from the era of the Articles of Confederation through ratification to better assess Marshall's view of those clauses. Section Two discusses influences on Marshall's view of corporate personhood, including Founders such as Alexander Hamilton and jurists from the English common law tradition. Section Three discusses Marshall's thoughts on corporate personhood, paying special attention to the restrictive statements he made about corporations. And lastly, Section Four analyzes the accuracy of recent inter-

undertaken to articulate the 'original understanding' of the corporation—American views about the corporation and its role in society at and around the time the Constitution and Bill of Rights went into effect. Furthermore, none has attempted to tie this understanding to the 'original meaning' of the Constitution—that is, the understood meaning of the Constitution's text at ratification.

Ian Speir, *Corporations, the Original Understanding, and the Problem of Power*, 10 GEO. J.L. & PUB. POL'Y 115, 117–18 (2012) (footnotes omitted).

13. Discussing the effect of the *Dartmouth College* case, Elizabeth Pollman also argues that "[r]ecognizing the corporate charter as covered by the Contract Clause and the corporation's property as protected by the Due Process Clause stabilized the corporate form as a viable organization for long-term private investment." Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1639.

14. 118 U.S. 394 (1886). However, Morton Horwitz writes that *Santa Clara County* largely takes Marshall's opinion in *Dartmouth College* as the foundation for its understanding of corporate personhood. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1870–1960*, at 67 (1992) ("The *Santa Clara* decision was not thought of as an innovation but instead was regarded as following a line of cases going back almost seventy years to the *Dartmouth College Case*").

pretations of Marshall's view of corporate personhood, such as those found in Justice Stevens's dissent in *Citizens United* and Justice Ginsburg's dissent in *Hobby Lobby*.

I. AN IMPLIED POWER TO CREATE CORPORATE PERSONS AND DUTY TO PROTECT THEM ONCE CREATED

The bare text of the Constitution itself neither allows Congress to create corporate persons nor makes it a duty to protect corporate persons' constitutional rights. Rather, Chief Justice Marshall and his contemporaries inferred the existence of such congressional power. They considered the power of the federal government to create corporations an implied power derived from the Necessary and Proper Clause. They understood the Contract Clause of Article I, Section 10, to imply the duty of the federal government to protect the rights of corporations, whether those corporations were created at the federal or state level.¹⁵ Marshall also considered whether corporate persons have standing to bring cases in federal court, raising questions about the interpretation of Article III, Section 2.

A. *Corporate Personhood Under The Articles of Confederation*

States were the main governments granting franchises to corporations in early America, and they generally considered corporations to have some of the qualities of legal personhood. Corporations differed from joint-stock associations (also present during the Colonial and Articles periods) in that those groups were not considered legal persons.¹⁶ The power to create corporate persons was considered a sovereign power. Initially, colonial governments were granted this power by the King's agents; after the colonies broke away and created new state governments, the power to create corporate persons was considered part of the sovereign power of the state govern-

15. William Crosskey also suggests that the Commerce Clause may have been understood as the source of congressional power concerning corporations. See WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 43 (1953).

16. See Simeon E. Baldwin, *American Business Corporations Before 1789*, 8 AM. HIST. REV. 449, 450 (1903).

ments. The Articles of Confederation gave scant assurance that a state corporate charter from one state would be honored in another state.¹⁷ The Articles' only mention of this issue is an oblique reference to interstate commerce for the "people" of a state in Article IV:

[T]he people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any state, to any other State of which the Owner is an inhabitant¹⁸

More assurance for corporate charters across state borders was desired when it came time to create a new constitution in 1787.

Whether or not the Continental Congress itself had the power to create corporations was a question debated during this period. In 1781, Alexander Hamilton began his first efforts to create a national bank by encouraging Robert Morris (then Superintendent of Finance) to create the Bank of North America. Some at the time (such as Thomas Fitzsimmons) protested the chartering of the Bank, while others (such as Thomas Paine) supported it.¹⁹ James Wilson delved into the difficult problem of constitutional justification for that 1781 Act.²⁰ The problem was that the Articles of Confederation only allowed the Continental Congress to legislate according to expressly delegated powers,²¹ and the power to create a corporation such as the Bank of North America was not expressly enumerated. Wilson was forced to resort to an argument outside the Articles, claiming that the power to incorporate for national goals flowed from the Union mentioned in the Declaration of Independence,

17. *See id.* at 464.

18. ARTICLES OF CONFEDERATION OF 1781, art. IV, para. 1.

19. *See Speir, supra* note 12, at 138.

20. James Wilson, *Considerations on the Bank of North America 1785*, reprinted in 1 COLLECTED WORKS OF JAMES WILSON 64 (Kermit Hall & Mark Hall eds., 2007) [hereinafter WILSON].

21. ARTICLES OF CONFEDERATION of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.").

which preexisted the Articles.²² Wilson pointed to examples of similar powers the Continental Congress had already exercised, such as the administration of national territory and the incorporation of new states.²³

Wilson's resources for arguing that the creation of a corporation was permissible under the Articles' government were few, but he had even fewer resources for arguing that there was a duty to defend the rights of that corporation. In the Bank of North America's charter, the Continental Congress explicitly recommended that states create laws "making it a felony without benefit of clergy, for any person to counterfeit bank notes, or to pass such notes, knowing them to be counterfeit."²⁴ Many states, including Wilson's Pennsylvania, did, in fact, pass laws protecting the Bank of North America Corporation, but the key point is that the Bank was dependent on the states to provide that protection.²⁵ Several states also passed their own charters of incorporation for the Bank of North America that overlapped the Continental Congress's charter. Wilson considered those state charters to be superfluous.

Wilson's arguments concerning the constitutionality of the Bank of North America would turn out to be highly significant for the future of corporate personhood and implied powers.²⁶

22. James Wilson, *Considerations on the Bank of North America 1785*, reprinted in 1 WILSON, *supra* note 20, at 65.

23. *Id.* at 66.

24. 1 DOCUMENTARY HISTORY OF BANKING AND CURRENCY IN THE UNITED STATES 141 (Herman Krooss ed., 1983) [hereinafter DHBC].

25. James Madison makes note of this issue of the charter of the Bank of North America in his speech in Congress opposing the National Bank on February 2, 1791:

The case of the bank, established by the former Congress . . . never could be justified by the regular powers of the articles of confederation. Congress betrayed consciousness of this, in recommending to the States to incorporate the bank also. They did not attempt to protect the bank notes, by penalties against counterfeiters. These were reserved wholly to the authority of the States.

JAMES MADISON: WRITINGS 1772–1836, at 484 (Jack Rakove ed., 1999) [hereinafter MADISON'S WRITINGS].

26. Ian Speir notes several other significant (though perhaps less influential) discussions of corporate rights during the Articles of Confederation period besides the bank charter debate; these include the revision of the University of Pennsylvania's corporate charter, the vetoing of a New York trade union charter, criticism of the New Jersey Society for Useful Manufactures corporation, and de-

With a new Constitution and the removal of the expressly delegated powers requirement, Alexander Hamilton was able to argue that the charter incorporating the Bank of the United States was constitutional based on reasons similar to Wilson's regarding implied sovereign power.²⁷ Hamilton's arguments would in turn influence Marshall's opinions in *McCulloch v. Maryland* and *Dartmouth College v. Woodward*.

B. *Corporate Personhood at the Philadelphia Convention*

There was less discussion of corporate personhood or corporations at the Philadelphia Convention and the state ratification debates than one might expect. A few sparse mentions of corporations indicate that the Framers either did not purposefully intend for Congress to be able to create corporations or, if they did intend to give Congress this power, thought it could be done by an implied power under the Necessary and Proper Clause.

At the Convention on September 14, 1787, James Madison proposed adding an express power of Congress to create corporations.²⁸ This proposal was rejected.²⁹ In the context of the delegates' discussion of national powers (what would become Article I, Section 8), Benjamin Franklin argued that "a power to provide for the cutting of canals where deemed necessary"³⁰ should be added. Madison then suggested, "an enlargement of the motion into a power 'to grant charters of incorporation where the interest of the U.S. might require & the legislative provision of individual states may be incompetent.'"³¹ This clause would have given Congress express permission to create corporations for various purposes, such as cutting canals. Rufus King objected to Madison's motion, arguing that "[i]t will be referred to the establishment of a Bank,"³² and that

bates over whether municipalities ought to incorporate. See Speir, *supra* note 12, at 130–35.

27. See 1 WILSON, *supra* note 20, at lxix.

28. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 615 (Max Farrand ed., 1911) [hereinafter FARRAND].

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 616. Ironically, King was also a key proponent of the addition of the Contract Clause to Article I, Section 10 through his role on the Committee of Style, and was later a supporter of Congress' charter of the first Bank of the United

those banks would establish monopolies. James Wilson's counter to King's objection was that "mercantile monopolies . . . are already included in the power to regulate trade,"³³ and the creation of a bank added nothing beyond what was already legal. In the end, Franklin's motion for Congress' canal cutting power was not modified to include the right to create corporations generally, and the canal cutting power itself was outvoted eight to three.³⁴

In 1791, after the Constitution was ratified, opponents of the Bank of the United States reminded those in favor of it that a clause for the creation of corporations by Congress had been explicitly rejected at the Constitutional Convention. Then-Secretary of State Thomas Jefferson wrote:

[I]t is known that the very power now proposed as a *means* was rejected as an *end* by the Convention which formed the Constitution. A proposition was made to them to authorize Congress to open canals, and an amendatory one to empower them to incorporate. But the whole was rejected, and one of the reasons for rejection urged in debate was, that then they would have a power to erect a bank, which would render the great cities, where there were prejudices and jealousies on the subject, adverse to the reception of the Constitution.³⁵

Madison too, when admonishing Congress not to charter the bank, "well recollected that a power to grant charters of incorporation had been proposed in the general convention and rejected;"³⁶ this is unsurprising considering that he was the one who proposed it.

None of these arguments about the legislative history of the Constitution would persuade Treasury Secretary Hamilton, however, who argued that although an express power was rejected, the words of the Necessary and Proper Clause implied

States in 1791. See ROBERT ERNST, RUFUS KING: AMERICAN FEDERALIST 112 n.77 (1968).

33. 1 FARRAND, *supra* note 28, at 616.

34. See ALAN CRAIG HOUSTON, BENJAMIN FRANKLIN AND THE POLITICS OF IMPROVEMENT 150 (2008).

35. 1 DHBC, *supra* note 24, at 149.

36. MADISON'S WRITINGS, *supra* note 25, at 482.

that Congress could create corporations.³⁷ This argument persuaded John Marshall.

On September 17, 1787 (the last day of the Convention), Elbridge Gerry complained that he could not vote for ratification due to his view that “under the power of commerce, monopolies may be established.”³⁸ It is likely that Gerry had monopolies established for corporations (such as a bank) in mind when he made this comment.³⁹ In fairness, this cannot be taken as strong evidence for the conclusion that the power to create corporations was implied in the Constitution, but it is some evidence.⁴⁰

To summarize: there is little evidence in the record to prove that the Constitution was intended by its framers to delegate the power to create corporations to Congress, that the Federal government had a duty to protect corporations’ rights by contract, or that corporate bodies had any sort of standing in federal court. However, Marshall did not need very much evidence, given what he was trying to say. Marshall argued in *Dartmouth College* that:

It is more than possible, that the preservation of [contract rights involved in corporate charters] was not particularly in view of the framers of the constitution, when the clause under consideration was introduced into that instrument. . . . But although a particular, and a rare case may not, in itself, be of sufficient magnitude to induce a rule, yet it must be governed by that rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say, that this particular case was not in the mind of the convention, when the article was framed, nor the American people, when it was adopted.⁴¹

37. See CARSON HOLLOWAY, *HAMILTON VERSUS JEFFERSON IN THE WASHINGTON ADMINISTRATION* 99–100 (2016).

38. See Elbridge Gerry, Speech in the Constitutional Convention, Monday September 17, in 4 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 15 (John Kaminski & Gaspare Saladino eds., 1987) [hereinafter DHRC].

39. See *id.* at 15 n.2.

40. The records of the state ratifying conventions do not indicate that a federal power to create corporations was a topic of discussion. See generally 2–26 DHRC, *supra* note 38.

41. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 644 (1819).

In other words, it did not matter to Marshall whether the contract rights involved in corporate charters were ever mentioned at the Constitutional Convention, as long as they used the word “contract” in a general sense that could be appropriately applied to corporate charters. Marshall’s argument about corporate persons does not rely on history or the Framers’ intent, but rather on the full applications of the words of the Constitution based on their original meaning.

II. MARSHALL’S INFLUENCES

When attempting to understand Chief Justice Marshall’s jurisprudence on corporate personhood, the importance of his training as a lawyer in the British common law tradition should not be underestimated. His common law-influenced views on corporate personhood can be seen illustrated in one of his experiences working as a lawyer in Virginia in the case of *Bracken v. Visitors of William and Mary College*.⁴² Additionally, the arguments Alexander Hamilton employed in his 1791 defense of the constitutionality of the Bank of the United States would shape Marshall’s understanding of corporate personhood in the context of the American Constitution.

A. *Blackstone, Coke, and British Common Law*

Marshall’s views on corporations were fundamentally informed by the precedents and writings of the British common law tradition, though he rarely explicitly quoted them in his major opinions on corporations delivered while on the Supreme Court.⁴³ Marshall himself wrote in *Deveaux* that “our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character.”⁴⁴

The core notions Marshall learned about corporations from the common law tradition were the general definition of a “corporation” and the reasons why government ought to create them. The famous legal commentator William Blackstone had

42. 7 Va. (3 Call) 573 (1790).

43. See WARREN HUNTING, THE OBLIGATION OF THE CONTRACTS CLAUSE OF THE U.S. CONSTITUTION 70 (1919).

44. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 88 (1809).

defined corporations as “artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality,” and stated that they were created “for the advantage of the public to have any particular rights kept on foot and continued.”⁴⁵ This is very similar to Marshall’s definition found in *Dartmouth College*.⁴⁶ Later commentators have called this the “concession” theory of corporate personhood.⁴⁷ Corporations are required to be created for public purposes, which Blackstone acknowledged could include the facilitation of a variety of public benefits, such as “the advancement of religion, of learning, and of commerce.”⁴⁸ These public purposes, whether achieved in some way by private corporations, government corporations, or eleemosynary corporations, are the ultimate reasons why the government ought to protect their rights once created, including granting corporations standing in court.

The reality that corporate persons are different than natural persons convinced the British common law commentators, and Marshall, that certain conditions must be met for a corporation to have standing to defend itself. Sir Edward Coke, another famous legal commentator whom both Blackstone and Marshall cite, pointed out that unlike a natural person, a corporate person must be defended by an attorney.⁴⁹ A natural person could presumably defend himself in court, but an entire corporation cannot—especially considering that all officers in the organization’s history are considered parts of the corporation’s life. In a statement very similar to Marshall’s comment in *Devaux*, Coke wrote in the *Sutton’s Hospital* case that:

[A] Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the law. . . . They may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by Attorney.⁵⁰

45. 1 WILLIAM BLACKSTONE, COMMENTARIES *467.

46. See 17 U.S. (4 Wheat.) at 636.

47. See MIKE O’CONNOR, A COMMERCIAL REPUBLIC 90 (2014).

48. 1 BLACKSTONE, *supra* note 45, at *467.

49. See Case of Sutton’s Hospital (1612) 77 Eng. Rep. 960, 971–73; 10 Co. Rep. 23 a, 30 b–32 b.

50. *Id.*

Coke and Marshall's acknowledgement that corporations are not natural persons was not intended to diminish or dismiss the legitimate role corporate persons played, or the rights they had. They were statements describing how and when it was appropriate for corporate persons to defend themselves in court, and were neither restrictive nor expansive of their rights. This is perhaps the main difference between Marshall's discussion of corporate persons and the recent use of his quotations in Justice Rehnquist's *Bellotti* dissent,⁵¹ Justice Stevens's *Citizens United* dissent,⁵² and Justice Ginsburg's *Hobby Lobby* dissent.⁵³

B. *Bracken v. Visitors of William and Mary College*

One case John Marshall was involved in as a young lawyer in Virginia demonstrates the stance he would later take toward corporations when he became Chief Justice and includes more explicit citation of British common law precedents than can be found in his Supreme Court opinions.⁵⁴ In the Virginia Court of Appeals, Marshall represented the College of William and Mary against a professor, Reverend Bracken, who complained that the board of visitors of the college was not the proper authority to make changes to the curriculum of the school. In *Bracken v. Visitors of William and Mary College*,⁵⁵ Marshall argued before the court that the corporate charter of the school had clearly put the board in charge of such decisions.⁵⁶

What is interesting with regard to corporate personhood about this case is where Marshall places the public purpose requirement that all corporations must ultimately serve. The Virginia Assembly had granted the college a charter for a private corporation to serve the public purpose of educating students;

51. See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 822–28 (1978) (Rehnquist, J., dissenting).

52. See *Citizens United v. FEC*, 558 U.S. 310, 393–485 (Stevens, J., dissenting).

53. See *Hobby Lobby v. Burwell*, 134 S. Ct. 2757, 2787–806 (Ginsburg, J., dissenting).

54. Florian Bartosic claimed that "it seems that the Chief Justice's reasoning in 1819 was in certain respects grounded upon premises only one step removed from the reasoning of Marshall, the lawyer, in 1790." See Florian Bartosic, *With John Marshall from William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259, 266 (1966).

55. 7 Va. (3 Call) 573 (1790).

56. *Id.* at 580.

once the corporation was created, Marshall contended that the court could not question or look into how well (and with what curriculum) the corporation was fulfilling its public purpose of education. All that mattered was that the board continued to meet the terms of the charter. The public purpose itself did not mean that the private corporation was under the public's control once created as a legal person.⁵⁷

Marshall's thoughts about the public purpose requirement in creating corporations in the American constitutional context would also be profoundly influenced by a real life political debate that contained lessons which could not be learned by reading the British common law books.

C. *Hamilton's Defense of the Bank of the United States Corporation*

In 1791, Secretary of the Treasury Alexander Hamilton successfully lobbied Congress to pass a bill to charter the Bank of the United States corporation.⁵⁸ However, President George Washington did not immediately sign the bill given the questions that had been raised in Congress by Madison about whether chartering such a corporation was a constitutional power of Congress since it was not explicitly stated in Article I, Section 8.⁵⁹ Washington took seriously his oath to "preserve, protect and defend the Constitution," so he asked Attorney General Edmund Randolph, Secretary of State Thomas Jefferson, and Secretary of the Treasury Hamilton for advisory opinions on whether they thought the bill was constitutional.⁶⁰

Hamilton's advisory opinion argued that the power to create corporations is implied by the Necessary and Proper Clause since the enumerated powers in Article I, Section 8 are aligned with the public purposes served by corporations. Hamilton's argument had some similarities to James Wilson's

57. *Id.* at 581 ("If, then, the Vistors have only legislated on a subject upon which they had a right to legislate, it is not for this Court to enquire, whether they have legislated wisely, or not, and if the change should even be considered as not being for the better, still it is a change . . .").

58. See *House of Representatives Vote to Charter the Bank of the United States (Feb. 8, 1791)*, in *DHBC*, *supra* note 24, at 145.

59. GORDON WOOD, *EMPIRE OF LIBERTY* 144 (2009) [hereinafter WOOD]; see also *MADISON'S WRITINGS*, *supra* note 25, at 484.

60. WOOD, *supra* note 59, at 144.

earlier defense of the Bank of North America corporation, but the inclusion of the Necessary and Proper Clause in the new U.S. Constitution provided Hamilton with a much stronger argument. The way Hamilton framed this question included the question of corporate personhood:

Now it appears to the Secretary of the Treasury, that *this general principle is inherent* in the very *definition of Government* and essential to every step of the progress to be made by the United States, namely—that every power vested in a Government is in its nature *sovereign* and includes by *force of the term*, a right to employ all the *means* requisite, and fairly applicable to the attainment of the ends of such power . . . This general and indisputable principle puts at once an end to the abstract question. Whether the United States have the power to *erect a corporation?* that is to say, to give a *legal or artificial capacity* to one or more persons, distinct from the natural. For it is unquestionably incident to *sovereign power* to erect corporations, and consequently to *that* of the United States, in *relation to the objects* intrusted to the management of government.⁶¹

In other words, the act of Congress to create a corporation such as the bank was a means to ends specified in Article I, Section 8, such as coining money and regulating its value.⁶² The public purposes of corporations, the key reasons for their creation going back to the earliest days of common law, were found by Hamilton in the enumerated powers of Congress.

While Hamilton's discussion of the constitutional power to create corporations is lengthy, he did not have as much to say about the constitutional duty to defend corporate rights. The most he had to say about it is this:

61. Hamilton's *Opinion as to the Constitutionality of the Bank of the United States*, 1791, in DHBC, *supra* note 24, at 153–54 (emphasis in original).

62. With regard to Hamilton's means-ends argument, Madison had a subtle rejoinder. In his speech against the Bank before Congress, Madison:

[A]dverted to a distinction, which he said had not been sufficiently kept in view, between a power necessary and proper *for the government or union*, and a power necessary and proper *for executing the enumerated powers*. In the latter case, the powers included in each of the enumerated powers were not expressed, but to be drawn from the nature of each. In the former, the powers composing the government were expressly enumerated . . . But the proposed bank could not even be called necessary to the government; at most it could be called convenient.

MADISON'S WRITINGS, *supra* note 25, at 488 (emphasis added).

To erect a corporation, is to substitute a legal or artificial for a natural person, and where a number are concerned, to give them individuality. To that legal or artificial person, once created, the common law of every State, of itself, annexes all those incidents and attributes which are represented as a prostration of the main pillars of their jurisprudence . . . the general rule of those laws assign a different regimen. The laws of alienage cannot apply to an artificial person, because it can have no country; those of descent cannot apply to it, because it can have no heirs; those of escheat are foreign from it, for the same reason; those of forfeiture, because it cannot commit a crime; those of distribution, because, though it may be dissolved, it cannot die.⁶³

Hamilton, like Coke, allowed that certain laws, rights, and duties simply cannot apply to corporations based on what they are. Once again, this acknowledgement by Hamilton that corporations do not have precisely the same privileges and immunities as natural persons was not intended to diminish or dismiss the legitimate role that Hamilton wanted corporate persons such as the Bank of the United States to play. Perhaps Hamilton simply took it for granted that the Bank of the United States would require constitutional protections from state legislators seeking to tax it in order to kill it. Marshall, of course, provided exactly that protection in *McCulloch*. Regardless, Hamilton did anticipate some of the criticisms of corporate rights that would come later. As he put it:

A strange fallacy seems to have crept into the manner of thinking and reasoning upon this subject. Imagination appears to have been unusually busy concerning it. An incorporation seems to have been regarded as some great, independent, substantive thing—as a political end of peculiar magnitude and moment; whereas it is truly to be considered as a *quality, capacity, or means* to an end.⁶⁴

Certainly Jefferson, the Secretary of State at the time, was willing to argue against corporate rights in that manner. He famously wrote that he wished to “crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government to a trial of strength and bid defiance to

63. DHBC, *supra* note 24, at 161.

64. *Id.* at 156 (emphasis in original).

the laws of our country.”⁶⁵ However, most of the judges or legal authorities at the time did not share Jefferson’s animosity toward corporations. Judges and lawyers, such as Marshall, were largely in agreement with Hamilton in wishing to ensure that corporate rights were defended.

Hamilton’s “Opinion on the Constitutionality of the Bank” is perhaps the main influence which led Marshall to defend corporations based on the Constitution. Marshall was fully aware of Hamilton’s arguments. In his five-volume edition of *The Life of Washington*, Marshall included an extensive multipage quote from Hamilton’s speech. Regarding Hamilton’s opinion, Marshall wrote: “A perusal of the arguments used on the occasion would certainly afford much gratification to the curious.”⁶⁶ Historian Charles Hobson goes so far as to say that: “[s]carcely a passage in the first part of *McCulloch* could not be traced to Hamilton’s advisory opinion or to some earlier writing, speech, or legal document.”⁶⁷ What is true of Marshall’s great case on the implied power of Congress to create a corporation is also true of his case defending corporate rights during the same 1819 term. Hardly a single premise of *Dartmouth College* cannot be traced back to Hamilton’s advisory opinion or to the earlier British common law commentators.

It is important to consider these historical events and earlier authors because most of Marshall’s arguments about the Constitution and corporations were purposefully not original. Corporations had been defended in courts for a long time before Marshall came to their defense in the American constitutional context.

65. Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 12 THE WORKS OF THOMAS JEFFERSON 44 (Paul Leicester Ford ed., 1905).

66. JOHN MARSHALL, 5 THE LIFE OF GEORGE WASHINGTON 254 (AMS Press 1969) (1804–07).

67. CHARLES HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 122 (1996). Another commentator, Wallace Mendelson, wrote that: “[*Brown v. Maryland* and *McCulloch v. Maryland*] are constitutional glosses to Hamilton’s *Report on Manufactures*, *Report on Public Credit*, and related state papers—the classic expressions of Federalist mercantile policy. Indeed, the *McCulloch* opinion is largely a repetition of Hamilton’s earlier defense of the bank.” WALLACE MENDELSON, CAPITALISM, DEMOCRACY, AND THE SUPREME COURT 23 (1960).

III. MARSHALL CREATES THE PRECEDENT

For Marshall, the question of whether the court had a duty to defend a corporate person's constitutional rights depended fundamentally on how the corporation in question was created. The restrictive statements Marshall occasionally made concerning corporate personhood did not have to do with whether the court had a duty to protect corporate persons' constitutional rights. Rather, those statements were made regarding either jurisdiction or the additional express powers given to a corporation by its charter. When Marshall did grant a corporation standing in court as an artificial person, there is no question that he considered it a duty to protect its rights.

A. *Marshall on the chartering of corporations*

Most of the cases Marshall heard concerning corporations during his time on the Supreme Court involved banking corporations, particularly the Bank of the United States. This bank, with its congressional charter, was repeatedly challenged in court when states attempted to impose taxes upon it. Some of those court challenges involved arguments against the Bank based on the mere fact that it was a corporation.

In *McCulloch v. Maryland*,⁶⁸ Marshall held that Congress had the power to create corporate persons. This power to create persons was one of the "necessary and proper" powers which Congress possessed to exercise the enumerated powers also found in Article I, Section 8 of the Constitution. The public purpose requirement that all corporations had according to the common law tradition was placed by Marshall as the end served by congressional creation of corporations. As he put it in *McCulloch*: "The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else."⁶⁹ Marshall went on to argue:

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

68. 17 U.S. (4 Wheat.) 316 (1819).

69. *Id.* at 411.

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.⁷⁰

In English law, the King possessed the sovereign power to create corporations for public purposes; in the new American context, the Framers implied a sovereign power to create corporations for public purposes in Article I, Section 8. The public purpose served by the Bank of the United States was summed up nicely by Marshall in a later court challenge, *Osborn v. Bank of the United States*, where he wrote that the Bank “is an instrument which is ‘necessary and proper’ for carrying on the fiscal operations of government.”⁷¹ The fiscal operations of government included the collection of taxes, the coining and regulation of currency, and other enumerated powers.

Even though the Bank of the United States conducted private business as well as public, Marshall held that this did not negate its status as a corporate person created for a public purpose.⁷² Corporations are defined as serving the public based on their stated objects found in their charter, not their individual corporate acts after they are created.⁷³ They are also not absorbed into the state’s control by their public purposes.⁷⁴ This argument is the context in which Marshall made his famous statement in *Dartmouth College* about corporate persons, as can be seen by reading the sentences immediately following the quote:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to the object, for which it was created. . . . But this being does not share in the civil government of the country, unless that be for the purpose for which it was created. Its immortality no more confers on it political

70. *Id.* at 421. Historically speaking, this argument from Marshall that a power to create corporations was intentionally left out of Article I, Section 8 is of course questionable given what happened at the convention. See *supra* Section I.B.

71. 22 U.S. (9 Wheat.) 738, 861 (1824).

72. See *id.* at 860.

73. See *id.*

74. See *id.* at 866–67.

power, or a political character, than immortality would confer such power or character on a natural person. It is no more a state instrument, than a natural person exercising the same powers would be. . . .

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes consideration, and in most cases, the sole consideration of the grant.⁷⁵

Corporations are somewhere in between the public and the private spheres. They cannot be politically controlled by the government in the way a government agency would be, but they also must have some public purpose as their object. Those public objects are the ultimate reason for creating corporations, and are also the reason why government has a duty to protect legitimate corporate rights.

B. Marshall on the duty to defend corporate persons' rights

Marshall also believed there was an implied constitutional duty under the Contract Clause of Article 1, Section 10 to defend the rights of corporate persons. For Marshall, once a corporation was created, a duty to protect its rights against statutory violations kicked in, since the charters of incorporation were constitutionally protected contracts.

Corporate persons had to meet several qualifications in order to be defended by the court, but in general Marshall considered it a matter of justice to defend their rights. In *Dartmouth College*, Marshall defended the property rights of an eleemosynary corporation. The young lawyer Daniel Webster made an impassioned defense on behalf of the College against the New Hampshire legislature at oral argument, one which a witness (Dr. Chauncey Goodrich) claimed moved Chief Justice Marshall to tears.⁷⁶ The contract violated in the case was between the state of New Hampshire and the donors of the money establishing the College (and their descendants). Marshall claimed that this was "a contract, on the faith of which, real and personal estate has been con-

75. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636–37 (1819).

76. *THE DANIEL WEBSTER READER* 163 (Bertha Rothe ed., 1956).

veyed to the corporation. It is then a contract within the letter of the constitution”⁷⁷ The Chief Justice also gave examples of other contracts that deserved the Court’s protection besides charters of incorporation, namely copyrights for the advancement of scientific discovery.⁷⁸ The United States had a public object worth defending in both instances, Marshall argued. It almost seemed “unnecessary” to him to argue that “in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the constitution.”⁷⁹

Not all contracts that corporations engage in, however, demanded the court’s protection under the Constitution. In his Rhode Island circuit court opinion *Head & Amory v. Providence Insurance Company*,⁸⁰ Marshall argued that given the type of beings they are, the subsequent contracts that corporations make after their creation must be done in a specific way.⁸¹ Natural persons have more freedom in the types of contracts they make which will be defended by courts; not so with corporate persons:

An individual has an original capacity to contract and bind himself in such manner as he pleases. . . . [B]ut with these bodies which have only a legal existence, it is otherwise. The act of incorporation to them is an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.⁸²

The fact that corporations make contracts is one of their essential properties, but they must adhere to the specific mode of making contracts stated in their charter in order for the court to defend them.

The duty of the court to defend corporate persons’ rights is generally founded on a “conservative principle” of the Court to

77. *Dartmouth College*, 17 U.S. (4 Wheat.) at 644.

78. *Id.* at 646.

79. *Id.* at 654.

80. 6 U.S. (2 Cranch) 127 (Marshall, Circuit Justice, C.C.R.I. 1804).

81. *Id.* at 168.

82. *Id.* at 168–69.

prevent corporations from being destroyed once created.⁸³ This follows from corporations' essential property of "immortality."⁸⁴ Marshall argued that the state of Ohio had no right to destroy the corporation of the Bank of the United States by a tax in the *Osborn* case, claiming:

The same conservative principle, which induces the Court to interpose its authority for the protection of exclusive privileges, to prevent the commission of waste, even in some cases of trespass, and in many cases of destruction, will, we think, apply to this.⁸⁵

However, the conservative principle was limited by the court's jurisdiction to hear a case involving a corporation in the first place. In *Providence Bank v. Billings*, Marshall drew a limit on how far the conservative principle applied by not defending a state corporation against a state tax. The reason for this was that the Rhode Island legislature granted Providence Bank's charter in the first place, and could choose to destroy the corporation, its creature, if it wished. Marshall admitted:

A power therefore which may in effect destroy the charter, is inconsistent with it; and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter.⁸⁶

Be this as it may, to deny the state its power to tax its own citizens (artificial or natural) was an absurd consequence that Marshall was unwilling to affirm. The power of the state to tax was in conflict with the duty of the state to defend corporate rights; what decided this case for Marshall was that exemption from such a tax was not explicitly stated in the corporation's charter.⁸⁷

83. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 842 (1824).

84. *Id.* at 861.

85. *Id.* at 842.

86. 29 U.S. (4 Pet.) at 560–61.

87. *Id.* at 560 ("This question is to be answered by the charter itself. It contains no stipulation promising exemption from taxation. The state, then, has made no express contract which has been impaired by the act of which the plaintiffs complain.").

C. *Marshall on standing for corporate persons in federal court*

For Marshall, the fact that a corporation had been incorporated and made a legal person by the state or national government did not automatically grant it standing in federal court. This was partially because they were artificial creatures of the law, which limited what types of court they could appear in.

The strictest requirement that Marshall imposed on corporations was that their access to federal court was limited by the terms of their charters. In the case of *Bank of the United States v. Deveaux*, Marshall was unwilling to grant standing even to a corporation created by the U.S. Congress, in part because the corporation was not a state “citizen” within the meaning of the Judiciary Act:

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, ‘to controversies between citizens of different states,’ both parties must be citizens, to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.⁸⁸

Furthermore, the charter granted by Congress for the first Bank of the United States only used general language about the bank’s standing: to “sue or be sued . . . in courts of record.”⁸⁹ Marshall was unwilling to construe this as authorization to sue in *federal* court.

However, if access to federal court was expressly mentioned in a congressionally-chartered corporation’s charter, Marshall was willing to grant it. When the Second Bank of the United States was chartered, Congress made sure to expressly mention a right “to sue and be sued . . . in every circuit court of the

88. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–87 (1809).

89. *Acts to Charter the Bank of the United States*, February 25 (Mar. 2, 1791), in DHBC, *supra* note 24, at 182.

United States.”⁹⁰ Marshall then confirmed that the court had jurisdiction to hear the corporation’s case in *Osborn*:

The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law.⁹¹

The corporation’s access to federal court under “arising under” jurisdiction was therefore derived from its charter. In *Osborn*, Marshall also makes an interesting comparison and contrast of corporate citizens with naturalized citizens. Like corporations, persons born in another country who become naturalized citizens are “the mere creature of a law.”⁹² But unlike corporations, naturalized citizens automatically are granted the rights to standing in specific courts under a “uniform rule of naturalization.”⁹³

In spite of his strict requirements regarding access to federal court, Marshall maintained that a corporation derives its citizenship from the citizenships of the individuals who work for and lead it. This principle was stated most clearly by Marshall’s dissent in the case of *Bank of the United States v. Dandridge*.⁹⁴ There Marshall contended that the agents of a corporation are themselves the corporate person. To deny this would be to deny the basis for all of corporate law. Marshall wrote, “[i]f this proposition can be successfully maintained, it becomes a talisman, by whose magic the whole fabric which the law has erected respecting corporations, is at once dissolved.”⁹⁵ Corporate acts are done by natural persons, since that is the only way

90. *Act to Charter the Second Bank of the United States* (Apr. 10, 1816), in DHBC, *supra* note 24, at 226.

91. *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824).

92. *Id.*

93. *Id.* at 827.

94. 25 U.S. (12 Wheat.) 64, 90 (1827) (Marshall, C.J., dissenting).

95. *Id.* at 113.

they can act given the entities that they are. To separate the legal entity of the corporation from the association of natural persons who run it is to flash the magic talisman to which Marshall referred. In *Deveaux*, Marshall admits that a corporation made of natural persons who are citizens is itself a citizen:

[T]he term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come to court, in this case, under their corporate name. That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act.⁹⁶

The problem for the first Bank of the United States in *Deveaux* was merely that the individuals comprising the bank lacked complete diversity of citizenship with the opposing party.⁹⁷

Marshall wanted to maintain the fabric of corporate law in American life for the public purposes that were served through it. He therefore upheld corporate personhood, even though certain courts were off limits to corporate persons due to the way their charters were written.

D. *Marshall on the "express" and essential rights of corporations*

In *Dartmouth College* and many other cases, Marshall claimed that the powers of a corporation were "express" powers and powers "incidental to its very existence."⁹⁸ Marshall considered several powers to be essential to corporations' very existence as corporations. These implied powers included: immortality (the corporation continuing after its founders passed away or quit the corporation), individuality (including a unique corporate name and seal), the right to manage its own internal affairs, the right to own property, the right to make binding contracts in some mode, the right to assistance of counsel, and the right to sue and be sued in some kind of court.⁹⁹ Marshall wrote in *Deveaux*:

96. *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 91 (1809).

97. *Id.* at 77.

98. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). For a helpful discussion of Marshall's stance on the express powers of corporations, see FRANCIS STITES, *PRIVATE INTEREST AND PUBLIC GAIN: THE DARTMOUTH COLLEGE CASE, 1819*, at 105 (1972) ("Corporate rights were not to be extended beyond the obvious meaning of their charters.").

99. 17 U.S. (4 Wheat.) at 636.

This power [to sue and be sued in some kind of court,] if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognisance of the cause, if brought by individuals.¹⁰⁰

Marshall defended this essential right of corporate persons and several others in his rulings.

Marshall also considered some rights of corporations to be non-essential to their existence. The charter thus had to express such rights in order for the corporation to legally possess them. He wrote in *Dartmouth College*: "There can be no reason for implying in a charter, given for valuable consideration, a power, which is not only not expressed, but is in direct contradiction to its express stipulations."¹⁰¹ Marshall adhered to a strict construction rule when interpreting corporations' non-essential powers.¹⁰² Those non-essential, "express" powers included: the exemption from a tax, the right to sue and be sued in a specific court, the right to make contracts in a specific mode, and the power to issue auctioneer licenses. The last mentioned, the power to issue an auctioneer license, is a particularly clear example of a power that would need to be expressed in a charter. Marshall discussed this power in *Fowle v. The Common Council of Alexandria*;¹⁰³ Marshall wrote:

The power to license auctioneers, and to take bonds for their good behavior in office, not being one of the incidents to a corporation, must be conferred by an act of the legislature; and in executing it, the corporate body must conform to the act.¹⁰⁴

Marshall applied this theory of express powers in other cases as well. In *Providence Bank v. Billings*, a state bank was not exempt from a state tax, since that exemption was not expressed in the

100. 9 U.S. (5 Cranch) at 85–86.

101. 17 U.S. (4 Wheat.) at 638.

102. Marshall was by no means alone in holding the doctrine of express rights. For example, Justice McLean wrote in *Beaty v. Lessee of Knowler* that "a corporation is strictly limited to the exercise of those powers, which are specifically conferred on it, will not be denied. The exercise of the corporate franchise, being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation." 29 U.S. (4 Pet.) 152, 164 (1830).

103. 28 U.S. (3 Pet.) 398 (1830)

104. *Id.* at 407.

corporation's charter.¹⁰⁵ "Any privileges which may exempt it from the burthens common to individuals, do not flow necessarily from the charter, but must be expressed in it," wrote Marshall.¹⁰⁶ After all, natural persons have to pay taxes, so an artificial person would also have to pay taxes ordinarily.¹⁰⁷

Marshall's doctrine of express rights strongly reinforced the importance of a corporation's charter. In his anonymous defense of the *McCulloch* decision, *A Friend to the Constitution No. V*, Marshall wrote that the chartering of a corporation is:

[T]he mere annexation of a quality to a measure, to the doing which, if the measure itself be proper, the constitution creates no objection. In illustration of this argument, reference is made to the territorial governments which are corporations.¹⁰⁸

Many different corporate bodies have charters; Marshall's concept of "corporation" was therefore a broad one. For Marshall, chartered corporations included not only private commercial corporations and eleemosynary corporations, but also cities and the United States government itself.¹⁰⁹ The Constitution itself is a form of corporate charter, based on Marshall's reasoning.¹¹⁰

E. *Marshall on the internal rules of corporations*

Marshall recognized the right to manage a corporation's own internal affairs, without outside interference, as one of the essential powers of a corporation. Marshall's involvement in a line of cases regarding corporations' official written documents reflects his respect for corporations' internal rules. He wrote in his *Dandridge* dissent that the principle of a corporation officially acting, speaking, and contracting through writing is "an essential ingredient of its very being . . ."¹¹¹ Marshall used these cases as another opportunity to emphasize the nature of corporations as artificial beings.

105. 29 U.S. (4 Pet.) 514, 563 (1830).

106. *Id.* at 562.

107. *See id.* at 564.

108. JOHN MARSHALL: WRITINGS 498 (Charles Hobson ed., 2010).

109. *See* *Dixon v. United States*, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (No. 3,934) ("The United States of America will be admitted to be a corporation.").

110. *See id.*

111. *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 103 (Marshall, C.J., dissenting).

Marshall favored accepting written documents from corporations as legally binding evidence in court, even when those documents did not bear an official corporate seal. Marshall wrote in the *Dandridge* dissent that corporations can—and can only—speak through their writing:

Can such a being speak, or act otherwise than in writing? Being destitute of the organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? . . . I can imagine no other than writing.¹¹²

Following Blackstone, Marshall's use of the term "speech" here concerns the corporation manifesting its intentions on a given matter. Some had argued that the manifestation of intentions had to be done under corporate seal in order for the court to recognize it, but Marshall allowed more leeway.¹¹³ His statement about corporations having no way to communicate except by writing was not intended to limit corporations' legally recognized speech, but to expand it. Marshall justified expansion of recognized speech for corporations as an update to the law in support of the corporations of his time.¹¹⁴ In earlier centuries, corporate seals were commonplace. But Marshall wrote that in 1827 that this practice had changed:

As writing has become more common, and seals are less distinguishable from each other, the good sense of mankind gradually receives the writing without the seal, in all the less formal and less important transactions of the corporate body.¹¹⁵

In *Dandridge*, Marshall approved of Justice Story's opinion in *Bank of Columbia v. Patterson's Administrators*,¹¹⁶ which stated that the "ancient rule" about corporate seals had to be relaxed.¹¹⁷ For Marshall, corporations themselves are "not novel-

112. *Id.* at 92. Marshall's discussion of corporations' lack of physical organs in his *Dandridge* dissent harks back to the arguments of Coke, whom Marshall explicitly cites. *Id.*

113. *Id.* at 100.

114. *Id.* at 97.

115. *Id.*

116. 11 U.S. (7 Cranch) 299 (1813).

117. *Dandridge*, 25 U.S. (12 Wheat.) at 100.

ties," but institutions of a "very ancient" date, to be protected by the court of the current day.¹¹⁸

F. Summary

Marshall discussed corporate personhood in a variety of different cases. Certain principles repeat themselves in all of his cases, regardless of factual variances. Marshall generally believed that corporations were created by the sovereign power of the government, which invests certain powers in associations to give them corporate form. In the American context, he thought responsibility fell to Congress and the state legislatures to charter corporations, for objects that would serve the public good of the American people. He also believed that the contract involved in creating the charter between the association and the legislature was not to be violated, and that therefore courts had a duty to protect corporations after their creation. Charters of corporations would contain certain implied powers incidental to all corporations, as well as expressed powers. All non-essential powers that are not expressed in a corporation's charter need not be defended by the courts. And lastly, Marshall embraced a certain amount of adaptation of the law to the changing circumstances of corporations in the current time, in order to defend them more vigorously.

My interpretation of Marshall's precedents and opinions about corporate personhood is that he followed closely the earlier common law defenses of corporations, applying them to the American context. In that application of common law to the American context, Marshall owed a great deal to Hamilton's arguments about the constitutionality of the Bank of the United States. Marshall's restrictive statements about corporate personhood did not amount to new restrictions on their rights, and were made either in contexts where he was ruling on their access to federal court or defending prerogatives they had long held, under a new Constitution.

G. The Immediate Aftermath

Immediately after Marshall's tenure on the court, several important developments occurred with regard to corporate per-

118. *Id.* at 92.

sonhood. These events inform an examination of Marshall's jurisprudence on this subject, especially given that he was tangentially involved in some of them.

In 1832, President Andrew Jackson famously vetoed the third charter of the Bank of the United States. The corporation was allowed to be privatized, and its assets were eventually liquidated. Although Marshall's Whig friends lost that political battle, his jurisprudence supporting the Bank of the United States corporation would live on as a support to other commercial corporations, and was even strengthened. A massive expansion in the number of commercial corporations occurred in the Jacksonian era as it was realized that that corporate rights would be legally protected. As Marshall scholar Francis Stites put it, the *Dartmouth College* decision in particular "rendered the corporation serviceable to the needs of a developing national economy."¹¹⁹

The Taney Court provided even stronger support for corporate rights, loosening Marshall's restrictions on corporate persons' standing in federal court. In *Louisville, Cincinnati, & Charleston Railroad Company v. Letson*,¹²⁰ Justice Wayne held that corporate persons were state citizens for purposes of establishing diversity jurisdiction, explicitly overturning Marshall's early rulings in *Bank of the United States v. Deveaux* and *Strawbridge v. Curtiss*.¹²¹ Interestingly, Justice Wayne claimed in his *Letson* opinion that in private conversations Chief Justice Marshall himself had changed his mind about the *Deveaux* restrictions on standing for corporations in federal court.¹²² Justice Wayne wrote in *Letson*:

We remark too that the cases of *Strawbridge* and *Curtiss* and *Bank* and *Deveaux* have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the Court that made them. They have been followed always most reluctantly and with dissatisfaction. By no one was the correctness of them more questioned than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the sub-

119. STITES, *supra* note 98, at 99.

120. 43 U.S. (2 How.) 497 (1844).

121. 7 U.S. (3 Cranch) 267 (1806).

122. *See id.* at 555.

ject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different.¹²³

Wayne's assertion about Marshall's ideas on this matter in *Letson* are confirmed by a private letter from Justice Story to James Kent, celebrating the 1844 decision. Justice Story wrote:

I equally rejoice, that the Supreme Court has at last come to the conclusion, that a corporation is a citizen, an artificial citizen, I agree, but still a citizen. It gets rid of a great anomaly in our jurisprudence. This was always [Justice Bushrod] Washington's opinion. I have held the same opinion for many years, and Mr. Chief Justice Marshall had, before his death, arrived at the conclusion, that our early decisions were very wrong.¹²⁴

Marshall may have considered his early opinions on the standing of corporations in federal court such as *Deveaux* to be wrong, but on the whole his jurisprudence consistently defended corporate persons' rights. His statement about corporations not being citizens in *Deveaux* was qualified by a proviso, and was followed ten years later by a strong assertion that corporations were persons in *Dartmouth College*. Marshall was a great supporter, at the end of the day, of corporate persons and their rights.

IV. CONCLUSIONS

Recent Supreme Court opinions (such as Justice Rehnquist's dissent in *Bellotti*, Justice Breyer's dissent in *Citizens United*, and Justice Ginsburg's dissent in *Hobby Lobby*) cite Marshall's restrictive statements about the nature of corporate personhood to suggest that Marshall did not intend for the Court to defend a robust set of rights for corporate persons.¹²⁵ However that interpretation is wrong, an error stemming largely from taking Marshall's restrictive statements out of context.

In his *Bellotti* dissent, Justice Rehnquist argued that corporations' political activities that had no connection to their com-

123. *Id.*

124. Letter from Joseph Story to James Kent (Aug. 31, 1844), reprinted in 2 LIFE AND LETTERS OF JOSEPH STORY 469 (William Story ed., 1851).

125. See *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2787 (2014); *Citizens United v. FEC*, 558 U.S. 310, 394 (2009); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 823 (1978).

mercial interests were not covered by First Amendment free speech protections.¹²⁶ Rehnquist cites the restrictive statement in *Dartmouth College*, that a corporation is merely an “artificial being,” as evidence to show that there is a distinction between the express and essential powers of corporations.¹²⁷ That much Chief Justice Marshall would agree with, although he would dispute Justice Rehnquist’s particular view of express powers. Justice Rehnquist wrote:

I can see no basis for concluding that the liberty of a corporation to engage in political activity with regard to matters having no material effect on its business is necessarily incidental to the purposes for which the Commonwealth [of Massachusetts] permitted these corporations to be organized or admitted within its boundaries.¹²⁸

Justice Rehnquist considered the activities in which the First National Bank of Boston was involved to be unprotected, since they were “incidental to the purpose” of their charters as banks.¹²⁹ For Chief Justice Marshall, the public purpose of a charter was the ultimate object a legislature had in mind during the charter’s initial creation; but that public purpose was not the sole determinant of which express powers the corporation was granted.¹³⁰ Some express powers could be granted by the legislature based on factors besides the ultimate purpose. Marshall would not have judged that a corporation had failed to live up to its ultimate public purpose based on a given activity in which it engages, so long as the provisions of the corporation’s charter were being followed. Justice Rehnquist’s use of Marshall got a lot right, especially in Justice Rehnquist’s willingness to admit that several other powers are incidental to corporations’ existence.¹³¹ Justice Rehnquist’s use of Marshall, however, went

126. 435 U.S. at 823.

127. See *Bellotti*, 435 U.S. at 823 (citing *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819))

128. *Id.* at 828.

129. *Id.*

130. See *Dartmouth College*, 17 U.S. (4 Wheat.) at 637–38.

131. Justice Rehnquist mentioned all of the following as essential powers of corporations: due process protection for their property, freedom of the press (if the corporation was a media corporation), the right to immortality, the right to

astray by enlisting the restrictive statement in *Dartmouth College* to suggest a limiting principle upon corporate powers that Chief Justice Marshall would not have recognized.

In his *Citizens United* dissent, Justice Stevens argued that corporations in general were not intended by Chief Justice Marshall or the Framers to be covered by First Amendment free speech protections.¹³² Justice Stevens cited the restrictive statement in *Dartmouth College*, that a corporation is merely an “artificial being,” to support the argument of law professor David Shelledy that “the legitimacy of every corporate activity was thought to rest entirely in a concession of the sovereign.”¹³³ Justice Stevens failed to mention that the concession of the sovereign occurs only at the time of chartering the corporation, and that legislatures were restricted from abridging the specific rights of corporate persons once created.

Generally, Justice Stevens painted an overly negative picture of Chief Justice Marshall and the Framers’ views of corporations. Citing the *Cyclopedia of the Law of Corporations*, Justice Stevens claimed there was a “cloud of disfavor under which corporations labored’ in the early years of this Nation.”¹³⁴ Justice Stevens pointed to the animus against corporations found in Jefferson’s 1816 “Letter to Tom Logan” as typical of the founding generation.¹³⁵ Contra Stevens, Jefferson’s animus was extremely atypical, and would have faced criticism from most of the legal community of that generation, including Marshall. Support for corporate rights, including business corporate rights, was much more common; as law professor Bruce Campbell put it:

After about 1810, there was a broad popular consensus concerning the status of business corporations. As a general rule, legislatures scrupulously respected chartered rights . . . [a]nd where there was a public outcry against an

limited liability, and freedom to engage in commercial speech in the form of advertising. See *Bellotti*, 435 U.S. at 822, 825–26.

132. See *Citizens United*, 558 U.S. at 425–32 (Stevens, J., dissenting).

133. *Id.* at 428–29 (quoting David Shelledy, *Autonomy, Debate, and Corporate Speech*, 18 HASTINGS CONST. L. Q. 541, 578 (1990–91)).

134. See *Citizens United*, 558 U.S. at 427 (Stevens, J., dissenting).

135. See *id.*

existing business corporation, the defense, predictably, was stated in terms of respect for chartered rights.¹³⁶

Chief Justice Marshall and the Framers' respect for corporate rights was completely lost on Justice Stevens in *Citizens United*. Justice Scalia's rejoinder to Justice Stevens was perhaps unsatisfying ("how came there to be so many" corporations in the early 1800s, if they were so hated?¹³⁷), but Justice Scalia's overall point on that score was correct.

In her *Hobby Lobby* dissent, Justice Ginsburg argued that a for-profit corporation which contained an explicitly religious mission statement in its charter was not covered by the free exercise of religion protections of the Religious Freedom Restoration Act.¹³⁸ Justice Ginsburg cited the restrictive statement in *Dartmouth College*, that a corporation is merely an "artificial being," as evidence that the artificial being of a corporation itself has no conscience.¹³⁹ This much Chief Justice Marshall would agree with, since he was in full agreement with Coke's view that since corporations have no souls, they could not appear in ecclesiastical courts or be excommunicated. However, Justice Ginsburg's citation of Chief Justice Marshall did nothing to show that a corporation that explicitly acknowledges a religious mission in its corporate charter should not have that religious aspect respected by the law.¹⁴⁰ Justice Ginsburg cited *Dartmouth College* an additional time to argue that Chief Justice Marshall was in favor of different types of corporations: some "for-profit," others religious, and still others eleemosynary.¹⁴¹ This sort of distinction between types of corporations is something that Chief Justice Marshall and all common law judges acknowledged, although Justice Ginsburg was wrong when she treated for-profit corporations as necessarily secular.¹⁴² Given his respect for express powers stated in charters, it seems

136. Bruce Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 KY. L. J. 697, 699–700 (1982).

137. See *Citizens United*, 558 U.S. at 386 (Scalia, J., concurring).

138. *Burwell v. Hobby Lobby*, 134 S. Ct. 2751, 2794–95 (Ginsburg, J., dissenting).

139. *Id.* at 2794.

140. See *id.*

141. See *id.* at 2795–96.

142. *Id.* One of the essential attributes of almost all charters, including charters incorporating a church, is the right to acquire property. See generally Paul Kauper & Stephen Ellis, *Religious Corporations and the Law*, 71 MICH. L. REV. 1499 (1973).

likely that Justice Marshall would have considered a for-profit corporation a religious corporation, if it had religion written into its charter.

Chief Justice Marshall's principles on corporate personhood require some imaginative reapplication in the present circumstances, because he never ruled in any cases in which for-profit corporations made pleas based on rights to political speech or the free exercise of religion. In his *Citizens United* dissent, Justice Stevens complained that Justice Scalia provided no quotations in his opinion to prove that the Framers would have granted corporate persons free speech protections.¹⁴³ Justice Stevens could not provide quotations on that specific topic either, because Chief Justice Marshall and the Framers were not presented with today's specific questions about corporations; it was a different "political universe" as Justice Stevens himself said.¹⁴⁴ In his *Dandridge* dissent, Chief Justice Marshall seemed comfortable adjusting the law to fit the changing historical circumstances in a way that supported corporations.¹⁴⁵

Some of the new historical circumstances of corporate personhood in the 21st century involve corporations explicitly created for the purpose of political speech, and religiously influenced business practices. These corporations complicate the question of whether Marshall would have considered the constitutional rights to political speech and the free exercise of religion to be implied powers of corporations or express powers of corporations. Marshall never heard a case involving congressional interference with a corporation during his tenure, so the application of the federal Bill of Rights to corporate persons never came up.¹⁴⁶ What would Marshall have said about today's corporate entities, with their new tax statuses? It is difficult to get a certain answer, but some flatly incorrect answers

143. See *Citizens United v. FEC*, 558 U.S. 310, 430–31 (2009) (Stevens, J., dissenting).

144. *Id.* at 432.

145. *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 96–97 (1827) (Marshall, C.J., dissenting).

146. Douglas Smith has argued that the Bill of Rights was nonetheless designed with corporate charters in mind. Smith interprets the Establishment Clause of the First Amendment as a restriction on the chartering of a church by the United States Congress. See Douglas Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U.L. REV. 239 (2003).

can at least be rejected. One can rule out arguments similar to that of Justice Stevens in *Citizens United* that Marshall would have been opposed to corporate persons possessing constitutional rights simply because they were corporations.¹⁴⁷ Marshall's overall stance of support for corporations throughout his tenure simply rules this possibility out. Marshall would also probably not be so quick to dismiss the religious character of some for-profit corporations, as Justice Ginsberg did in her *Hobby Lobby* dissent. Simply because a corporate person engages in a given form of activity allowed by its charter, such as making money, does not determine that it is solely devoted to making money. Following the common law tradition, Marshall considered the promotion of religion to be one of the main public purposes served by corporations. In that tradition, the ultimate reason that the law considers all corporations to be legal persons is for the promotion of the public good.

Legislatures may propose restrictions on political influence or provisions requiring birth control in health insurance plans for reasons of promoting the public good. But whenever such measures are proposed, it should be expected that the judiciary will defend the rights vested in corporate persons, given its long history of doing so going back to Chief Justice Marshall. No "magic talisman" can be found in Marshall's words that would change that history.

147. A brief submitted by a group of historians and legal scholars as *amici curiae* in *Hobby Lobby* misused Marshall's restrictive statements in a similar way. See Brief of Historians and Legal Scholars as Amici Curiae Supporting Neither Party, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (No. 13-354). They wrote: "This Court's earliest decisions addressing the status of corporations reveal little protection of corporations *qua* corporations." *Id.* at 8. The example from Marshall the historians cite, *Deveaux*, does not prove their point however, since it dealt only with jurisdictional matters and not the rights of corporations recognized by the court. That would have required an interpretation of *Dartmouth College* and the express powers doctrine.