

# Washington University Journal of Law & Policy

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Volume 6

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January 2001

## The Corporate Conception of the State and the Origins of Limited Constitutional Government

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### Recommended Citation

Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J. L. & POL'Y 1 (2001), [https://openscholarship.wustl.edu/law\\_journal\\_law\\_policy/vol6/iss1/2](https://openscholarship.wustl.edu/law_journal_law_policy/vol6/iss1/2)

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# Washington University Journal of Law & Policy

## The Corporate Conception of the State and the Origins of Limited Constitutional Government

Eric Enlow<sup>\*</sup>

The word “corporations” in its largest sense has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense “a corporation.” . . . [N]ot only each State singly, but even the *United States* may without impropriety be termed “corporations.”<sup>1</sup>

### I. INTRODUCTION

This Article discusses the corporate conception of the state in European and American legal history. The corporation as a legal idea was instrumental in the development of modern public law. In medieval and early modern history, the application of corporate law principles to the state contributed to the development of constitutionalism and to the idea of popular sovereignty.<sup>2</sup> This Article traces a small part of this history in the common law of England and in the broader European canon law. The purpose of this historical review is to provide a background for understanding similar corporate views of the state in early American legal history—views which are central to the original understanding of limited

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1. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 447 (1793) (emphasis in original).

2. BRIAN TIERNEY, *RELIGION, LAW AND THE GROWTH OF CONSTITUTIONAL THOUGHT* 82-84 (1982).

government. As Justice Iredell's quotation suggests, the corporate conception of the state was not limited to European jurisprudence, but had real currency in American jurisprudence as well.

The conception of the state as a corporation has historically been associated with the major goal of constitutionalism: the limitation of governmental power by the law.<sup>3</sup> In England, lawyers and parliamentarians classified the king as a legal corporation in order to provide principled, legal limitations to his powers. Because the king in his political capacity existed solely as the head of a legal corporation, whig lawyers argued that the king acted *ultra vires* when transgressing the incorporating law of the kingdom.<sup>4</sup>

Similarly, in the canon law, corporate law principles established limitations on papal authority. By classifying the church as a corporation, the canonists found a locus of authority that was preexisting and superior to the papal hierarchy. Canonists used this theory to explain how an act of the corporate whole might limit or override papal authority. The work of these canonists inspired the works of secular political theorists like John Locke. These theorists adopted the concepts of corporate theory and articulated analogous theories of popular rights and sovereignty to impose limitations on secular governments.<sup>5</sup>

In sum, corporate law analogies have historically provided two ways of conceiving limits on government. First, in the common law context, corporate principles expressed the purely legal nature of the king's political office and its consequential subordination to law. Second, in the canon law or popular sovereignty tradition, corporate analogies enabled political theorists to postulate a legal authority in the people themselves, independent of the government. Parts II and IV of this Article trace the history of these respective lines of corporate analogy in the common and canon law. Following each, Parts III and V examine evidence of the awareness and use of these analogies in American jurisprudence. Part VI of this Article considers

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3. See CHARLES HOWARD MCILWAIN, *CONSTITUTIONALISM ANCIENT AND MODERN* (rev. ed. 1947). "[C]onstitutionalism has one essential quality: it is a legal limitation on government . . . [T]he most lasting of the essentials of true constitutionalism still remains what it has been almost from the beginning, the limitation of government by law." *Id.* at 21-22.

4. See *infra* Part II.

5. See *infra* Part IV.

how modern constitutional interpretation and jurisprudence can use these background ideas of the corporate state.

## II. THE CORPORATION AT COMMON-LAW: ORIGINS OF THE STATE AS CORPORATION

One need not dig very deeply into Blackstone's *Commentaries* to find a connection made between the corporation and the state. Blackstone notes that there are two types of legal persons at common law—natural and artificial.<sup>6</sup> Artificial persons are referred to equivocally as “bodies politic, bodies corporate, (*corpora corporata*) or corporations . . . .”<sup>7</sup> Blackstone classifies everything from the kingdom to groups chartered “for the advancement . . . [of] commerce” as “corporations” exemplifying “political constitutions.”<sup>8</sup> Whatever the ends of the particular corporation, all are “bodies politic . . . created and devised by human laws for the purpose of society and government.”<sup>9</sup>

Blackstone also teaches that the king exemplifies both types of legal personhood. He is both a natural person as a man and yet also a corporate person, as head of the body politic of the kingdom.<sup>10</sup> Before Blackstone, Dr. John Cowell's *Interpreter*, the seventeenth-century dictionary of legal terms, stated plainly that the king “is a Corporation in himself . . . .”<sup>11</sup> However, the sixteenth-century case of *William v. Berkley* expounded the same view a century earlier:

The king has two capacities, for he has two bodies, the one whereof is a body natural . . . . [T]he other is a body politic, and the members thereof are his subjects, and he and his subjects together compose the corporation, as Southcote said, and he is incorporated with them and they with him, and he is the head and they are the members . . . .<sup>12</sup>

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6. 1 WILLIAM BLACKSTONE, COMMENTARIES \*455.

7. *Id.* (emphasis in original).

8. *Id.* at \*459.

9. *Id.* at \*455.

10. *Id.* at \*457.

11. JOHN COWELL, THE INTERPRETER OR BOOK CONTAINING THE SIGNIFICATION OF WORDS (1607) s.v. “King (Rex).”

12. *Willion v. Berkley* (1559), cited in Frederick Maitland, *The Crown as Corporation*, 17

The view expressed in *William* was not itself an innovation. Frederick Maitland, the common-law historian, believed that this doctrine emanated directly from the legal understanding of the nation in the middle ages:

Medieval thought conceived the nation as a community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed. What we should regard as the contrast between State and Corporation was hardly visible. The “commune of the realm” differed rather in size and power than in essence from the commune of the county or the commune of a borough.<sup>13</sup>

Indeed, the idea that the king is related to kingdom as the head to members predates the middle ages.<sup>14</sup> Seneca addressed Nero in the same terms: “You are the soul of the republic and the republic is your body.”<sup>15</sup> In Nero’s Rome, the political reality was that the head of the Republic absorbed all public rights and little control was left to the members. In England, however, the corporate conception of the state provided a more powerful legal method for restraining the powers of the king.

Historically, the legal treatment of the king as both a corporation of the kingdom and as a natural person exemplified the ongoing conflict in England between the republican idea that the king derived his power from the people and the monarchical doctrine that sovereign power inhered in his natural person.<sup>16</sup> In the sixteenth century, when the sovereign power of the king as a person was ascendent, courts employed great logical feats to reconcile and equate

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LAW Q. REV. 131, 134-35 (1901).

13. Maitland, *supra* note 12, at 132-33.

14. The comparison of the state to a human body originated in ancient Greece and became a medieval commonplace. See 2 SIR PAUL VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 12 (1922); ERNST KANTOROWICZ, *THE KINGS TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957). For an example of the idea in seventeenth-century England, see EDWARD FORSET, *A COMPARATIVE DISCOURSE OF THE BODIES NATURAL AND POLITIQUE* (London, 1606).

15. SENECA, *DE CLEMENTIA* 1.5.1 (“tu animus rei publicae tuae es, illa corpus tuum”).

16. Liam Seamus O’Melinn, Note, *The American Revolution and Constitutionalism in the Seventeenth-Century West Indies*, 95 COLUM. L. REV. 104, 118-19 (1995).

the king's personal rights with his corporate rights as head of the kingdom. Thus, in the *Case of the Duchy of Lancaster*, decided during Elizabeth's reign, the court struggled to maintain the identity of the king's personal and corporate capacities:

[T]he [king] has a body natural adorned and invested with the estate and dignity royal, and he has not a body natural distinct and divided by itself from the office and dignity royal, but a body natural and a body politic together indivisible, and these two bodies are incorporated in one person and make one body and not divers, that is, the body corporate in the body natural *et e contra* the body natural in the body corporate. So that the body natural by the conjunction of the body politic to it (which body politic contains the office, government and majesty royal) is magnified and by the said consolidation hath in it the body politic.<sup>17</sup>

The effort to equate the king's personal rights with his rights as officer of the corporation of the realm was an effort to identify the state as a whole with the king as an individual, excluding the Parliament, the courts, and the people. It would not be long before a similar effort succeeded in the transformation of the French monarchy into the "moi-narchy" of Louis XIV.

During the reign of Louis XIV, it was perhaps true that the state was embodied in the king in his personal capacity. By Blackstone's day, however, the effort to identify the king's personal capacity and his corporate capacity as head of the kingdom had dissipated. Thus, Blackstone taught that the king is only head of the kingdom in his corporate capacity:

The constituent parts of a parliament are the next objects of our enquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal, (who sit, together with the king, in one house) and the commons, who sit by themselves in another. And the king and these three estates, together, form

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17. *Case of the Duchy of Lancaster* (1561), cited in Maitland, *supra* note 12, at 134.

the great corporation or body politic of the kingdom, of which the king is said to be *caput, principium, et finis*.<sup>18</sup>

By maintaining the separation between the king's capacity as head of the corporation of the kingdom and his private capacity, England avoided the personal absolutism of France. For us, Blackstone proceeded to demonstrate, the king, lords, and commons possessed total sovereign power only when acting together as a single corporation.<sup>19</sup> Anticipating our Framers, Blackstone explained that the union of all powers in either the king or any of the estates "would be productive of tyranny."<sup>20</sup> "For preserving the balance of the constitution," the respective powers of legislature and executive were separated.<sup>21</sup> Only when the officers of the kingdom coordinated their powers according to the principles of the corporation could they change the law.<sup>22</sup>

Blackstone's analysis was not novel. King Henry VIII recognized this principle and he differentiated his individual power from his power as head of the corporation of the kingdom: "We be informed by our judges that we at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head and you as members are conjoined and knit together in one body politic."<sup>23</sup> In other words, the corporate principles of the kingdom limited the king's powers. When the king acted as head of the corporation of the kingdom in agreement with parliament, he acted with greater authority than he possessed merely as the chief executive officer thereof.

John Fortescue, a prominent parliamentarian and judge, expressed similar views in his fifteenth-century work *On the Merits of the Laws of England*.<sup>24</sup> Fortescue argued that a king who rules a people "politically" must be subservient to the law.<sup>25</sup> A king who rules

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18. BLACKSTONE, *supra* note 6, at \*149.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at \*150.

23. KANTOROWICZ, *supra* note 14, at 228 (quoting Henry VIII).

24. Sir John Fortescue, *On the Merits of the Laws of England*, IX-XIII, in *MEDIEVAL POLITICAL PHILOSOPHY* 518-21 (S.B. Chrimes trans., Ralph Lerner & Muhsin Mahdi eds., 1963). Sir John Fortescue, c. 1395-c. 1477, served several times as a member of Parliament and was appointed Chief Justice of the King's Bench in 1422.

25. *Id.* at 518-21.

politically cannot violate the fundamental law “of the corporate body politic” because those laws constitute that body politic, of which he is a mere officer:

[A] people is a body of men united by consent of law and by community of interest . . . . The law by which a group of men is made into a people, resembles the nerves of the body physical, for, just as the body is held together by the nerves, so this body mystical is bound together and united into one by law . . . and just as the head of the body physical is unable to change its nerves, or to deny its members the powers belonging to them and the nourishment of blood belonging to them, so a king who is head of the body politic is unable to change the laws . . . [by which a group of men is made into a people].<sup>26</sup>

Fortescue argued that the king derived his powers and functions from his position in the corporation of the kingdom. Accordingly, he could not abrogate the law which incorporates the polity without abrogating his own position.

In his *Commentaries*, Blackstone discussed another feature of the corporate conception of the king. When acting in his political capacity as an officer of the kingdom corporate:

[T]he prerogative of the crown extends not to do any injury: it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong: he can never mean to do an improper thing: in him is no folly or weakness. And therefore, if the crown should be induced to grant any franchise or privilege to a subject contrary to reason or in any wise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action . . . .<sup>27</sup>

Thus, the king in his corporate capacity was given a legal limitation. As with any entity existing in the intendment of the law, he could not

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26. *Id.*

27. BLACKSTONE, *supra* note 6, at \*239 (internal citations omitted) (emphasis in original).

violate the law. As in corporate law, when the officers of the corporation violate its charter or the laws of the corporation, the corporation then is not considered to have acted, only the officers in their private capacity.<sup>28</sup> Similarly, if the king acted illegally in his personal capacity, the law would hold that the king in his political capacity had not acted at all.

Or, as the court put it in *Willion v. Berkley*, during the reign of Henry VII:

[W]hen the Body politic of King of this Realm is conjoined to the Body natural, and one Body is made of them both, the Degree of the Body natural . . . is thereby altered, and the Effects thereof are changed by its Union with the other Body, and don't remain in their former Degree, but partake of the Effects of the Body politic . . . . The Body politic wipes away every Imperfection of the other Body . . . .<sup>29</sup>

The corporate law doctrine of *ultra vires*, at least theoretically, prevented the king's personal acts from becoming an act of his corporate or political capacity when they violated the laws which created his office. The king's corporate nature when acting in his official capacity placed an inherent limit on his capacity to violate the fundamental laws of the corporate kingdom.

As the kings of England sought to centralize their power, they naturally resisted the view of themselves as mere officers within a legal corporation. As long as the crown was a creation of the law, it was subject to legal limitation by courts and by Parliament. As long as the king was enmeshed in the corporation of the kingdom, the republican ideal of the subjection of the ruler to law and the good of the people held sway. As Blackstone observed, if the Crown is "created for the benefit of the people . . . [it] cannot be exerted to their prejudice."<sup>30</sup> By contrast, if the king ruled by divine right and personal authority, as in the Filmerian view, then the king was not a

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28. Being "invisible, and existing only in intendment and consideration of law . . . [a] corporation cannot commit treason, or felony, or other crime, in it's corporate capacity: though its members may in their distinct individual capacities." *Id.* at \*464 (internal citations omitted).

29. Plowden, *Reports* 238, quoted in KANTOROWICZ, *supra* note 14, at 11.

30. BLACKSTONE, *supra* note 6, at \*239.

creation of the law by the people, but rather the sovereign source of the law.<sup>31</sup>

For these reasons, the corporate conception of the state came to a head in the Puritan Revolution. Even the ballads of the Cavaliers made it clear that they were loyal to a personal rather than a corporate king: "Thou art our sovereign still in spite of their hate; Our zeal is to thy person, not thy state."<sup>32</sup> While on the other side, the Puritan motto elevated the legal King above the person of the king: "We fight the king to defend the King."<sup>33</sup> The Puritan war-cry was transformed into law by the Declaration of the Lords and Commons of May 27, 1642, in which Parliament declared itself to retain the "King's" corporate power even though the "king" himself stood in the field against it.<sup>34</sup>

In the events leading to Charles I's execution in the 1640s, Charles himself, in an attempt at reconciliation with Parliament, formally declared in 1642 that England was a corporation.<sup>35</sup> Charles' declaration was widely viewed as a concession of his claims to rule by personal right.<sup>36</sup> Lawyer and parliamentarian William Prynne explained Charles' pronouncement: "*Kings, Lords, and Commons*, by the Common Law, make up but one intire *Corporation* . . ."<sup>37</sup> Hence,

31. Sir Robert Filmer, a prominent royalist and Locke's chosen adversary in the first of his *Two Treatises*, argued for the personal nature of royal authority by equating kingly and paternal authority. Since Adam had been a king by dint of his literally primary paternal right and the king's right descended from this Adamic right, the notion of original popular sovereignty was impossible and no place was left "for such imaginary pactions between Kings and their people as many dream of." *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450-1700*, 358-60 (J.H. Burns & Mark Goldie eds., 1991).

32. The mournful ballad's name is "Upon His Majesty's Coming to Holmby." After his surrender to the English Commissioners by the Scotch, King Charles was conveyed to Holmby House, Northamptonshire, on February 16, 1647.

33. KANTOROWICZ, *supra* note 14, at 18.

34. The Declaration read:

it is acknowledged that the king is the fountain of justice and protection; but the acts of justice and protection are not exercised by his own person, nor depend upon his pleasure, but by his courts and by his ministers who must do their duty therein though the king in his own Person should forbid them. And therefore, if judgement should be given by them against the king's will and personal command, yet are they the king's judgements.

SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 488 (Carl Stephenson & Frederick George Marcham eds., 1937).

35. TIERNEY, *supra* note 2, at 82.

36. *Id.*

37. WILLIAM PRYNNE, *THE SOVERAIGNE POWER OF PARLIAMENTS AND KINGDOMS* I, 41

as Prynne argued, although the king was greater than any individual, he was less than the two houses of commons and lords: “[they are superior to the king] as a Generall Councill is above the Pope, the Chapter above the Bishop, the University above the Chancellor.”<sup>38</sup> Prynne’s corporate thinking was realized in its severest form at Charles’ trial for high treason and the replacement of his Kingdom with a Commonwealth.

### III. THE UNITED STATES AS CORPORATION: A CONTINUATION OF THE COMMON-LAW TRADITION

Prynne’s corporate conception of the government is repeated almost verbatim one-hundred and fifty years later in the American case *Respublica v. Cornelius Sweers*.<sup>39</sup> The Court heard the appeal of a clerk, Sweers, who had been convicted of defrauding the American army during the revolutionary war.<sup>40</sup> Sweers argued that it was impossible for him to have defrauded the government because during the Revolutionary War the government was not yet a corporation and so lacked any legal personality.<sup>41</sup> In rejecting this argument, the Court reasoned that “[f]rom the moment of their association, the United States necessarily became a body corporate.”<sup>42</sup> To explain the necessity of this conclusion, the Court analogized the United States to the English government of “the king, lords, and commons” which were “certainly a body corporate.”<sup>43</sup> The Justices were not only familiar with the corporate conception of the state discussed above but thought that it would apply “necessarily” to any new American government.

The corporate conception of the United States also played a role at the Constitutional Convention in 1787. Madison recorded an interesting submission to the Committee of Detail which suggests a close link between the corporate conception of the state and the legal

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& IV, 153 (London, 1643).

38. *Id.* at IV, 153.

39. 1 U.S. (1 Dall.) 41 (1779).

40. *Id.* at 41-44.

41. *Id.* at 44.

42. *Id.* (alterations and emphasis in original).

43. *Id.*

limitation of government.<sup>44</sup> The proposal, from Mr. Pinckney, suggests a whole list of protections from governmental abuse to be included in the Constitution: provisions for the writ of Habeas Corpus, liberty of the press, limitations on a standing army, prohibitions on the quartering of soldiers, prohibitions on any individual's holding of a plurality of offices, and prohibitions on religious tests.<sup>45</sup> Among these protections, Pinckney includes the proposition that "[t]he United States shall be forever considered as one body corporate and politic in law"<sup>46</sup> as if this provision would likewise protect the liberties of the people. The combination of these proposals may be merely coincidental. Assuming, however, that the propositions bore a common end, Pinckney's proposition suggests a strong connection in the delegate's mind between the corporate conception of the state and the protections of liberty which he proposed.

More evidence of this conception can be found in the debates of the Federal Convention. Utilizing a corporate conception of the government, Madison argued several times in these debates that the term "sovereign" could not truly be applied to any government of limited powers:

We are vague in our language . . . There is a gradation from a simple corporation for limited and specified objects, such as an incorporation of a number of Mechanics up to a full sovereignty . . . whose Powers are not limited. The last only are truly sovereign. The States, which have not such full power, . . . are political associations or corporations, possessing certain powers—by these they may make some, but not all, Laws.<sup>47</sup>

Madison argued that the laws passed by the legislature of a limited government stood in the same relation to that government's constitution as a "corporation's bye laws [sic] to the supreme law

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44. JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 558-59 (E.H. Scott ed., special ed. 1898).

45. *Id.* at 559.

46. *Id.*

47. RUFUS KING, 1 NOTES OF RUFUS KING IN THE FEDERAL CONVENTION OF JULY 1787, THE LIFE AND CORRESPONDENCE OF RUFUS KING 610 (N.Y. 1894).

within a State.”<sup>48</sup> Madison explained that the term ‘sovereign’ was applicable only to “the largest empire[s].”<sup>49</sup> Madison returned to that point in another speech, again emphasizing that limited governments are “only great corporations, having the power of making by-laws.”<sup>50</sup> Rufus King expressed the same view that limited governments are properly considered “corporations . . . and not sovereigns.”<sup>51</sup>

Perhaps the most considered treatment of the corporate conception of the state in early American jurisprudence can be found in the Supreme Court’s treatment of state sovereign immunity in *Chisholm v. Georgia*.<sup>52</sup> Five years after the debates of the federal convention, the Court encountered a “great cause”—the issue of state sovereign immunity.<sup>53</sup> Perhaps surprisingly to the modern mind, four of the five Justices deciding the case found corporate law principles relevant to the issue of sovereign immunity. Indeed, Justice Iredell, having considered the common law rules of sovereign immunity directly, noted that besides these “[t]here is no other part of the common law . . . which can by any person be pretended in any manner to apply to this case, but that which concerns corporations.”<sup>54</sup>

Justice Iredell explained the relevance of corporate law to understanding the nature of the states:

The word “corporations,” in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate) whether its power be restricted or transcendent, is in this sense “a corporation.” The *King*, accordingly, in *England* is called a corporation . . . So also, by a very respectable author . . . is the Parliament itself. In this

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48. MADISON, *supra* note 44, at 297. The comparison of the subordination of legislation to the constitution and the subordination of a corporation’s by-laws to the laws of the state may not be immediately clear. However, the principle that the private statutes of a corporation cannot conflict with the laws of the state was a rule set forth in the Twelve Tables of Ancient Rome: “*Sodales, legem quam volent, dum nequid ex publica lege corrumpant, sibi ferunt.*” JAMES WILSON, II THE WORKS OF JAMES WILSON 270 (James DeWitt Andrews ed., 1896) (discussing the principles at length).

49. *Id.*

50. ROBERT YATES, SECRET PROCEEDINGS OF THE FEDERAL CONVENTION 117 (1836).

51. KING, *supra* note 47, at 602.

52. 2 U.S. (2 Dall.) 419 (1793).

53. *Id.* at 429.

54. *Id.* at 446.

extensive sense, not only each State singly, but even the *United States* may without impropriety be termed “corporations.”<sup>55</sup>

Additionally, Justice Iredell pointed out that neither the United States nor the individual states are “subordinate corporations.”<sup>56</sup> Rather, both emerged equally from “the same pure and sacred source,” the act of the people.<sup>57</sup> Justice Iredell considered that all corporations are totally dependent on their creating authority from which they draw their existence and by whose will their charter may be revoked or amended.<sup>58</sup> Likewise, because corporations are entities of law, their acts are subject to revision by a court of law.<sup>59</sup> Accordingly, while corporate law properly described the constitutionally based dependence of government on the will of the people, it did not describe the relation between states and the federal government.<sup>60</sup>

Justice James Wilson also analyzed the issue of sovereign immunity in terms of corporate law. Speaking of states generally, Justice Wilson explained their nature in corporate terms:

By a State I mean, a complete body of free persons united together . . . [forming] an *artificial* person. It has its affairs and its interests: It has its rules: It has its rights: And it has its obligations. It may acquire property distinct from that of its members. It may incur debts to be discharged out of the public stock, not out of the private fortunes of individuals.<sup>61</sup>

Three years before he wrote his opinion in *Chisholm*, Justice Wilson had explained this position in public lectures on law at the College of Philadelphia:

[I]n a state, smaller societies may be formed by a part of its members: that these smaller societies, like states, are deemed to be moral persons . . . . To these societies the name of

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55. *Id.* at 447 (emphasis in original) (internal citations omitted).

56. *Id.* at 447-48.

57. *Chisholm*, 2 U.S. (2 Dall.) at 448.

58. *Id.*

59. *Id.*

60. *See id.*

61. *Id.* at 455 (emphasis in original).

corporations is generally appropriated, though somewhat improperly; for that the term is strictly applicable to supreme as well as to inferior bodies politic.<sup>62</sup>

Justice Wilson likewise was familiar with the view that “the *King* and these three Estates together form the great corporation or body politic of the *Kingdom*.”<sup>63</sup> Like Justice Iredell, he insisted that the government of the United States, unlike the King-in-Parliament, did not form the great corporation of the nation; the people did. In relation to the “body of the people,” both the United States and the individual states remained subordinate corporations.<sup>64</sup>

Justice Cushing likewise relied upon corporate theory to explain why suits could be allowed against states. Justice Cushing addressed arguments that allowing suits against the states would be to treat them as mere corporations and hence to rob them of their sovereign powers.<sup>65</sup> Cushing dismissed the notion that corporate status somehow degraded the states: “As to corporations, all States whatever are corporations or bodies politic. The only question is, what are their powers? As to individual States and the *United States*, the Constitution marks the boundary of powers.”<sup>66</sup>

In the light of popular sovereignty, all states could be considered as mere corporations. This view transformed the sovereign immunity issue from a question of the nature of states to a positive question of which rights the people had delegated to which corporations. Because of popular sovereignty, Chief Justice Jay considered the question of the suability of a state or a corporation to be an identical issue.<sup>67</sup> Because all power was delegated from the people, all corporations, whether called states or not, were equally susceptible by nature to suit if the people had delegated jurisdiction for such suits.<sup>68</sup> That is, the consideration of the state as a corporation transformed the question from one about the nature of statehood into a legal, positivist question

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62. WILSON, *supra* note 48, at 265.

63. *Chisolm*, 2 U.S. (2 Dall.) at 462 (emphasis in original).

64. *Id.* at 456.

65. *Id.* at 468.

66. *Id.* (emphasis in original).

67. *Id.* at 472.

68. *Id.*

about the construction of the Constitution.

These views were echoed in later cases. In 1823 Chief Justice Marshall noted: “The United States is a government, and, consequently, a body politic and corporate, capable of attaining the objects for which it was created . . . . This great corporation was ordained and established by the American people . . . . Its powers are unquestionably limited . . . .”<sup>69</sup>

In 1850 the Supreme Court noted that the general capacities and powers of corporations, like making contracts and holding property, had to be attributed to the United States because “[e]very sovereign State is of necessity a body politic, or artificial person . . . .”<sup>70</sup> In 1885, the Court noted that because a state is a corporation—“an ideal person, intangible, invisible, immutable”—it followed that a state can “act only by law, whatever it does say and do must be lawful.”<sup>71</sup> Indeed, the court called this corporate conception of the state “essential to the idea of constitutional government.”<sup>72</sup> The court reasoned that because a “state is a political corporate body, [it] can act only through agents, and can command only by laws.”<sup>73</sup> The corporate nature of the state rendered it an entity of law and, hence, subject to the law.

One reason the corporate conception of the state may have been so attractive is the common law principle that corporations are the recipients of delegated powers of the sovereign. This comports well with the Federalist idea that the people delegated the powers of the individual states to the United States. For example, Kent in his *Commentaries* defined the common law corporation, both private and municipal, precisely as a political association to which the sovereign has delegated a part of its power.<sup>74</sup>

In American history, the idea that corporations received a delegation of part of the sovereign’s authority was politically important and well known. Several of the American colonies were

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69. *United States v. Maurice*, 26 F. Cas. 1211 (C.C.D. Va. 1823) (Marshall, C.J.).

70. *Cotton v. United States*, 52 U.S. (11 How.) 229, 231 (1850).

71. *Poindexter v. Greenhow*, 114 U.S. 270, 290 (1884).

72. *Id.* at 291.

73. *Id.* at 288.

74. JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 267 (New York, O. Halstad, 2d ed. 1832).

established as corporations. Accordingly, the colonists' legal arguments against Parliamentary jurisdiction over internal colonial matters rested on the belief that Parliament's sovereign authority over these matters had been delegated to the colonies in their corporate charters.<sup>75</sup>

This understanding of the corporation remained strong in America after its independence. Popular opposition to corporations in the first fifty years of American history rested largely on the principle that "whatever power is given to a corporation, is just so much power taken from the State, in derogation of the original power of the mass of the community."<sup>76</sup> Indeed, the idea that corporations exercised sovereign powers was so familiar to the American people that newspaper editorials opposed the incorporation of the national bank as threatening "that solecism in politics, *a government within a government*."<sup>77</sup> Public officials similarly warned their constituents that "government, unsparingly and with an unguarded hand, shall multiply corporations . . . until only the very shadow of sovereignty remains."<sup>78</sup> The notion that all corporations were vested with delegated sovereign rights was taken seriously, even in popular circles.

Thinking along these lines, some nineteenth-century legal treatises associated American federalism not only with the constitutionally protected rights of the individual states, but with all corporations. As the jurist Francis Lieber explained, "[a] corporation is a political or civil institution . . . conducted according to the laws of its constitution."<sup>79</sup> He further explained that "[a]ll the American governments are corporations created by charters, viz. their constitutions . . ."<sup>80</sup> Subordinate corporations—those created by the individual states—were viewed as an extension of American federalism into day-to-day life so that "[t]he whole political system is

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75. See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 189-91, 201, 221 (1992).

76. Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q., 3d Series 51, 68 (1993).

77. *Id.* (emphasis in original).

78. *Id.* at 68-69 (internal citations omitted).

79. FRANCIS LIEBER, 3 *ENCYCLOPAEDIA AMERICANA* 547 (1830).

80. *Id.*

made up of a concatenation of various corporations, political, civil, religious, social and economical,” in which the nation itself was a “great corporation, comprehending all others.”<sup>81</sup>

Similarly, in a nineteenth-century American treatise on private corporations, the authors, having already emphasized the common nature of state and corporation, discussed the historical role of corporations as antecedents of American federalism:

Nations, or States, are denominated by publicists bodies politic; and are said to have their affairs and interests, and to deliberate and resolve in common. They thus become as moral persons, having an understanding and will peculiar to themselves, and are susceptible of obligations and laws. In this extensive sense, the *United States* may be termed a corporation; they are a collective invisible body, which can act and be seen only in the acts of those who administer the affairs of the government . . . . It may be so said of each State singly. So the king of England is a corporation; and so is parliament.<sup>82</sup>

Similarly, in another nineteenth-century treatise, the author notes that “[corporations] are simply the administrative form of the fundamental American idea of government, viz., that the *people are the source of all political power* and have the right to exercise it.”<sup>83</sup> In the author’s view, corporations allowed the delegation of governmental authority away from the center to ever-smaller political communities, more adapted to self-rule and more protective of the people’s liberty.<sup>84</sup>

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81. *Id.*

82. JOSEPH K. ANGELL & SAMUAL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 10-11 (Boston, Little, Brown & Co., 5th ed. 1855) (internal citations omitted).

83. JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 25 (5th ed. 1911) (emphasis in original).

84. *Id.* at 23-25.

#### IV. THE SOVEREIGNTY OF THE PEOPLE: A SECOND STRAND OF CORPORATE THEORY

As we have discussed, the legal conception of the state as a corporation was not only present at common law but continued into early American jurisprudence. The application of corporate theory to the state occurred not just in the common law, but also in the wider canon law governing the Roman Catholic Church in Europe. An understanding of the canon laws application of corporate law to politics is ultimately necessary to make sense of the relationship between the corporation and state in American jurisprudence. The idea of popular sovereignty first emerged from canon law.<sup>85</sup>

By the twelfth century, the Roman Catholic church was conceived in legal terms as a corporation by European civilians and canonists.<sup>86</sup> As a matter of canon law, all Christians were incorporated into the one Body of Christ. During the twelfth century, it became usual to describe the Church itself as a “mystical body.”<sup>87</sup> This corporation was considered a real person: a *substantia*, a *species*, a *natura*, and possessing its own instinctum.<sup>88</sup> As early as 1250, civilians, secular lawyers of the civil law tradition, borrowed this terminology from the canonist to describe the state as a “*corpus republicae mysticum*, ‘mystical body of the commonweal.’”<sup>89</sup> By the fourteenth century, as we have discussed above, English judges were already applying these borrowed ideas of canon law in England, laying the groundwork for

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85. JOSEPH P. CANNING, *THE CORPORATION IN THE THOUGHT OF THE ITALIAN JURISTS, HISTORY OF POLITICAL THOUGHT* 9, 31 (1980). The medieval canonists:

combined the ultimately Aristotelian conception of the people composed of natural, political men, with juristic corporational concepts, thus adding juristic refinement to the idea of the people as a political entity. The result . . . produced a conception of the city populis that had not been enunciated before, namely that it is a collection of natural, political men into a unitary entity which is an abstract and immortal legal person . . . both self-governing and territorial.

*Id.*

86. Anton-Hermann Chroust, *The Corporate Idea and the Body Politic in the Middle Ages*, in 9 *THE REVIEW OF POLITICS* 423-52 (1947); MICHAEL WILKS, *THE PROBLEM OF SOVEREIGNTY IN THE LATER MIDDLE AGES* 19 (1963).

87. See Chroust, *supra* note 86; WILKS, *supra* note 86, at 19.

88. ANTONY BLACK, *COUNCIL AND COMMUNE: THE CONCILIAR MOVEMENT AND THE FIFTEENTH-CENTURY HERITAGE* 58 (1979).

89. KANTOROWICZ, *supra* note 14, at 208.

the conversion of the king's personal right of dominion into a right delegated to an officer of the corporation of the realm.

For the contemporary ear, the analogy made by the English judges between the legal nature of the state and the legal nature of the Church sounds strained. In point of fact, the Church was legally more state-like than the states of that era. The political alliances of the feudal middle ages were personal; the medieval lord governed through his personal feudal attachments.<sup>90</sup> Meanwhile, the Church had already developed the idea of sovereignty: an idea of a legal community governed by a public office. As John Neville Figgis, the great historian of constitutionalism, observed:

[I]n the Middle Ages the omnipotent territorial State, treated as a person and the coequal of other states, was non-existent . . . . It has been said that there is no Austinian [absolute] sovereign in the medieval State. This is true of the individual kingdoms. This is not true of the Church.<sup>91</sup>

The development of the modern state depended on learning from the Church.

[I]n the Latin West, the Church had the first organized hierarchy of courts with positive written laws, standardized pleadings, and regular channels of appeal . . . the first rationalized system of tax collection and disbursement . . . it was inevitable that the medieval Church should . . . recapitulate in advance the development of the modern state.<sup>92</sup>

This recapitulation occurred. The Church first developed theories of the absolute sovereignty of the Pope in matters of Church polity. Then, discovering the difficulties of a legally unrestrained "monarch," Church canonists developed a theory of constitutionalism.<sup>93</sup> In their efforts to formulate legal limits on papal sovereignty, they developed Roman principles of corporate law into a

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90. Garret Mattingly, *Introduction* to JOHN NEVILLE FIGGIS, *POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625* xiii-xiv (Princeton, 1957).

91. JOHN NEVILLE FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625*, 14-15, 17 (Princeton, 1957).

92. MATTINGLY, *supra* note 90, at xii-xiv.

93. *See infra* notes 95-101.

new vision of the papacy as a mere legal office of the Church's body politic.<sup>94</sup>

The rise of popular sovereignty as a political doctrine was prefigured and informed by the events of the Conciliar movement in the fourteenth and fifteenth centuries. The Conciliar movement attempted to use general councils to limit papal control over the Church.<sup>95</sup> The movement responded both to the growing centralization of papal authority and to the abuses of power by the papacy in exile in Avignon.<sup>96</sup> The conciliarists provided the legal framework necessary to articulate a fundamental idea of popular sovereignty based on the principle that the Church was a corporation. Prefiguring Prynne's arguments against Charles I, conciliarists argued that the corporate body of the Church was superior to its head officer because the corporate body is the source of the officer's power.<sup>97</sup>

Legal arguments about the rights of the councils qua representatives of the corporate body of Christians, versus the Pope, began with two principles from Justinian's *Digest*: "Laws themselves are binding because the people accept them," and "[w]hat has pleased the Prince has the force of law since the people conferred all its imperium and power on him."<sup>98</sup> The conciliarist jurists argued that these legal principles could only be reconciled if the people conceded power without transferring it and, consequently, fundamentally alienated it from themselves.<sup>99</sup> In any other case, only one of the propositions could be true. If the people had truly alienated sovereignty from themselves, then laws promulgated by the ruler, political or religious, were not contingent on the people's acceptance of them. However, if the people merely delegated the authority to the

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94. See *infra* notes 95-101.

95. THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350-C. 1450, 573 (J.H. Burns ed., 1988).

96. *Id.*

97. *Id.* at 576.

98. THE DIGESTS OF JUSTINIAN 1.3.32, 1.4.1 (Theodore Mommsen et al. eds., 1985).

99. Many of the conciliarists arguments are assembled in RW. & A.J. CARLYLE, II POLITICAL THEORY: POLITICAL THEORY OF THE ROMAN LAWYERS AND THE CANONISTS 174-77 (1909). The canonists carried on a parallel debate all through the latter middle ages, usually starting from a dictum of Gratian at *Dist.* 4.p.c.3: "Laws are instituted when they are promulgated; they are confirmed when they are approved by the practice of those using them."

ruler, then it would still be true that the ruler or government issued laws at its will while recognizing the people's right to revoke or limit that power.

Still, the conciliarists faced a contradiction: "How, as all admitted, could the Pope be set above the church as the governor of Her and yet be subordinate to the people whom he ruled as head?" Corporate theory provided the answer. The Church—the people—command as a corporation; they obey the Pope as individuals.<sup>100</sup> The jurists noted that the ruler—the government—of a corporation "does not have more power than the whole people but than each individual of the people."<sup>101</sup> Thus, the conciliarists were able to reconcile the Pope's claim to supremacy over any individual within the Church and yet recognize the rights of the individuals of the Church. These individuals, in their character as a corporate entity, disciplined the Pope and passed fundamental canon laws that he could not disobey.

During the Great Schism, when there were three contending popes, specifying the relation between the authority of the Church—corporate and its head officer, the Pope, became an essential legal matter for the Church.<sup>102</sup> In 1408, Cardinal Zabarella held that, like any corporation, "the [chief officer] has plenitude of power not as an individual but as head of the corporation so that the power is in the corporate whole as its foundation and in the pope as the principal minister through whom it is exercised."<sup>103</sup> In 1415, the Council of Constance claimed supreme authority to represent the corporate body of Christians.<sup>104</sup> The council removed all three contending popes and elected a new one. Similar views were expressed at the Council of Basle in the 1430s: "the power of the people is greater than the power of their rulers . . . because they could not alienate jurisdiction from themselves."<sup>105</sup>

During roughly the same period, Italian civilian jurists formulated the legal doctrines of the independent city-republics of northern and

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100. A.J. BLACK, *MONARCHY AND COMMUNITY: POLITICAL IDEAS IN THE LATER CONCILIAR CONTROVERSEY* 10 (1970).

101. AZO, *LECTURA AD COD.* 8.53.2.

102. BLACK, *supra* note 100, at 15.

103. *Id.* at 18.

104. *Id.* at 20.

105. Canning, *supra* note 85, at 30.

central Italy. The theory of a sovereign, self-governing people emerged there on the foundation of canon laws developed in the Conciliarist movement.<sup>106</sup> Following the canonists' description of the Church as the *corpus mysticum Dei*, the commentator Baldus, for example, described the people as a *corpus mysticum*.<sup>107</sup> Moreover, Baldus argued that the nature of the corporation of the people was not derived from or artificially created by the state. In his account, there is no externally appointed administrator of the people's rights. Rather, the corporation of the people came into being through the election of representatives who, in assembly, created the governing council of the city. This election transformed individuals into a corporate legal person by unifying the will and mind of the people. Baldus also made clear that officers who were elected to the council of the people derived their authority from the will of the people, to whom they are *inferiores*.<sup>108</sup>

As our earlier discussion of their role in England showed, the ideas of the Conciliarists and canonists like Baldus did not fade into obscurity. They expressed theories of a limited monarchy and popular rights in ways that enabled them to become classical. Additionally, through the universities, their teachings passed to civilian jurists who were commonly educated both in canon and common law. Their elaboration of corporate law inspired a shift in the understanding of government from principles of personal lordship to principles of legal association. When the canonists began to write, the principles of republican government and popular consent as the sources of governmental legitimacy were virtually unknown. Divine right, the right of conquest, or the right of a Filmerian patriarchy grounded the king's right to rule. By the time of the American Revolutionary War, respected thinkers such as John Locke had popularized the canonists' theory of popular sovereignty to the point where it became a common maxim of our Framers.<sup>109</sup>

These modern theorists continued to use the logic of corporate law

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106. *Id.*

107. *Id.* at 13.

108. *Id.* at 30.

109. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, 330 (1969).

to explain the sovereignty of the people. Locke, for example, in two critical passages used analogies of incorporation to explain the origin of government:

When any number of men have so consented to make one community . . . *they are thereby presently incorporated, and make one body politic*, wherein the majority have a right to act and conclude the rest. For when any number of men have, by the consent of every individual, made a community, they have thereby made that community one body with a power to act as one body, which is only by the will and determination of the majority.<sup>110</sup>

. . . That which makes the community, and brings men out of the loose state of nature, into one politic society, is the agreement which every one has with the rest *to incorporate and act as one body, and so be one distinct commonwealth*.<sup>111</sup>

This “agreement . . . to incorporate” created a corporate body with rights of self-determination. The corporation of the people, in turn, acted to create government; that is, no government was required to create this corporation, but rather, the people exercised their inherent right to incorporate themselves. These corporate ideas, borrowed from canon law, are the foundation of the American theory of popular sovereignty to which this Article now turns.

#### V. THE CORPORATION OF THE PEOPLE IN AMERICA: A CONTINUATION OF THE CANON LAW TRADITION

The view that the people are separate, superior, and antecedent to government requires that they be self-incorporating. This idea was present in America before the American Revolution. The Pilgrims on board the Mayflower announced that even without a state to incorporate them they could, in the presence of God and one another, covenant and combine to form a “civil body politic.”<sup>112</sup> Comparing

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110. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 52 (ch. vii §§ 95, 96) (C.B. Macpherson ed., Hackett Publishing Co. 1980) (emphasis added).

111. *Id.* at 107 (ch. xix § 211) (emphasis added).

112. H. Hoepfl & M. Thompson, *The History of Compact as a Motif in Political Thought*, 84 AM. HIST. REV. 919, 938 (1979).

church and state, the Pilgrims reasoned that just as they had the right to form a congregation, they also had the right to form a state: “A visible Church under the Gospel [is] as spiritual body politike . . . [formed] by a free mutuall consent of Believers joyning and covenanting to live as members of a society . . . by such consent . . . all Civill perfect Corporations [i.e. states] did first beginne.”<sup>113</sup>

Following the Pilgrims’ example, in 1647 the colonists of Rhode Island erected themselves into a corporation by their own act: “Wee do jointly agree to incorporate ourselves and soe to remain a Body politicke . . . and do declare to own ourselves and one another to be Members of the same body, and to have right to the Freedom and priviliges thereof.”<sup>114</sup> Thus, the precedent was established that the corporation of the people is created not by act of the state but by the self-acting power of properly assembled individuals giving themselves a corporate capacity. Likewise, after the American Revolution, the leaders of New Hampshire urged all towns “forthwith [to] incorporate themselves” so that in the absence of Crown authority “*the people*” might not slip into anarchy but “*ma[k]e a stand at the first legal stage, viz. their town incorporations.*”<sup>115</sup>

A decisive moment in American constitutionalism came when the former colonists decided that the people, acting through their own initiative by convention, outside of an established legislature, could form “a body corporate and politic in name and fact.”<sup>116</sup> The contract principles based on an agreement between ruler and those ruled served the English Constitution in Magna Charta but could not provide a foundation for the creation of the “American People.”<sup>117</sup> No government yet existed. As Thomas Paine stated: “To suppose that any government can be a party in a compact with the whole people, is to suppose it to have existence before it can have a right to exist.”<sup>118</sup> Instead, the people had to incorporate before they could take steps towards forming the new government.

Accordingly, early American minds fastened on the corporatist

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113. *Id.*

114. SAMUEL GREENE ARNOLD, HISTORY OF RHODE ISLAND 26 (1894).

115. WOOD, *supra* note 109, at 288.

116. *Id.*

117. *Id.*

118. THOMAS PAINE, RIGHTS OF MAN 210 (Henry Collins ed., 1969).

ideas of John Locke, who advocated replacing a contract between ruler and those ruled with the idea of the people as a self-incorporating entity.<sup>119</sup> This self-formation of the people as a corporation “seemed to make sense of their rapidly developing idea of a constitution as a fundamental law designed by the people to be separate from and controlling of all the institutions of government.”<sup>120</sup> Moving the fundamental source of authority from the government to the people allowed the development of a law that would be superior to government and thus capable of limiting government.

Popular sovereignty, the idea of a self-incorporating and pre-existing group that itself created the government, reflects one influence of corporate theory on the United States Constitution. However, the United States of America is definitively not the American people. Indeed, as Hamilton put it, “[t]he true distinction [of the American government] . . . lies *in the total exclusion of the people, in their collective capacity, from any share*” in the government.<sup>121</sup> Hamilton obviously did not mean that the Constitution excluded popular participation in elections, because the Constitution requires the election of representatives by the people.<sup>122</sup> Rather, Hamilton meant that the entity, the United States, is not identified with the people. Instead, the United States is constituted as an inferior and artificial body, fully separate, distinct, and derivative from the corporation of the People.

Unlike England, where the corporation of the king-in-parliament came to be equated with the people, the American people stand above and separate from the corporation which is the government. As John Taylor wrote in 1814: in the English Constitution, “the nation and the government is considered as one, and the passive obedience denied to the king [ended up] conceded to the government . . . ; whereas, by ours, the people and the government are considered as distinct.”<sup>123</sup> In Taylor’s analysis, the English Constitution did not fail because it

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119. WOOD, *supra* note 109, at 283.

120. *Id.*

121. THE FEDERALIST No. 63 (Alexander Hamilton) (emphasis in original).

122. U.S. CONST. art. I, § 2, cl. 1.

123. WOOD, *supra* note 109, at 288.

lacked the principle of representative government. Quite the opposite; the doctrine of the unlimitable power of the government had emerged because the English government was itself treated as the representative equivalent of all society. Therefore, its downfall was not due to the English rejection of popular sovereignty, but to an inability to conceive the government as separate from the people.

The Framers of the United States Constitution rejected the view that the corporation of the government encompasses or represents the corporation of the people. As Thomas Tudor Tucker wrote in 1784: "It is a vain and weak argument . . . that, the legislature being the representatives of the people, the act of the former is therefore always to be considered as the act of the latter. They are the representatives of the people for certain purposes only, not to all intents and purposes whatever."<sup>124</sup> Rather, Tucker concluded that the corporation of the people encompassed the corporation of the government: "who have we in America but the people? Members of congress, of assemblies, or councils are still a part of the people. Their honours do not take them out of the aggregate body."<sup>125</sup>

The particular powers of the United States Congress were not derived from its identity with the people, like Parliament's powers, but delegated according to its charter from the people. Thus, America transformed the doctrine of popular sovereignty from one that delivered omnipotence to the government to one that restrained the government.

## VI. CONCLUSION

The aim of this Article is to provide a historical background within which a corporate conception of the United States could be considered. There are two separate dimensions to this history and the difference between them is important. Common law conceives of the government as a legal corporation and places it thereby firmly under the law. The canon law, by contrast, conceives of the people as a self-incorporating body and, thereby, treats the people as an entity

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124. *Id.* at 384.

125. *Id.* at 388.

antecedent and superior to government. These two corporate conceptions combine in the United States Constitution to create a government twice limited, once by its own merely legal nature and once by the people's prior existence.

The combination of both in American constitutional history is problematic. As a matter of logic, if the corporation of the people can be conceived of as natural and self-creating, then why suppose that the corporation of the government is any less so? On the other hand, the fact that the Framers treated the people as a natural corporation and the government as an artificial legal corporation is surely significant, even if not a logical necessity. In fact, precisely because the differentiation is not a requirement of logic, it emphasizes the deliberate nature of the Framers' choice. To maintain the Framers' vision, the government's artificial legal existence must always be distinguished from the people's real and natural existence.

As a principle of law, it is not obvious what direct application the consideration of the United States government as a legal corporation might have. Although the Justices in *Chisholm* found it workable, a corporate view of the government is a better principle of interpretation than a source of substantive law. A principled application of constitutional law is impossible without a background understanding of the legal nature of the government which the Constitution creates. If constitutional interpretation is to be principled, one of the core principles upon which it is based should be derived from the nature of government which the Constitution creates. In this case, the conception of the government as a legal corporation emphasizes the susceptibility of the government to legal limitation. This ground alone recommends it to any society which values the rule of law.

Similarly, the conception of the people as a corporation renders a great service if only in reminding us that the government is not ultimate, natural, or instituted for any purpose beyond the needs of the people. The corporate conception of the people also offers a foundation for working out a less individualistic account of the rights reserved to the people. The corporate conception of the people suggests that not all rights protected from government interference need be vested in individuals. The peoples, both of the United States and of the individual states, as corporations, constitute alternative

bearers of rights whose legal claims should be protected as well.

Most broadly, the corporate conceptions of government and people provides an alternative to the dichotomous view of state and individual. The important role which corporate theory played in the development of constitutionalism warns against trying to understand our polity solely in terms of the individual and the sovereign. In place of the sovereign's power, corporate theory offers an idea of a legal association. In place of individual isolation, the corporation offers an additional group existence which mediates between the individual and the government. The reduction of the people to a mere aggregation of individuals, like the elevation of the government to a position of extra-legal sovereignty, tears at the corporate conceptions which are basic to our constitutional tradition.





