Is the Constitution a Power of Attorney or a Corporate Charter? A Commentary on *"A Great Power of Attorney": Understanding the Fiduciary Constitution* by Gary Lawson and Guy Seidman

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ABSTRACT

In their stimulating book, "A Great Power of Attorney": Understanding the Fiduciary Constitution, Professors Gary Lawson and Guy Seidman argue that: (1) the Constitution of the United States is a power of attorney, or at least usefully analogized to a power of attorney; (2) although the United States of America is a legal corporation, the Constitution of the United States is not a corporate charter; and (3) the Necessary and Proper Clause is best understood as a narrow incidental powers clause. In this commentary, I dispute all three claims and explain why I believe Lawson and Seidman are mistaken.

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INTRODUCTION

"A Great Power of Attorney": Understanding the Fiduciary Constitution by Professors Gary Lawson and Guy Seidman is an important and stimulating book.[1] There are many impressive features of it, and many ideas with which I agree. In this commentary, I will not "accentuate the positive" but will focus instead on some basic disagreements I have with several of the book's core arguments. These disagreements turn in large part on answers to the following questions:

(1) Is the Constitution of the United States a power of attorney, or at least usefully analogized to a power of attorney?

(2) Is the United States of America a legal corporation and, if so, is the Constitution of the United States a corporate charter?

(3) How should we understand the Necessary and Proper Clause? In particular, is it more accurately conceived as a narrow "incidental powers" clause or as a broader "sweeping" clause?

Lawson and Seidman are admirably clear in their answers to these questions, which occupy most of Chapters Two, Four, and Five of *"A Great Power of Attorney,"* respectively. First, they believe that the Constitution of the United States is a power of attorney, or at least more appropriately described as a power of attorney than as any other type of legal instrument. At the very least, they maintain, the Constitution is usefully analogized to a power of attorney. Second, although they concede that the "United States of America" is the name of a legal corporation, Lawson and Seidman believe that the Constitution of the United States is not a corporate charter. Third, Lawson and Seidman argue that the Necessary and Proper Clause is best conceived as a narrow "incidental powers" clause, which should be construed strictly, in line with analogous clauses in other powers of attorney.

My own answers to these questions are different. First, I do not believe that the Constitution is adequately described as, or usefully analogized to, a power of attorney, except perhaps in a very abstract sense that does not afford much insight into either side of the analogy. Second, although I agree with the authors that the United States of America is a legal corporation, unlike Lawson and Seidman I have no difficulty in maintaining that the Constitution of the United States is a corporate charter, or at least that it is more appropriately regarded as a corporate charter than as any other eighteenth-century legal instrument, such as a statute, contract, treaty, or trust. Third, although I agree with Lawson and Seidman that one part of the Necessary and Proper Clause might with some qualifications be

1. *See* GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017).

fairly characterized as an "incidental powers" clause, I do not think that the complete text of the Necessary and Proper Clause can be accurately characterized in this manner, at least not in the sense presupposed by Lawson and Seidman. Instead, the Necessary and Proper Clause is better understood as containing both an incidental powers clause (the "foregoing powers" provision) and a sweeping clause (the "all other powers" provision).[2] Lawson and Seidman focus their attention almost entirely on the foregoing powers provision and virtually ignore the all other powers provision, despite the importance of the latter in the framing, ratification, and early operation of the Constitution. They also continue to insist that the Constitution vests no powers in the Government of the United States itself, as distinct from the powers vested in its Departments and Officers.[3] This view effectively treats one of the Constitution's most significant provisions—one which refers expressly to "powers vested by this Constitution in the Government of the United States"—as if it did not exist. It also distorts the basic design of the Constitution as it was conceived by its principal draftsmen.

These disagreements with Lawson and Seidman are not merely academic. What is at stake is how to understand the powers delegated to the United States by the Constitution and, in particular, whether they include the power to provide for the common defense and general welfare. In two previous articles, I drew upon the premise that the Constitution is a corporate charter to argue that the Government of the United States is vested with the power to fulfill these and other ends for which that government was established. Although I did not defend the point at length, I also suggested that many famous Supreme Court opinions involving the scope of federal powers, such as *Dred Scott v. Sanford*, *Hammer v. Dagenhart*, *NFIB v. Sebelius*, and *Shelby County v. Holder*, rest on a flawed understanding of the Constitution.[4] Lawson and Seidman embrace a much narrower conception of the scope of federal powers, and *"A Great Power of Attorney"* is their most recent attempt to explain why. This commentary, in turn, seeks to explain why their arguments remain unconvincing.

Two preliminary terminological clarifications before I proceed. First, the Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[5] In my previous work, I have referred to the first part of this clause as the "foregoing powers" provision and to the second part of the clause as the "all other powers" provision.[6] Where it is helpful, I will continue to use those labels here, while also referring

2. *See generally* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

3. *See, e.g.*, LAWSON & SEIDMAN, *supra* note 1, at 75 (maintaining that "the United States as a unitary corporate entity received none of the newly granted authority" delegated by the Constitution).

4. *See* Mikhail, *supra* note 2; John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063 (2015).

5. U.S. CONST., art. I, § 8.

6. *See* Mikhail, *supra* note 2.

more generally to the full text of Article I, Section 8, Clause 18 as the "Necessary and Proper Clause."

Second, when Lawson and Seidman characterize the Necessary and Proper Clause as an "incidental powers" clause, they generally mean that it permits the exercise of implied powers only insofar as they are incidental to the government's enumerated powers.[7] This use of "incidental" and related terms ("incident," etc.) must be distinguished from at least two other senses in which the Necessary and Proper Clause can be characterized as an "incidental powers" clause: (1) an interpretation according to which the United States is a legal corporation and the clause encompasses implied powers that are incidental to the corporation, and (2) an interpretation according to which the United States is a sovereign nation and the clause encompasses implied powers that are incidental to national sovereignty.[8] Because all three usages were prevalent at the time, founding-era references to incidental powers do not necessarily validate Lawson and Seidman's thesis about the meaning of "incidental" or the scope of the Necessary and Proper Clause. Some historical usages of this term lend support to their thesis, while others do not.

I. IS THE CONSTITUTION A POWER OF ATTORNEY?

A. Expanding the Evidentiary Base

Lawson and Seidman maintain that the Constitution of the United States is aptly characterized as a power of attorney. Perhaps the most direct way for them to anticipate and respond to criticisms of this thesis would be to build a representative database of powers of attorney actually used by the founders and to compare those instruments with the original 1787 Constitution. A related line of inquiry would be to study how the founders discussed or referred to powers of attorney in their public statements, correspondence, and other sources.

Curiously, Lawson and Seidman do neither of these things. Instead, in Chapter Two of *"A Great Power of Attorney"* ("The Fiduciary Background of the Founding Era"), they defend their thesis by supplying the reader with a handful of illustrations drawn from a series of relatively obscure eighteenth-century form books, including Nicholas Covert's *Scrivener's Guide* (1702), Gilbert Horseman's *Precedents in Conveyancing* (1744), Giles Jacob's *New Law Dictionary* (6th ed., 1750), and the anonymous *Attorney's Compleat Pocket Book* (1772).[9] To establish that these form books were "influential in the United States,"[10] the authors produce four powers of attorney that were used in North Carolina from 1759 to 1762,

7. *See infra* notes 113–17 and accompanying text.

8. For illustrations of (1), see, for example, the statements by Roger Sherman and Fisher Ames in the First Congress, *infra* notes 85–86 and accompanying text. For illustrations of (2), see, for example, *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889).

9. LAWSON & SEIDMAN, *supra* note 1, at 14–21, 178 nn.57–58, 60.

10. *Id.* at 21.

which appear to follow the templates found in these texts.[11] Next, Lawson and Seidman analyze these powers of attorney in order to extract their leading features.[12] Having done so, they proceed to compare these features with similar characteristics of the Constitution.[13] Finally, at various points in their book, Lawson and Seidman support their thesis by pointing to James Iredell's description of the Constitution as "a great power of attorney" in the North Carolina ratifying convention.[14]

All of this is moderately revealing, but more probative evidence that bears more directly on Lawson and Seidman's thesis is ready to hand. Search for "power of attorney" in the *Founders Online* database, and in just a few seconds one can locate *hundreds* of examples in which this phrase is used in the papers of the six most prominent founders.[15] Some of these entries are duplicates, of course, because a single document involving two of these men normally appears twice in this collection.[16] Other entries reflect uses of "power of attorney" by the historians who edited these collections, not by the founders themselves.[17] Even taking factors like these into account, there remains a remarkable body of primary data here for students of eighteenth-century fiduciary instruments to consider, including hundreds of occasions in which powers of attorney are discussed or otherwise referenced in the papers of these six individuals.[18] Better still, these records contain *actual* powers of attorney that were used or encountered by these men in their private and public affairs. For example, one can locate here powers

11. *Id*. at 178 nn.57–58, 60.

12. *Id*. at 15–16, 23.

13. *Id*. at 49–57.

14. *See, e.g*., *id*. at 3–5, 7, 49, 54, 75, 106.

15. When I last performed this search on April 6, 2018, I discovered 748 entries in this database. *See* Search of "Power of Attorney," FOUNDERS ONLINE, https://founders.archives.gov/index.xqy?q=%22power+of+attorney%22&s=1111211111&sa=&r=1&sr [https://perma.cc/KNX7-A3BG].

16. *See, e.g*., *From Thomas Jefferson to James Madison, 29 March 1805*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Jefferson/99-01-02-1462 [https://perma.cc/RH4X-7WFH] (last visited June 26, 2019) (enclosing a "power of attorney" from Lafayette to Madison); *To James Madison from Thomas Jefferson, 29 March 1805*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/02-09-02-0206 [https://perma.cc/Y46J-ZW4M] (last visited June 26, 2019) (same).

17. *See, e.g*., *Power of Attorney to John Chaloner, 22 November 1788*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Hamilton/01-05-02-0054 [https://perma.cc/9FQC-EV76] (last vistied June 26, 2019) (editorial note using this phrase); *To Benjamin Franklin from William Strahan: Power of Attorney, 2 September 1748*, FOUNDERS ONLINE, http://founders.archives.gov/documents/Franklin/01-03-02-0132 [https://perma.cc/HZ9L-YYH9] (last visited June 26, 2019) (same).

18. *See, e.g*., Letter from George Washington to Edmund Randolph (Feb. 10, 1784), *in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Washington/04-01-02-0076 [https://perma.cc/LG8H-TT6T] (last visited June 26, 2019) (discussing "a power of Attorney" Washington received from the Earl of Tankerville and his brother); Letter from John Adams to Thomas Jefferson (Jan. 19, 1786), FOUNDERS ONLINE, http://founders.archives.gov/documents/Adams/99-01-02-0466 [https://perma.cc/F3KL-6Y54] (last visited June 26, 2019) (explaining that Adams had advised mutual acquaintances of Jefferson and himself "to write and send a Power of Attorney to our old Friend Edward Rutledge" concerning land claims in Georgia and South Carolina).

of attorney that were drafted or used by Franklin,[19] Hamilton,[20] Madison,[21] and Washington[22]—all of whom were present in Philadelphia and played important roles in framing and ratifying the Constitution. If one seeks to establish a previously hidden or underappreciated connection between the Constitution and powers of attorney, this seems like a good place to begin. At a minimum, it seems like a better starting place than a random collection of eighteenth-century form books, a handful of obscure manuscripts from North Carolina, or an isolated quotation from Iredell.

Hundreds of data points in the papers of just six founders! What about other members of the founding generation? Here, too, if one pokes around a bit, one can find many explicit references to powers of attorney, and many examples of them, in easily searchable records, yielding a wider basis from which to draw comparisons to the Constitution. For example, the phrase "power of attorney" occurs thirty-three times in *The Papers of John Marshall*, twelve times in *The Diaries of Gouverneur Morris*, and twice in *The Selected Papers of John Jay*. Less accessible papers of important founders such as George Mason, Robert Morris, and James Wilson contain similar references. "Power of attorney" appears at least seventeen times in the *Letters of Delegates to Congress*—including six letters to or from framers who signed the Constitution[23]—and at least eight times in the *Journals of the Continental Congress*. Likewise, a cursory search for "power of attorney" in *America's Historical Newspapers* (Evans) from 1780 to 1790 yields 172 entries. Finally, an initial search of *Hein Online*'s early

19. *See, e.g.*, Power of Attorney from Benjamin Franklin to Deborah Franklin (Aug. 30 1733), *in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Franklin/01-01-02-0103 [https://perma.cc/YT3N-8ARF] (last visited June 26, 2019); Power of Attorney from Benjamin Franklin to James Parker (Nov. 5, 1764), *in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Franklin/01-11-02-0126 [https://perma.cc/N327-4YJ6] (last visited June 26, 2019).

20. *See, e.g.*, Power of Attorney from Alexander Hamilton to John Semphill and William Amorey (May 18, 1786), *in* FOUNDERS ONLINE, https://founders.archives.gov/documents/Hamilton/01-03-02-0525-0002 [https://perma.cc/2MYK-KZTB] (last visited June 26, 2019).

21. *See, e.g.*, Power of Attorney from James Madison to Callender Irvine (July 1, 1814), *in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Madison/03-08-02-0005 [https://perma.cc/AZW3-RSNR] (last visited June 26, 2019).

22. *See, e.g.*, Letter from George Washington to Tobias Lear (Aug. 5, 1795), *in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-18-02-0336 [https://perma.cc/T4GG-HFLG] (last visited June 26, 2019) (enclosing power of attorney); Power of Attorney from George Washington to the Commissioners for the District of Columbia (May 23, 1796), *in* FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/99-01-02-00543 [https://perma.cc/A9UK-ZHBX] (last visited June 26, 2019).

23. *See, e.g.*, Letter from William Blount to Nathanial Lawrence (Jan. 11, 1787) *in* 24 LETTERS OF DELEGATES TO CONGRESS, 1774–1789, at 67 (Paul H. Smith ed., 1976); Letter from Nathanial Gorham to Caleb Davis (Feb. 26, 1783), *in* 19 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 736; Letter from Robert Morris to Thomas Morris (Jan. 31, 1777), *in* 6 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 179; Letter from John Bannister to Robert Morris (Oct. 1, 1778), *in* 11 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 12 n.1; Letter from Jonathan Dayton to John Cleves Symmes (Sept. 12, 1788), *in* 25 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 358; Letter from Richard Dobbs Spaight to James Iredell (Mar. 10, 1785), *in* 22 LETTERS OF DELEGATES TO CONGRESS, *supra*, at 265.

American state case law also bears fruit: seventy-eight cases in which "power of attorney" is used from 1780 to 1800.

Shifting gears from names to things, *The Papers of John Marshall* contains several actual powers of attorney, including one given to Marshall in March 1788, around the time the Constitution was ratified.[24] The same is true of *The Papers of George Mason*, which includes the full text of a power of attorney Mason gave to George Mercer in 1763.[25] Of greater interest, the University of Oklahoma Law Library's online collection of the surviving corporate records of the United Illinois and Wabash Land Companies contains at least ten signed and notarized powers of attorney, including one assigned by Daniel Hughes to James Wilson in 1780, and another given by Samuel Chase to William Paca, John Hanson, Gouverneur Morris, and William Sharp in 1781. Finally, a particularly revealing document in this same collection lists all of the Illinois-Wabash proprietors and their registered attorneys as of May 4, 1781. All told, this list includes five men who signed the Declaration of Independence (Charles Carroll, Samuel Chase, Robert Morris, George Ross, and James Wilson); five men who signed the Constitution (Thomas Fitzsimmons, Daniel St. Thomas Jennifer, Gouverneur Morris, Robert Morris, and Wilson); three future Supreme Court Justices (Chase, Thomas Johnson, and Wilson); and a host of other important founding-era figures (e.g., Tench Coxe, Silas Deane, Lord Dunmore, and Paca).[26]

What lessons should we draw from findings like these, which of course barely scratch the surface of the full archival record? At least two conclusions seem warranted, one which lends support to the main thesis of *"A Great Power of Attorney"* and the other which cuts against it. On the one hand, it is clear that the founders were intimately acquainted with powers of attorney and frequently used these instruments in their private and public affairs. It seems entirely accurate, therefore, for Lawson and Seidman to maintain that when the Constitution was adopted, many Americans were familiar with these fiduciary instruments, "either by serving as fiduciaries, having someone serve as their fiduciary, or knowing or being related to someone in one or the other of these categories."[27] There are no reasonable grounds for skepticism on this score (although the authors' further

24. *See* Power of Attorney from Charles Tyler to John Marshall (Mar. 12, 1788), *in* 1 THE PAPERS OF JOHN MARSHALL 250 (Herbert A. Johnson ed., 1974).

25. *See* Power of Attorney From George Mason to George Mercer (Mar. 29, 1763), *in* 1 THE PAPERS OF GEORGE MASON 52 (Robert A. Rutland, ed., 1970).

26. Thanks to the efforts of Professor Lindsay Robertson, the surviving records of the Illinois and Wabash Companies can be found on a web site hosted by the University of Oklahoma Law Library. These records include two lists of shareholders, one dated May 4, 1781, and the other likely written in the early 1790s. *See United Illinois and Wabash Land Companies Collection*, U. OKLA. L. LIBR., https://digital.libraries.ou.edu/IWLC/ [https://perma.cc/7AAE-WEMK]. For the history of these records, see generally LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERCIA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS, at ix–xiii (2005). For the significance of this land syndicate on the activities of framers like Wilson, see John Mikhail, *James Wilson, Early American Land Companies, and the Original Meaning of "Ex Post Facto,"* 17 GEO. J.L. & PUB. POL'Y 79 (2019).

27. LAWSON & SEIDMAN, *supra* note 1, at 29.

claim about the founders' intimate acquaintance with fiduciary *law* seems more contestable). Accordingly, there is no need for Lawson and Seidman to strain to make this basic point by relying on eighteenth-century facts about life expectancy, family relationships, and the like.[28] In short, one hardly needs to "pile inference upon inference" to establish that, as a group, the founders were generally familiar with powers of attorney. Direct inspection of their correspondence and other papers definitively establishes this conclusion.

On the other hand, the evidence in favor of Lawson and Seidman on this issue is *so* strong that it appears to undercut one part of their central argument. The reasoning here is simple and straightforward: a legal form *that* well-known and such a familiar part of everyday life, at least for the men who drafted and ratified the Constitution, would have played a much bigger role in the debates surrounding the Constitution in 1787–1788, if it had been a useful or relevant analogy to draw in that context. Powers of attorney simply were not used or understood in this fashion. As far as I can tell, references to them occur only four times in the thousands of pages that comprise *Elliot's Debates* and *The Documentary History of the Ratification of the Constitution*.[29] Iredell referred to powers of attorney in two different speeches at the North Carolina ratifying convention. On both occasions, the language he reportedly used suggests that it was perceived to be a helpful metaphor or analogy, nothing more.[30] Furthermore, the substance and context of Iredell's remarks indicate that he may have been reaching for straws by trying to convince his listeners that the Constitution tacitly incorporated a strong check on implied powers akin to the "expressly delegated" limitation in Article II of the Articles of Confederation.[31] This was a popular rhetorical strategy of some Federalists, particularly in large slaveholding states like North Carolina, South Carolina, and Virginia, but it never really worked, as one can infer from the

28. *Id*. at 29–30.

29. Although *The Documentary History of the Ratification of the Constitution* includes most of the selections found in *Elliot's Debates*, this is not true for the records of the North Carolina convention, which have not yet been published by the *Documentary History* project.

30. *See* 4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 148–49 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT'S DEBATES] (observing that the Constitution "*may be considered as* a great power of attorney, under which no power can be exercised but what is expressly given") (emphasis added); *id* at 166 ("It would be the greatest absurdity for any man to pretend that, when a legislature is formed for a particular purpose, it can have any authority but what is so expressly given to it, *any more than* a man acting under a power of attorney could depart from the authority it conveyed to him. . . .") (emphasis added).

31. *See* 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."). In the passage in which Iredell first describes the Constitution as "great power of attorney," he uses the word "expressly" four times, referring to government powers under the new Constitution as "expressly declare[d]", "expressly given", "expressly authorized" and "expressly defined." *Id*. at 148–49. In the second speech, he does the same thing, referring to congressional powers as "expressly given." *Id*. at 166.

various amendments and forms of ratification eventually adopted by these conventions.[32] Moreover, the value of the strategy may have been limited, as the unsuccessful efforts to add the word "expressly" to the future Tenth Amendment seem to indicate.[33] Apart from Iredell's remarks, the only occasions on which the phrase "power of attorney" appears in these documentary sources are a speech by Rufus Choate in the Massachusetts Ratifying Convention on January 25, 1788,[34] and a draft of prepared remarks to the same convention by William Cushing around the same time.[35] Otherwise, the historical record appears to be entirely bereft of any references to the idea that the Constitution resembles a power of attorney.

Stepping back from these details, we are left with a striking contrast. The founders used and referred to powers of attorney frequently in their private affairs—all told, probably thousands of times[36]—but they almost never appealed to them when discussing the Constitution of the United States. In addition, there appear to be no published cases or controversies in which the analogy between the Constitution and a power of attorney did any real work. By contrast, the corporate status of the United States was discussed extensively during the founding era, and it explains many important facts about the text, structure, and history of

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32. *Compare, e.g.*, Statement by Charles Cotesworth Pinckney to the South Carolina Legislature (Jan. 17, 1788), *in* ELLIOT'S DEBATES, *supra* note 30, at 286 ("We have a security that the general government can never emancipate [enslaved persons], for no such authority is granted; and it is admitted, on all hands, that the general government has no powers but what are *expressly* granted") (emphasis added), *with* Amendments Proposed by the South Carolina Convention (May 23, 1788), *in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 15 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) ("This Convention doth also declare that no Section or paragraph of the said Constitution warrants a Construction that the states do not retain every power not *expressly* relinquished by them and vested in the General Government of the Union.") (emphasis added).

33. On August 18, 1789, South Carolina Representative Thomas Tucker moved to add the word "expressly" to James Madison's original version of the clause that became the Tenth Amendment so that it would read: "The powers not *expressly* delegated by this constitution [nor prohibited by it to the States, are reserved to the States respectively]." 1 ANNALS OF CONG. 790 (1789) (Joseph Gales ed., 1834) (emphasis added). Madison and Roger Sherman firmly opposed this language. *Id.* Three days later, Elbridge Gerry renewed Tucker's motion and called for a recorded vote, whereupon the motion to add "expressly" to the amendment was defeated by a wide margin, 32-17. *Id.* at 797. Finally, the Senate rejected a similar proposal on September 7, 1789. *See* CREATING THE BILL OF RIGHTS, *supra* note 32, at 41 n.21 (observing that on this date the Senate denied a motion to add the word "expressly" to what became the Tenth Amendment).

34. *See* Theophilus Parsons: Notes of Convention Debates, 25 January, A.M., *in* 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1351 (John P. Kaminski & Gaspere J. Saldino eds., 2000) [hereinafter DHRC] ("Mr. Choate. Suppose a power of attorney to transact a particular object—the attorney can go no further—if the power was general, and he afterwards gave a new power to a second person, for a particular object, the second power can go no further to control the first, than to the particular object to which it extends. The same reasoning applies to the Constitution.").

35. *See* William Cushing: Undelivered Speeches, *in* DHRC, *supra* note 34, at 1428–42, 1432, 1441, n.11.

36. According to Lawson and Seidman, 1,649 people voted on the Constitution at the state ratifying conventions. LAWSON & SEIDMAN, *supra* note 1, at 29. Based on this figure and the number of times "power of attorney" appears in the *Founders Online* database alone, an extrapolation to thousands of occurrences seems reasonable.

the Constitution.[37] Finally, unlike the power of attorney designation, the corporate status of the United Sates has played a significant role in actual judicial decisions, including opinions by Cushing, Iredell, Marshall, and others.[38]

B. Powers of Attorney Used by the Founders

As we have seen, the central thesis of *"A Great Power of Attorney"* rests on an exceedingly thin and unpersuasive evidentiary base. Still, the fact that two future Supreme Court Justices—Iredell and Cushing—analogized the Constitution to a power of attorney is notable and suggests that this idea deserves closer scrutiny. Rather than simply dismissing Lawson and Seidman's analogy out of hand, we should give it due consideration by evaluating both sides of the comparison in more detail. As I suggested, one way to pursue this inquiry is to examine several powers of attorney actually used by the founders in their daily lives. To that end, here are five examples, each of which involves one or more founders who played a key role in drafting and/or ratifying the Constitution.

1. Wilson. James Wilson became affiliated with the United Illinois and Wabash Land Companies in 1779 and served as president and chief legal officer of the companies from 1780 until his death in 1798. In June 1780, he received this power of attorney from fellow shareholder, Daniel Hughes:

> To all whom these presents shall come Greeting Know ye that I Daniel Hughes of Baltimore in the State of Maryland stands seized in one quarter share or part of one twenty second share part of the Illinois Land purchase—now Know ye that I the said Daniel Hughes have made constituted nominated and appointed and by these presents do make constitute nominate and appoint my trusty friend James Wilson esquire of the State of Pennsylvania my true and lawful

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37. *See generally infra* Part II.

38. *See, e.g.*, Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 446 (1793) (Iredell, J.) ("There 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."); *id.* at 447 ("The word 'corporations,' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic . . . whether its power be restricted or transcendant, is in this sense 'a corporation.' . . . In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations.'"); *id.* at 468 (Cushing, J.) ("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."); *id.* at 462 (Wilson, J.) (contrasting the "artificial person" known as "the United States" with "the natural persons who spoke it into existence"); Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811) (Marshall, C.J.) ("The United States of America will be admitted to be a corporation. But it is incidental to a corporation to sue and to be sued, to convey and to take property. . . . 'The United States of America' is the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigour."); United States v. Maurice, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823) (Marshall, C.J.) ("The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes."); Cotton v. United States, 52 U.S. (11 How.) 229, 231 (Grier, J.) (explaining that because it is "a corporation or body politic," the United States may bring lawsuits to vindicate its contract and property rights).

> attorney for me and in my name on my behalf to be and attend at all future meetings to be held by the united Illinois and Ouabache Land Companies and there to act and vote in my name and on my behalf in all and every matter of Business coming before the said United Companys for their consideration or determination to the same Effects for all intents and purposes as if I myself were personally present and consenting to such Business in person hereby ratifying and confirming all whatsoever my said Attorney shall Lawfully do in the premises by virtue of these presents. In writing whereof I have hereunto Set my hand and affixed my seal this twenty seventh day of June anno Domini Seventeen hundred and Eighty.
>
> Daniel Hughes[39]

2. Morris. Gouverneur Morris did not own shares of the United Illinois and Wabash Companies, but he represented some of their shareholders, including Samuel Chase. In March 1781, Chase gave this power of attorney to Morris and three other of his "trusty friends," John Hanson, William Paca, and William Sharp:

> To all to whom these presents shall come I Samuel Chase of the City of Annapolis in the State of Maryland, Attorney at Law, send Greeting. Whereas on the tenth day of July last I appointed the Hon[ora]ble Wm Paca, W. Murray and J. Hanson Esqrs or either of them my Attornies and Attorney to appear and act and vote for me in any Meeting to be held by the united Illinois & Ouabache Land Companies before the first Day of this present Month. Now Know Ye that I Samuel Chase have made, constituted, and appointed and by these presents do make constitute and appoint my trusty friends, the Hon[ora] ble Wm Paca, J. Hanson, Gouverneur Morris & Wm Sharp Esqrs and either of them my true and lawful Attornies & Attorney, for Me and in my name, and on my behalf, to appear and attend at any Meeting to be held by the united Illinois & Ouabache land Companies before the first Day of September, and in any such Meeting to act and vote in my Name and on my Behalf on every Subject Matter as fully, and effectually as I could do if I were personally [present], and I do hereby ratify and confirm all and whatsoever either of my Attornies shall lawfully do in the premises by virtue of this Power of Attorney. In Witness whereof I have hereunto set my name and affixed my Seal, this Twenty third Day of March in the year, One Thousand seven hundred & eighty one.
>
> Samuel Chase[40]

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39. Power of Attorney from Daniel Huges to James Wilson (June 27, 1780), *in United Illinois and Wabash Land Companies Collection*, U. OKLA. L. LIBR., https://digital.libraries.ou.edu/IWLC/docs/pa1780-06-27b.pdf [https://perma.cc/YNE5-RCMS] (last visited June 26, 2019). The transcription of the passage is mine and may contain errors.

40. Power of Attorney from Samuel Chase to William Paca, John Hanson, Gouverneur Morris and William Sharp (Mar. 23, 1781), *in United Illinois and Wabash Land Companies Collection*, U. OKLA. L. LIBR., https://digital.libraries.ou.edu/IWLC/docs/pa1781-03-23.pdf [https://perma.cc/Q3ME-BKAN] (last visited June 26, 2019). The transcription of the passage is mine and may contain errors.

3. Hamilton. In May 1786, roughly two weeks after he was appointed a delegate to the Annapolis Convention, Hamilton drafted a power of attorney to authorize agents to collect money and other assets he was owed in St. Croix:

> Know all Men by these presents, that I Alexander Hamilton of the City of New York, Counsellor at Law, have made, ordained, authorized, constituted and appointed, and by these presents do make, ordain, authorize, constitute and appoint John Sempill and William Amorey of the Island of St. Croix Merchants jointly and severally my true and lawfull Attornies, for me and in my Name, and to my Use to ask, demand, sue for, recover and receive of all and every person whomsoever in the said Island of St. Croix, all and every Sum and Sums of Money Debts, Legacies and Demands whatsoever which now are due, owing and coming unto me, and in default of payment thereof, to have use and take all lawfull ways and means in my Name or otherwise for the Recovery thereof, by Attachment, Arrest or otherwise, and to compound and agree for the same, and on Receipt thereof acquittances or other sufficient Discharges for the same for me and in my Name to make seal and deliver, and to do all lawfull Acts and Things whatsoever concerning the premisses as fully in every Respect, as I myself might or could do if I was personally present, and an Attorney or Attornies under them or either of them to make for the purposes aforesaid, and at their pleasure to revoke, hereby ratifying allowing and confirming all and whatsoever my said Attornies or Attorney shall in my Name lawfully do or cause to be done in and about the premises by virtue of these presents—In Witness whereof I have hereunto set my Hand and Seal the eighteenth Day of May in the Year of our Lord one Thousand seven Hundred and eighty six.
>
> Alexander Hamilton[41]

4. Marshall. In March 1788—just a few months before the Constitution was debated and ratified in Virginia—a Virginian landowner, Charles Tyler, gave the following power of attorney to John Marshall:

> I Charles Tyler of the County of Prince William & State of Virginia do hereby Constitute Nominate and appoint my trusty friend John Marshall jr of the City of Richmond, my true and Lawful Attorney, for me and in my behalf to subscribe my name to an Assignment of a certain Tract or parcel of Land now lying in the Registers Office at Richmond; containing twenty five thousand Acres on Salt Lick Creek one half to Abraham Foe & his Heirs and Assigns the other moiety to Christopher Greenup and Humphrey Marshall as Tenants in Common and their Heirs or Assigns forever hereby ratifying and confirming whatever my said Attorney may legally do in the premises. In Witness whereof I have hereunto set my hand and Seal this 12th. day of March A D. 1788.
>
> Charles Tyler[42]

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41. Power of Attorney from Hamilton to Semphill and Amorey, *supra* note 20.
42. Power of Attorney from Tyler to Marshall, *supra* note 24, at 250.

5. Washington. On August 5, 1795, George Washington informed his secretary, Tobias Lear, that he might not be able to attend a meeting of the Potomac Company in Georgetown on the following day. Accordingly, Washington gave Lear the following power of attorney to act for him if he could not be there.

> I do by these presents, constitute & appoint Mr Tobias Lear my Attorney, to represent my interest of fifty five shares in the Potomack Company; a general meeting of which is to be held in Georgetown (by adjournment) on thursday next, the 6th instant. And I do hereby authorise & require him to vote in my behalf, on any question, or questions which may come before the said meeting on that day, or during the continuance thereof by adjournment if I am not present—and his acts and doings in the premises (conformably to Law) will be obligatory on me.
>
> [George Washington][43]

What can we learn from these powers of attorney, which were actually used by five important founders in ordering their personal affairs? Consider some notable features of these instruments. To begin with, they are dull, repetitive, formulaic, badly written, and lacking in careful organization, punctuation, or style. They give every indication of having been dashed off quickly on the basis of preexisting forms or habitual practice, with little or no critical examination, reflection, or negotiation. Compare these features with how the Constitution reads and was drafted, and the contrasts are sharp.

To be sure, these fiduciary instruments do contain delegations of authority and a handful of words and roots one finds in the Constitution—for example, "ordain," "establish," "constitute," and "power." Yet otherwise the resemblance to the Constitution seems slight. There are no references in these texts to "government," "states," "departments, "officers," "judges," or "constitutions." Indeed, apart from passing references to scheduled meetings of the Illinois-Wabash and Potomac Companies, there are no references to governance structures or political or corporate bodies whatsoever. Furthermore, there appears to be nothing of any significance in these instruments pertaining to popular sovereignty, separation of powers, bicameralism, federalism, bylaws, elections, qualifications, compensation, emoluments, armies, navies, offenses, pardons, treaties, ambassadors, vacancies, recesses, courts, crimes, treason, jurisdiction, privileges, immunities, amendments, ratification, rights, or other familiar features of written constitutions.

These are just some of the obvious dissimilarities between the Constitution and powers of attorney that Lawson and Seidman recognize but do not adequately

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43. Letter from George Washington to Tobias Lear (Aug. 5, 1795), *in* FOUNDERS ONLINE http://founders.archives.gov/documents/Washington/05-18-02-0336 [https://perma.cc/C2QP-LQM4] (last visited June 26, 2019).

come to grips with in *"A Great Power of Attorney."* These differences become even more apparent when one inspects actual powers of attorney with which the founders were intimately familiar. Would any impartial observer who examines these instruments infer that "the Constitution resembles a power of attorney"?[44] Would she go further and conclude that the "essential structure of the Constitution bears a remarkable resemblance to the familiar structure of a power of attorney"?[45] These are genuine questions, which readers can answer for themselves. Speaking for myself, I do not see any strong resemblance, let alone a "remarkable" one.

C. A Closer Look at Some Structural Comparisons

Lawson and Seidman contend that the "familiar pattern or structure" that emerges from a survey of eighteenth-century powers of attorney "is a preamble setting forth the reasons for and purposes of the document, a clause constituting and ordaining the agent, a description of the agent's principal powers, and (where appropriate) an incidental powers clause."[46] Do the five examples given above correspond to this pattern? Perhaps—but even if one grants this questionable premise, the relevant comparisons to the Constitution seem awfully thin and unilluminating.

To begin with, none of these powers of attorney contains a clear and identifiable preamble, setting forth the purposes of the document. Nor do any of them clearly demarcate the next two features Lawson and Seidman identify: (i) one or more separate clauses constituting an agent and (ii) a description of the agent's principal powers. Instead, all of these instruments appear to combine these functions into a single elaborate sentence, which accomplishes all three tasks at once. Even if one were to attempt to distinguish these functions by adding missing punctuation where it is currently lacking, it would be difficult to separate them into distinct clauses. Moreover, insofar as they can be identified, the purposes of these instruments are either tacit or merely a repetition of the express powers. Put differently, there is no clear basis on which to distinguish the express *purposes* of these instruments from their enumerated *powers*. Instead, the purposes and powers are substantially identical. Compare all of these characteristics with the corresponding features of the Constitution, and, again, the relevant similarities are notably lacking.

What about the final characteristic identified by Lawson and Seidman? Do these powers of attorney contain an incidental powers clause, vesting the agent with the authority to carry their enumerated powers into effect? Alternatively, do they contain a sweeping clause, vesting the agent with the authority to carry out their purposes or implied powers? Here the situation seems a bit more complicated. On the one hand, all of these powers of attorney contain a delegation of

44. LAWSON & SEIDMAN, *supra* note 1, at 55.
45. *Id.* at 49.
46. *Id.* at 23.

additional powers that appears at first glance to be more sweeping than incidental.[47] On the other hand, because these grants are limited to acts done in or near "the premises," they may be narrower than they first appear.[48] In any event, the more important point is that these provisions are quite unlike the Necessary and Proper Clause in the most relevant respects. The latter is one of the most complex clauses in the Constitution. In addition to giving Congress the authority to carry into effect its own powers, it also authorizes Congress to carry into effect "all other powers" vested by the Constitution in the government or any of its departments or officers. To achieve these ends, the clause distinguishes no fewer than six distinct sets of powers vested by the Constitution in the Government of the United States, only some elements of which are specified.[49] Partly because of this complex structure, the Necessary and Proper Clause gives Congress a flexible "choice of means"[50] to adapt the Constitution to new circumstances, design a government capable of regulating a vast territory and millions of inhabitants, and respond to "the various crises of human affairs."[51] On all these dimensions, the analogy to the narrow grants of authority in powers of attorney seems inapt and unconvincing.

II. IS THE CONSTITUTION A CORPORATE CHARTER?

In a pair of previous articles, I drew upon the premise that the United States of America is a legal corporation to argue that the Government of the United States has the power to promote the general welfare. Among other things, I pointed out that the United States possesses all of the tacit corporate powers identified by Blackstone, Wilson, and other writers, including perpetual succession; the power to sue and be sued; the power to acquire, hold, and convey property; the power to operate under a common seal; and the power to enact by-laws.[52] I suggested that

47. *See* Power of Attorney from Hughes to Wilson, *supra* note 39 ("hereby ratifying and confirming all whatsoever my said Attorney shall Lawfully do in the premises by virtue of these presents"); Power of Attorney from Chase to Paca, Hanson, Morris and Smart, *supra* note 40 ("I do hereby ratify and confirm all and whatsoever either of my Attornies shall lawfully do in the premises by virtue of this Power of Attorney"); Power of Attorney from Hamilton to Sempill and Amorey, *supra* note 41 ("hereby ratifying allowing and confirming all and whatsoever my said Attornies or Attorney shall in my Name lawfully do or cause to be done in and about the premises by virtue of these presents"); Power of Attorney from Tyler to Marshall, *supra* note 42 ("forever hereby ratifying and confirming whatever my said Attorney may legally do in the premises"); Power of Attorney from Washington to Lear, *supra* note 43 ("and his acts and doings in the premises (conformably to Law) will be obligatory on me"). Furthermore, the additional grant of authority given by Hughes seems redundant, since Wilson was already authorized to act on his behalf in every subject matter coming before the companies. The same appears to be true of the supplemental authority given by Chase and Hamilton to their designated agents.

48. *See supra* notes 39–41 and accompanying text.

49. *See* Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 4, at 1091–97.

50. United States v. Fisher, 6 U.S. (2 Cranch) 358, 396 (1805) (Marshall, C.J.).

51. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (Marshall, C.J.).

52. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *463–64 (D. Lemmings ed., Oxford U. Press 2016) (including these five powers among those which "are necessarily and inseparably incident to every corporation" and "tacitly annexed" to it, once it is formed); JAMES WILSON, *Of Corporations*, *in* LECTURES ON LAW (1804), *republished in* 2 COLLECTED WORKS OF JAMES WILSON 1035–37 (Kermit L.

the Constitution vests these and other corporate powers in the Government of the United States "tacitly, and as a matter of course,"[53] just as these writers held. In addition, I pointed out that in many cases the text of the Constitution itself indicates that these corporate powers are vested in the Government of the United States.[54] For example, the United States' power to sue and be sued is presupposed by the jurisdictional grants of Article III; its power to possess and use property is presupposed by the Property Clause of Article IV; and its power to make contracts is presupposed by various clauses of Articles I, III, and IV.[55] For these reasons alone, I argued, Lawson and Seidman were mistaken to insist that the Constitution "never grants power to the 'national government' or the 'federal government' as an undifferentiated entity."[56] Finally, I suggested that, together with other implied powers, such as the power to fulfill the ends for which the Constitution was formed, these corporate powers are plausibly held to be among the "other powers vested by this Constitution in the Government of the United States" to which the Necessary and Proper Clause refers.

In a significant development, Lawson and Seidman now concede that the United States is a legal corporation, which possesses implied corporate powers.[57] Nevertheless, they deny that the Constitution of the United States is a corporate charter.[58] This odd combination of views naturally raises the question of whether Lawson and Seidman believe that the United States even *has* a governing charter, and, if so, when it was ordained and established—and by whom. All of these questions are easily answered by those who believe both that the United States is a legal corporation and that the Constitution is its basic charter. As we shall see, this group includes many of the founders themselves.[59] Yet simple questions like these seem difficult for Lawson and Seidman to answer convincingly, while remaining faithful to the text, structure, and history of the Constitution.

Perhaps the most pressing question for Lawson and Seidman to address is this: Do they agree that the implied corporate powers whose existence they now accept are vested in the United States *by the Constitution*? If not, then who or what instrument do they think delegates these powers to the United States? In light of the precise text of the Necessary and Proper Clause (which refers to "powers

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Hall & Mark David Hall eds., 2007) (discussing several of these corporate powers, with reference to Blackstone and other writers). *See generally* Mikhail, *The Necessary and Proper Clauses*, *supra* note 2; Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 4.

53. BLACKSTONE, *supra* note 52, at *463.

54. See Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 4, at 1096 n.5.

55. *See, e.g.*, U.S. CONST., art. III, § 2 (extending the judicial power "to Controversies to which the United States shall be a party"); *id.* at art. IV, § 2 (authorizing Congress to regulate "the Territory or other Property belonging to the United States"); *id.* § 1 (referring to Debts contracted and Engagements entered into . . . [by] the United States").

56. GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY L. SEIDMAN, THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 1 (2010).

57. *See* LAWSON & SEIDMAN, *supra* note 1, at 65.

58. *Id.* at 68 ("We actually agree with the characterization of the United States as a corporation, though we do not agree with the characterization of the Constitution as its charter.").

59. See *infra* section II.A.

vested by this Constitution to the Government of the United States") and the Tenth Amendment (which refers to powers "delegated to the United States by the Constitution")—and in light of their own insistence that "*all* federal power must be traced to some enumerated grant of power"[60]—these are critical questions for Lawson and Seidman to confront. That they neglect to do so in *"A Great Power of Attorney"* makes their claim that the United States is a legal corporation without a corporate charter even less persuasive than it already appears to be.

A. The Case for a Corporate Charter

To their credit, Lawson and Seidman devote twelve detailed pages in Chapter Four of *"A Great Power of Attorney"* ("Categorizing the Constitution") to explaining why "there is much to be said for viewing the Constitution as a species of corporate charter"[61] before denying that proposition. In particular, they identify six discrete reasons supporting this conclusion before ultimately rejecting it. First, drawing on the work of Professor Eric Enlow, they observe that "the idea of political bodies as corporations had long histories in both English and canon law as devices for limiting power."[62] Second, they observe that a number of American colonies, including Massachusetts, Connecticut, Rhode Island, and Georgia, were constituted by royal charters.[63] Third, they contend that "many of the characteristics of a power of attorney found in the Constitution, such as a declaration of purposes, delegations of power to agents, and enumerations of powers, were also common in eighteenth-century corporate charters."[64] Fourth, they acknowledge that "the extensive and detailed governance norms set forth in the Constitution are more redolent of corporations than of private fiduciary instruments."[65] Fifth, drawing upon Professor Mary Sarah Bilder's scholarship on the corporate origins of judicial review, they maintain that conceiving the Constitution as a corporate charter helps to explain "the easy and near-universal acceptance of judicial review in America."[66] Finally, Lawson and Seidman acknowledge that conceiving of the Constitution as a corporate charter fits comfortably with the idea of popular sovereignty.[67]

With a few quibbles, I largely agree with what Lawson and Seidman have to say about these matters. In what follows, therefore, I will assume for the sake of argument that these six reasons are generally cogent and will seek to supplement them with four additional factors Lawson and Seidman do not consider.

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60. LAWSON & SEIDMAN, *supra* note 1, at 95 (emphasis original).

61. *Id*. at 66.

62. *Id*. (drawing upon Eric Enlow, *The Corporate Conception of the State and the Origins of Limited Constitutional Government*, 6 WASH. U. J.L. & PUB. POL'Y 1 (2001)).

63. LAWSON & SEIDMAN, *supra* note 1, at 66.

64. *Id*. at 66–67.

65. *Id*. at 67.

66. *Id*. (relying upon Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L. J. 502 (2006)).

67. LAWSON & SEIDMAN, *supra* note 1, at 67–68.

First, many founding-era Americans were intimately acquainted with the history and charters of the colonies, cities, towns, guilds, churches, universities, trading companies, and other corporations which formed the basic governing units in their lives. In this sense, corporate charters and other legal acts of incorporation were all around them and completely familiar to them. Lawson and Seidman focus on corporate charters "as devices for limiting power,"[68] but this description seems one-sided and misleading. What corporate charters mostly did at the time was to create and empower institutions to accomplish important objectives on behalf of distinct groups and communities. As such, they were vehicles for establishing authority, structuring governance, marshalling resources, and promoting the general welfare, in addition to providing limits on the exercise of those capacities.[69]

Second, an examination of the drafting history of the Constitution reveals that Professor Geoffrey Miller was correct to assume that the individuals who did most of the actual drafting were "immersed in the conventions and usages of corporate law"[70] and drew on this background when framing the Constitution. To highlight just one illustration, before James Wilson wrote the first complete draft of the Constitution for the Committee of Detail, he had framed or was intimately familiar with many articles of incorporation, including those of the Bank of Pennsylvania, the United Illinois and Wabash Companies, and the Bank of North America. He knew from Blackstone and other authorities that every corporation must be given a name and that "by that name alone it must sue, and be sued, and do all legal acts."[71] For that reason, the very first article of the charter Wilson

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68. *Id*. at 66.

69. The literature on corporations and their relationship to medieval and modern political thought is vast. In addition to the articles by Bilder, *supra* note 66, and Enlow, *supra* note 62, see, for example, HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); ERNST H. KANTOROWICZ, THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY (1957); PHILIP J. STERN, THE COMPANY-STATE: CORPORATE SOVEREIGNTY AND THE EARLY MODERN FOUNDATIONS OF THE BRITISH EMPIRE IN INDIA (2011); J.P. Canning, *Law, Sovereignty, and Corporation Theory*, *in* THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT (J.H. Burns ed., 1988); David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418 (2017); Ron Harris, *Trading with Strangers: The Corporate Form in the Move from Municipal Governance to Overseas Trade*, *in* RESEARCH HANDBOOK ON THE HISTORY OF CORPORATE AND COMPANY LAW (Harwell Wells ed., 2008); W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382 (1922); Mathias Hein Jessen, *The State of the Company: Corporations, Colonies and Companies in* Leviathan, 1 J. INTELL. HIST. & POL. THOUGHT 56 (2012); Harold Laski, *The Personality of Associations*, 29 HARV. L. REV. 404 (1916); Herbert Osgood, *The Corporation as a Form of Colonial Government*, 11 POL. SCI. Q. 259 (1896); David Siepp, *Formalism and Realism in Fifteenth-Century English Law: Bodies Corporate and Bodies Natural*, *in* JUDGES AND JUDGING IN THE HISTORY OF THE COMMON LAW (Paul Brand & Joshua Geltzer eds., 2012); Quentin Skinner, *A Genealogy of the Modern State*, 162 PROC. BRITISH ACAD. 325 (2008).

70. Geoffrey P. Miller, *The Corporate Law Background of the Necessary and Proper Clause*, *in* LAWSON ET AL., *supra* note 56, at 145.

71. BLACKSTONE, *supra* note 52, at *462; *cf*. WILSON, supra note 52, at 1036 ("To every corporation a name must be assigned; and by that name alone it can perform legal acts.").

helped draft for the United Illinois and Wabash Land Companies assigned a name to the united companies.[72] Likewise, when Wilson, Robert Morris, and/or others drafted the charter of the Bank of North America, they began by giving a name to that corporation.[73] When it came time to frame the Constitution of the United States, Wilson followed the same pattern. The very first thing he did was to recognize the corporate existence of the United States by assigning that body a name.[74] Moreover, his subsequent drafts reveal that Wilson was preoccupied with the corporate status of the United States and considered the act of naming that corporate entity to be of great importance when drafting the Constitution.[75]

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72. *See Extract from the Articles of Agreement of the Illinois-Wabash Land Company*, *in* SHAW LIVERMORE, EARLY AMERICAN LAND COMPANIES 306 (1939) ("First, that the said Companies or grantees shall from hence forth be called and known by the name of the United Illinois and Ouabache Land Companies.").

73. *See An Ordinance to Incorporate the Subscribers to the Bank of North America*, *reprinted in* 3 THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D. 429–30 (Bird Wilson, ed., 1804) ("Be it therefore ordained, and it is hereby ordained by the United States in Congress assembled, that those who are, and those who shall become subscribers to the said bank, be, and for ever after shall be, a corporation and body politick, to all intents and purposes, by the name and style of The President, Directors and Company of the Bank of North America.").

74. "The People of the States of New Hampshire &C do agree upon ordain and establish the following Frame of Government as the Constitution of the 'United States of America' according to which we and our Posterity shall be governed under the Name and Stile of the "United States of America.'" 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 150 (Max Farrand ed., rev. ed. 1937) [hereinafter FARRAND'S RECORDS]. Wilson later added "We" to this passage, thus composing for the first time the Constitution's three most famous words: "We the People." He also added "known by the Stile of the United States of America" to his preamble to indicate that the United States would continue to be known by its existing corporate name. Finally, he deleted "agree upon" and "Frame of Government," thinking they were unnecessary. Together, these edits resulted in a new preamble that more closely resembled the one that appeared in the Committee of Detail's August 6 draft: "We the People of the States of New Hampshire &C, known by the Stile of the 'United States of America,' do ordain declare and establish the following Constitution of the said United States." *Id*. Wilson was not alone, of course, in thinking that the first order of business was to assign the United States a corporate name. *See id*. at 138 (Randolph's outline for the Committee of Detail, the first resolution of which refers to "the style of the United States, which may continue as it now is"); *cf*. *id*. at 135 (Wilson's draft of the Pinckney Plan, which includes "The Stile" among its provisions).

75. For a time, Wilson considered emphasizing the pre-existing corporate status of the United States by using the phrase, "already confederated united and known by the stile of the 'United States of America,'" instead of simply referring to that name being "known." *Id*. at 150. He also decided that an explicit reference to "Frame of Government" was appropriate after all. After making these edits, his preamble read: "We the People of the States of New Hampshire &C, already confederated united and known by the Stile of the 'United States of America,' do ordain declare and establish the following Frame of Government as the Constitution of the said United States." *Id*.

In his later drafts, Wilson continued to assign a "stile" to the United States, in line with the procedure for naming corporations. Probably for strategic reasons, however, he decided to pattern his draft more closely on the Articles of Confederation. This required moving the provision assigning a name to the United States to a separate article, while retaining the other elements of his preamble. Wilson's first such attempt resulted in an awkward opening to his preamble—"We the People and States of New Hampshire [etc.]"—and a new corporate name: "the United People and States of America." *Id*. at 152. Subsequently, Wilson decided to retain the name, "United States of America," in line with its familiar use in the Declaration of Independence, Articles of Confederation, and other state papers. As a result, he

Third, it is important to recognize that a significant amount of cross-labeling linked constitutions and corporate charters during the founding era. For example, the corporate charter Wilson drafted for the United Illinois and Wabash Land Companies labels itself a "Constitution" for the companies.[76] Likewise, Hamilton referred to the corporate charter he drafted for the Bank of New York in 1784 as the "Constitution for the Bank of New York."[77] Conversely, many founders referred to the Constitution as the "charter" of the United States Government. In *Federalist No. 49*, for example, Madison wrote: "[T]he people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived. . . ."[78] Likewise, in his First Inaugural Address (also drafted by Madison), Washington referred his audience to "the Great Constitutional Charter under which you are assembled; and which, in defining your powers, designates the objects to which your attention is to be given."[79] These are just a few of many similar illustrations. As far as I am aware, nothing comparable exists with respect to powers of attorney.

Finally, many prominent founders explicitly referred to the United States as a legal corporation, characterized the Constitution as a corporate charter, or made other remarks of a similar character. Here are ten notable illustrations, listed in chronological order:

1. McKean. In *Respublica v. Sweers*, Chief Justice Thomas McKean wrote: "From the moment of their association, the United States necessarily became a body corporate; for, there was no superior from whom that character could otherwise be derived. In England, the king, lords, and commons, are certainly a body corporate; and yet there never was any charter or statute, by which they were expressly so created."[80]

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revised his draft again, resulting in a new preamble and first article that, with only minor changes, became the version found in the Committee of Detail's August 6 draft:

> We the People of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and of our Posterity.
>
> I.
>
> The stile of this Government shall be "the United States of America."

Id. at 177. In this draft, the Committee of Detail hewed closely to the Articles of Confederation, which also began by assigning a name to the United States: "The stile of this confederacy shall be 'The United States of America.'" ARTICLES OF CONFEDERATION of 1781, art. I.

76. LIVERMORE, *supra* note 72, at 306.

77. *See* Constitution of the Bank of New York (1784), *reprinted in* 3 PAPERS OF ALEXANDER HAMILTON 514–18 (Harold C. Syrett ed., 1962).

78. THE FEDERALIST NO. 49, at 339 (James Madison) (Jacob E. Cooke ed., 1961). Madison also refers to the government's "chartered authorities" in this essay. *Id.*

79. First Inaugural Address (April 30, 1789), FOUNDERS ONLINE, http://founders.archives.gov/documents/Washington/05-02-02-0130-0003 [https://perma.cc/46DQ-XGCV] (last visited July 7, 2019).

80. Respublica v. Cornelius Sweers, 1 U.S. (1 Dall.) 41, 44 (Pa. 1779) (emphasis omitted). McKean represented Delaware in the Continental Congress and signed the Declaration of Independence. Later,

2. Madison. At the federal convention, James Madison conceived of limited governments as corporations and compared ordinary legislation to corporate by-laws: "There was a gradation, [Madison] observed, from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the States, as now confederated; their laws in relation to the paramount law of the Confederacy were analogous to that of bye laws to the supreme law within a State."[81]

3. Pinckney. Later that summer, Charles Pinckney proposed adding a clause to the Constitution affirming that the United States "shall be forever considered as one Body corporate and politic in law, and entitled to all the rights privileges, and immunities, which to Bodies corporate do or ought to appertain."[82]

4. Wilson. In his State House Yard Speech, James Wilson responded to the claim that the Constitution was designed "to reduce the state governments to mere corporations, and eventually to annihilate them"[83] by observing:

> Those who have employed the term corporation upon this occasion, are not perhaps aware of its extent. In common parlance, indeed, it is generally applied to petty associations for the ease and conveniency of a few individuals; but in its enlarged sense, it will comprehend the government of Pennsylvania, the existing union of the states, and even this projected system is nothing more than a formal act of incorporation.[84]

5. Sherman. In the debate in the First Congress over whether add the word "expressly" to the Tenth Amendment, Roger Sherman objected to this proposal on the grounds that "corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed."[85]

6. Ames. In the debate over the First Bank of the United States, Fisher Ames defended the constitutionality of the bank by arguing that, because the United States was a corporation, it possessed the implied powers to fulfill its purposes:

> A corporation, as soon as it is created, has certain powers, or qualities, tacitly annexed to it, which tend to promote the end for which it was formed—such as, for example, its individuality—its power to sue, and be sued—and the perpetual succession of persons. Government is the highest kind of corporation, and from the instant of its formation, it has tacitly annexed to its being, various powers which the individuals who framed it did not separately possess, but

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he became Chief Justice of the Pennsylvania Supreme Court and actively supported the Constitution in the Pennsylvania ratifying convention.

81. 1 FARRAND'S RECORDS, *supra* note 74, at 464 (June 29).

82. 2 *id*. at 342 (August 20). Pinckney's motion was not adopted, but presumably this was not because anyone objected that the United States was not "one Body corporate in politic and law."

83. James Wilson, State House Yard Speech (Oct. 6, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 52, at 174.

84. *Id*.

85. COLLECTED WORKS OF ROGER SHERMAN 667 (Mark David Hall ed., 2016).

> which are essential to its effecting the purposes for which it is framed—to declare, in detail, every thing that government may do, could not be performed, and has never been attempted: It would be endless, useless, and dangerous—exceptions of what it may not do, are shorter and safer. Congress may do what is necessary to the end for which the constitution was adopted, provided it is not repugnant to the natural rights of man, or to those which they have expressly reserved to themselves, or to the powers which are assigned to the States.[86]

7. Hamilton. In composing his *Opinion on the Constitutionality of an Act to Establish a Bank*, Alexander Hamilton also drew on the corporate conception of the United States. In one notable illustration taken from his draft opinion, Hamilton wrote:

> The institution of a Government in the western Territory is admitted to belong to this head of the powers of the Fœderal Government. Now to admit the right of instituting a Government and to deny that of erecting a corporation appears to be a contradiction in terms. For a Government as already remarked is a Corporation of the highest nature. It is a Corporation which can itself create other corporations.[87]

8. Iredell. In his opinion in *Chisholm v. Georgia*, Justice James Iredell wrote: "The word 'corporations,' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic . . . is in this sense 'a corporation.' . . . In this extensive sense, not only each State singly, but even the United States may without impropriety be termed 'corporations.'"[88]

9. Cushing. In his separate opinion in *Chisholm*, Justice William Cushing also affirmed the corporate conception of the United States and characterized the Constitution as its charter: "But still it may be insisted that this will reduce States to mere corporations, and take away all sovereignty. 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."[89]

10. Marshall. In *Dixon v. United States*, a case decided on circuit in 1811, John Marshall wrote: "The United States of America will be admitted to be a corporation. But it is incidental to a corporation to sue and to be sued, to convey and to take property. . . . 'The United States of America' is the true name of that grand corporation which the American people have formed, and the charter will, I trust, long remain in full force and vigour."[90] Twelve years later, Marshall made a

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86. 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, MARCH 4, 1789–MARCH 3, 1791, at 393 (William C. diGiacomantonio et al. eds., 1995).

87. ALEXANDER HAMILTON, OPINION ON THE CONSTITUTIONALITY OF THE BANK (1791), *reprinted in* 8 PAPERS OF ALEXANDER HAMILTON, *supra* note 77, at 89 (emphasis omitted).

88. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 447 (1793) (Iredell, J.).

89. *Id.* at 468 (Cushing, J.).

90. Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811).

similar remark in another circuit case, *United States v. Maurice*: "The United States is a government, and consequently a body politic and corporate, capable of attaining the objects for which it was created, by the means which are necessary for their attainment. This great corporation was ordained and established by the American people, and endowed by them with great powers for important purposes."[91]

Each of these founders actively participated in the drafting or ratification of the Constitution. There is no reason to doubt that these statements reflect their genuine convictions. Here again, a revealing contrast can be drawn between these considered judgments, with a deep foundation in Coke, Locke, Blackstone, and other influential writers,[92] and a mere talking point used by Iredell at the North Carolina ratifying convention, describing the Constitution as "a great power of attorney, under which no power can be exercised but what is *expressly* given."[93]

B. Lawson and Seidman's "Rechartering Thesis"

Why do Lawson and Seidman insist that the Constitution is not a corporate charter? I suspect that the main reason concerns the fact that corporate charters are typically given the most favorable legal interpretation possible and that, especially in that favorable light, the objects clause and sweeping clause of a corporate charter can be plausibly interpreted to vest the corporation with the implied power to fulfill its purposes. Accordingly, it seems plausible to hold that the Constitution vests the Government of the United States with the implied power to fulfill every purpose for which that government was established, including the six great objects of the Preamble. This was the progressive vision of the Constitution advanced by Franklin D. Roosevelt, who maintained that the federal government had the power to promote the general welfare.[94] It also was the basic argument by means of which Benjamin Franklin, in his last public act, called upon Congress to abolish slavery.[95] As Jonathan Gienapp, Richard Primus, and David Schwartz

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91. United States v. Maurice, 26 F. Cas. 1211, 1216 (C.C.D. Va. 1823).

92. *See, e.g.*, BLACKSTONE, *supra* note 52, at *460–67 (explaining the legal formation of and powers incident to every corporation); The Case of Sutton's Hospital, 77 Eng. Rep. 960 (K.B. 1612), *reprinted in* 1 SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 347–78, 363, 366 (Steve Sheppard ed., 2003) (same); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 375 (Peter Laslett ed., Cambridge U. Press 1988) (1963) ("When any number of Men have so consented to make one Community or Government, they are thereby presently incorporated, and make one Body Politick, wherein the Majority have a Right to act and conclude the rest."); Bilder, *supra* note 66; Ciepley, *supra* note 69.

93. ELLIOT'S DEBATES, *supra* note 30, at 148–49.

94. *See, e.g.*, George Creel, *Roosevelt's Plans and Purposes*, COLLIER'S MAGAZINE, Dec. 26, 1936, at 7, 40 (explaining FDR's view that the "all other powers" provision authorizes Congress "to enact laws to 'promote the general welfare' so specifically mentioned in the Preamble and again in Article 1, Section 1."); *cf.* WILLIAM SHEPHEARD, OF CORPORATIONS, FRATERNATIES, AND GUILDS 44 (1659) (observing that corporate charters "have the most favourable interpretation in Law that can be. And they shall be taken strongly . . . to advance the Work intended by it."); *id.* at 82, 85 (explaining that even if this power is not expressly given, a corporation may make laws for the common good).

95. *See* 2 ANNALS OF CONG., *supra* note 33, at 1197–98 (1790) (publishing the 1790 abolition petition submitted to the First Congress by the Pennsylvania Abolition Society and signed by Franklin,

have recently shown, similar appeals to implied powers, grounded in the Preamble and Sweeping Clause, were used throughout the founding era, particularly in connection with the First and Second Bank of the United States.[96] Yet this progressive vision of the Constitution is hardly congenial to Lawson and Seidman, who have labored diligently for many years to defend a much narrower conception of government power.

Lawson and Seidman do not discuss whether granting that the Constitution is a corporate charter would force them to accept that the Government of the United States is vested with the power to fulfill its purposes. Instead, after explaining why "there is much to be said" for conceiving the Constitution to be a corporate charter, the authors abruptly pivot and supply seven detailed pages of argument explaining why that characterization is mistaken. At the end of the day, their argument boils down to a single historical claim, which I will refer to as their "rechartering thesis." The thesis is inaccurate, however, and their defense of it is unpersuasive.

Lawson and Seidman begin their defense of the rechartering thesis by correctly noting that the Constitution did not create the United States of America, which already existed as a legal entity before the Constitution was adopted. In light of this "preconstitutional existence of the United States of America,"[97] they contend that, if the Constitution is a corporate charter, it must be understood either as a "charter amendment,"[98] which modified, or as a "'repeal and replace instrument,"[99] which supplanted, a pre-existing charter. Because the former view is untenable,[100] Lawson and Seidman ultimately rest their case against the corporate charter interpretation on whether the Constitution was an act of "rechartering of the corporate entity known as the United States of America."[101]

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which called upon Congress to end slavery by exercising its powers for "promoting the welfare and securing the blessings of liberty to the people of the United States").

96. *See* JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA (2018); Richard Primus, *The Essential Characteristic: Enumerated Powers and the Bank of the United States*, 117 MICH. L. REV. 415 (2018); David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573 (2017).

97. LAWSON & SEIDMAN, *supra* note 1, at 71.

98. *Id.*

99. *Id.* at 72.

100. *Id.* at 71–72. Among other reasons, Lawson and Seidman point out that the Constitution was "not presented by its proponents or sold to ratifying conventions as an amendment to the Articles of Confederation." *Id.* at 72. To this one might add that rejection the "charter amendment" conception of the Constitution also draws support from the fact that the Articles of Confederation are no longer operative. For example, no one thinks that Canada retains a right to join the United States whenever it wants, so long as it accedes to the Articles of Confederation. Yet presumably that would follow if the provisions of the Articles of Confederation remained in force. *See* ARTICLES OF CONFEDERATION of 1781, art. XI ("Canada acceding to to this Confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this union; but no other colony shall be admitted into the same, unless such admission is agreed to by nine states.").

101. LAWSON & SEIDMAN, *supra* note 1, at 72.

Building on this foundation, Lawson and Seidman maintain that any such rechartering thesis must fail for one simple reason: because the Constitution "does not at all resemble previous instruments from American legal history that served to recharter governmental corporations."[102] Why not? According to Lawson and Seidman, a necessary feature of such rechartering instruments is that they explicitly refer to the superseded document.[103] The Constitution, however, does not do so:

> The Constitution of 1788 does not read like a rechartering of a governmental institution, as that idea would have been recognizable to an eighteenth-century audience. There are no references to the prior charter. There is nothing to indicate a substitution of one charter for another. There is nothing describing the cancellation, nullification, or suppression of a prior charter. That might well have been the legal effect of the adoption of the Constitution, but we are not concerned here with legal effects; we are concerned with characterizations. And although it is theoretically possible to describe the Constitution of 1788 as a rechartering of the United States of America, it simply does not fit the form of the document.[104]

In brief, Lawson and Seidman's rechartering thesis holds that if one corporate charter repeals and replaces another, then the former must explicitly refer to the latter—which the Constitution does not do. Although it is presented with a great deal of confidence, this argument is unsound for at least two reasons. In the first place, it rests on a false premise. It is simply not true that in the eighteenth century a rechartering instrument always referred "to the previous, superseded document," as the authors contend.[105] In particular, early Americans were familiar with *state* constitutions that rechartered state governments in just this manner. The 1784 New Hampshire Constitution, the 1790 Pennsylvania Constitution, and the 1793 Vermont Constitution all replaced earlier constitutions, for example, yet none of them refers to the constitution it replaced. Furthermore, it is not true that the Constitution "does not read like a rechartering of a governmental institution" because "[t]here are no references to the prior charter" and "nothing to indicate a substitution of one charter for another."[106] Article VI, Section 1 reads: "All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, *as under the Confederation*"[107]—a statement that clearly refers to the Articles of Confederation and indicates that the Constitution is replacing it. Less explicitly, the Preamble refers to "a more Perfect Union"[108] (a well-understood reference at

102. *Id.* at 73.
103. *Id.* at 73–74.
104. *Id.* at 74–75.
105. *Id.*
106. *Id.*
107. U.S. CONST., art. IV, § 1 (emphasis added).
108. U.S. CONST., pmbl.

the time to the "Perpetual Union" to which the Articles of Confederation refers), and Article VI, Section II refers to "all Treaties made, or which shall be made, under the Authority of the United States"[109] (a well-understood reference at the time to treaties which had been made under Article IX of the Articles of Confederation).

In sum, Lawson and Seidman are mistaken, not only about founding-era rechartering instruments, but also about the constitutional text itself. As a result, their only real argument against conceiving of the Constitution as a corporate charter is unpersuasive. The authors' further claim that "the United States as a unitary corporate entity received none of the newly granted authority"[110] vested by the Constitution is likewise at odds with the best understanding of that instrument. The crux of the problem is the Necessary and Proper Clause, to which we now turn.

III. THE NECESSARY AND PROPER CLAUSE

The Necessary and Proper Clause authorizes Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[111] In the amicus brief they submitted to the Supreme Court in support of the challenge to the minimum coverage provision of the Affordable Care Act ("ACA"),[112] Lawson, Seidman, and their co-authors defended a narrow understanding of this clause, according to which:

1. The Necessary and Proper Clause is a recital, which indicates that the doctrine of incidental powers applies to the Constitution's express grants of authority, but which does not grant any new power which is neither expressly given nor incidental to those expressly given.[113]
2. According to well-established legal usage at the founding, the word "necessary" was a term of art meaning "incidental."[114]
3. Under the doctrine of incidental powers, for an implied power to qualify as "necessary" (i.e., incidental) to an express power, the implied power must be both (i) inferior or subordinate to the express power, and (ii) so closely connected to the express power by custom or need as to as to justify inferring that the parties to the Constitution intended the inferior power to accompany the express power.[115]

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109. U.S. CONST., art. VI, § 2.

110. LAWSON & SEIDMAN, *supra* note 1, at 75.

111. U.S. CONST., art. I, § 8.

112. Brief for Gary Lawson, Robert G. Natelson, Guy Seidman & Independence Institute as Amici Curaie Supporting Respondents, NFIB v. Sebelius, 567 U.S. 519 (2012) (No. 11-398), 2012 WL 484061 [hereinafter Amicus Brief]; *see also* LAWSON & SEIDMAN, *supra* note 1, at 92–99 (discussing the brief's arguments and their impact on the Court in *Sebelius*).

113. *See, e.g.*, Amicus Brief, *supra* note 112, at ii, 2–3, 9–12.

114. *Id.* at iii, 2, 11.

115. *Id.* at iii, 2-3, 19–25.

4. The Necessary and Proper Clause also demands that laws adopted under it must be "proper," that is, subject to fiduciary constraints.[116]

5. The legal background, drafting history, and ratification history of the Necessary and Proper Clause supports and confirms all of the foregoing points.[117]

Applying these principles to the ACA, Lawson, Seidman, and their co-authors argued that its minimum coverage provision was neither "necessary" nor "proper" under the original meaning of the Necessary and Proper Clause and thus was unconstitutional. In Chapter Five of *"A Great Power of Attorney"* ("Incidental Powers"), Lawson and Seidman reaffirm the main argument of their amicus brief and extend it in new and interesting ways.[118] I am not concerned here with assessing the validity of the ACA or tracing all of the provocative claims about the Necessary and Proper Clause that Lawson and Seidman make in this chapter. Instead, I will merely offer a few general observations about their treatment of this clause in both *"A Great Power of Attorney"* and their other writings, including their influential amicus brief.

First, to grasp the meaning of the Necessary and Proper Clause, it is crucial to recognize that this clause is comprised of three distinct provisions, only one of which refers to Congress's enumerated powers in Article I, Section 8. In their analysis of the Necessary and Proper Clause in *"A Great Power of Attorney*," Lawson and Seidman repeatedly focus their attention almost entirely on this first provision and practically ignore the rest of the clause. For example, referring to the Necessary and Proper Clause for the first time, Lawson and Seidman explain that "it is the kind of clause . . . that clarifies and cabins the incidental powers that flow, by custom or necessity, from grants of express powers *to the legislature*."[119] Likewise, when introducing the clause in Chapter Five, the authors write: "Article I, section 8 of the Constitution contains seventeen clauses that identify specific legislative powers of Congress and one clause at the end—the necessary and proper clause—that seems to deal with implementation or execution of *those* powers."[120]

These formulations imply that the sole function of the Necessary and Proper Clause is to authorize Congress to execute its *own* enumerated powers. Yet any such reading ignores the entire second half of the clause, which authorizes Congress to carry into execution "all *other powers* vested by this Constitution in the *Government* of the United States, or in any *Department* or *Officer* thereof."[121] When Hamilton referred to the "peculiar comprehensiveness" of the Necessary and Proper Clause in his *Opinion on the Constitutionality of an Act to Establish a*

116. *Id*. at iv, 2–4, 31–36.
117. *Id*. at ii–iv, 2–4, 9–17, 31–36.
118. *See* LAWSON & SEIDMAN, *supra* note 1, at 90–103.
119. *Id*. at 53 (emphasis added).
120. *Id*. at 78 (emphasis added).
121. U.S. CONST., art. I, § 8 (emphasis added).

Bank, he illustrated what he meant by highlighting just those words of the second half of the clause I have italicized: "other powers," "Government," "Department" and "Officer."[122] Hamilton's point was that one must not overlook the fact that the Necessary and Proper Clause does more than authorize Congress to carry into effect its own powers in Article I, Section 8. Time and again, however, this is precisely what Lawson and Seidman do in *"A Great Power of Attorney"* and their other writings in the course of delineating the "proper scope" of that clause.

Perhaps the clearest illustration of this point can be found in Lawson and Seidman's account of the drafting history of the Necessary and Proper Clause. In Chapter Five of *"A Great Power of Attorney,"* Lawson and Seidman write:

> [The] common-law background of agency informed—and indeed drove—the drafting and ratification of the necessary and proper clause. . . . An early draft from the Committee of Detail, in Randolph's handwriting, included a supremacy clause that expressly invoked the doctrine of principals and incidents as a tool for judicial interpretation: "All laws of a particular state, repugnant hereto, shall be void, and in the decision thereon . . . all incidents without which the general principles [sic] cannot be satisfied shall be considered, as involved in the general principle." The provision was crossed out and replaced by one in John Rutledge's handwriting, that contained a vicinage and jury trial provision and also the grant of "a right to make all Laws necessary to carry the foregoing Powers into Execu-." This was the obvious precursor to the necessary and proper clause, and, as written, it was a familiar agency-law provision codifying the incidental powers doctrine. The committee later added the words "and proper," and the final result was the necessary and proper clause, approved by the committee and the convention without significant controversy.[123]

The final result was the Necessary and Proper Clause? Notice what has happened here: Lawson and Seidman have supplied their readers with a drafting history of the Necessary and Proper Clause in which the second half of that clause has disappeared.[124] The same crucial elision can be found in another amicus brief Lawson, Seidman, and their colleagues submitted in *NFIB v. Sebelius*[125] and in

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122. *See* HAMILTON, *supra* note 87, at 103.

123. LAWSON & SEIDMAN, *supra* note 1, at 85–86.

124. For the drafting history of this language—"and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"—see Mikhail, *supra* note 2, at 1096–1106.

125. In the brief they submitted at an earlier stage of this lawsuit to the U.S. Court of Appeals for the Elevent Circuit, the authors described the drafting history of the Necessary and Proper Clause as follows:

> The first draft of the Clause, extant in Randolph's handwriting, expressly referenced the incidental power doctrine as a tool for judicial interpretation. 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 144 (1937) ("all incidents without which the general principles cannot be satisfied shall be considered, as involved in the general principle"). The Provision was replaced by one in Rutledge's handwriting, which substituted the most common legal label for incidental powers: "necessary." The new Provision read, "a right to make all Laws necessary to carry the

their co-authored book on *The Origins of the Necessary and Proper Clause*.[126] In each case, the authors' unwillingness to engage with the actual text, structure, drafting history, and early interpretations of the Necessary and Proper Clause is striking.

When Lawson and Seidman do engage with the critical "all other powers" provision—ironically, the part of the Necessary and Proper Clause the founders most likely had in mind when they referred to it as the "Sweeping Clause"—the results are weak and unconvincing.[127] Consider this footnote in their Supreme Court brief, for instance, explaining how they conceive of this provision:

> While admitting that the "foregoing powers" part of the Clause merely recites the incidental powers doctrine, some have argued that authority "To make all Laws which shall be necessary and proper for carrying into Execution . . . *all other Powers*" bespeaks of a further grant of unspecified authority. . . .
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> Even if it were relevant, that interpretation is untenable. It requires applying variant meanings, within the same Clause, to the single specialized phrase "necessary and proper." It also contradicts repeated Federalist explanations to the public at the Founding and disregards the limiting words "*vested by this Constitution* in the Government of the United States, or in any Department or Officer thereof." Departments and officers are, of course, created by Congress, which even in the absence of this language would have incidental authority to delineate their duties. "The Government of the United States" refers to institutions of the federal government other than departments or officers of the United States, such as joint actors or single houses of Congress. *E.g.*, U.S. CONST., art. II, §2, cl.2 (treaty power exercised by President and one house of Congress).

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foregoing Powers into Execu-." *Id*. The Committee then added the words "and proper." After some polishing, the final result was approved by the Committee and the Convention without significant controversy. Randolph subsequently confirmed publicly that the word "necessary" was a synonym for 'incidental.'"

Brief for Authors of The Origins of the Necessary and Proper Clause (Gary Lawson, Robert G. Natelson & Guy Seidman) and the Independence Institute as Amici Curai Supporting Respondents (Minimum Coverage Provision), Florida v. U.S. Dep't of Health & Human Servs., 648 F.3d. 1235 (11th Cir. 2011) (No. 11-11021-HH) (filed on May 9, 2011) (on file with author), at 5–6.

126. *See* LAWSON ET AL., *supra* note 56, at 88–89 (outlining the same account of the drafting history, focusing on Randolph and Rutledge at the expense of Wilson and the "all other powers" provision).

127. *See* Mikhail, *supra* note 2, at 1121–28. I say "ironically" because there is probably no legal scholar who is more closely identified with the term "Sweeping Clause" than Professor Lawson. Quite admirably, in my view, he has frequently used this term while discussing this provision or else explained his departure from that practice. *See, e.g.*, LAWSON & SEIDMAN, *supra* note 1, at 190 n.11 (noting that while "one of us prefers the founding-era label . . . we will employ the modern formulation to avoid confusion"); Gary Lawson, *Burning Down the House (and Senate): A Presentment Requirement for Legislative Subpoenas Under the Orders, Resolutions, and Votes Clause*, 83 TEX. L. REV. 1373, 1385 n.53 (2005) ("It has become conventional to refer to Article I, Section 8, Clause 18 as the 'Necessary and Proper Clause.' The founding generation, however, generally referred to it as the 'Sweeping Clause.'"); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L. J. 267, 270 n.10 (1994) ("We use the founding era's label rather than the modern designation of the provision as the 'Necessary and Proper Clause.'").

> The phrase acknowledges that Congress may exercise any legislative incidents of that authority, such as the power to adopt laws implementing treaties.[128]

In this passage, Lawson, Seidman, and their co-authors claim that the Departments and Officers to which the Necessary and Proper Clause refers *are created by Congress*. That argument is incorrect for at least two reasons. First, the Departments and Officers to which the clause refers are those whose powers are "vested by [the] Constitution." Executive departments and officers created by Congress—the State Department or Attorney General, for example—do not have constitutionally vested powers. Furthermore, the unqualified word, "Department," was generally used by the founders in constitutional contexts to refer to the three primary divisions or "branches" of government: Legislative, Executive, and Judicial.[129] The founders also knew how to distinguish "Departments" from "executive Departments." When they wanted to refer only to the latter, they generally did so explicitly.[130]

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128. *See* Amicus Brief, *supra* note 112, at 14–15 n.9 (internal citations omitted) (emphasis original).

129. In his *Lectures on Law*, for example, Wilson devotes one chapter to each main division of the federal government, entitled "Of the Legislative Department," "Of the Executive Department," and "Of the Judicial Department," respectively. *See* 2 COLLECTED WORKS OF JAMES WILSON, *supra* note 52, at 829–72, 873–84, 885–942. The same understanding of "Department" is illustrated throughout *The Federalist*. *See, e.g.*, THE FEDERALIST NO. 38, *supra* note 78, at 245 (James Madison) ("With another class of adversaries to the constitution, the language is that the legislative, executive, and judiciary departments are intermixed in such a manner as to contradict all the ideas of regular government. . . ."); THE FEDERALIST NO. 47, *supra* note 78, at 324 (James Madison) ("In order to form correct ideas on this important subject, it will be proper to investigate the sense, in which the the preservation of liberty requires, that the three great departments of power should be separate and distinct."); THE FEDERALIST NO. 48, *supra* note 78, at 332 (James Madison) ("[T]he powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments."); THE FEDERALIST NO. 78, *supra* note 78, at 522 (Alexander Hamilton) ("[W]hoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution."). *See also, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 272–73 (1796) (referring to "the Legislative, Executive, and Judicial Departments"); Letter from James Wilson, John Blair, and Richard Peters to George Washington (Apr. 18, 1792), *in* 6 DOCUMENTARY HISTORY OF THE SUPREME COURT 53 (Maeva Marcus ed., 1998) [hereinafter DHSC] (observing that "the judicial should be distinct from, and independent of the legislative department."); *accord* Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1156 n.6 (1992) ("The Constitution uses the word 'Department' to refer to the three institutions of our national government, U.S. CONST. art. I, § 8, cl. 18, and the word 'Branch' to refer to the two houses of a state legislature, *see id.* art. I, § 2, cl. 1."). I recognize, of course, that the reference to "Heads of Departments" in the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, poses a challenge to this interpretation. A full discussion of the Appointments Clause and its possible bearing on the Necessary and Proper Clause (and vice versa) must be left for another occasion.

130. *See, e.g.*, Letter from the Justices of the Supreme Court to George Washington (Aug. 8, 1793), *in* 6 DHSC, *supra* note 129, at 755–77. In this letter, which established the rule against advisory opinions, Justices Jay, Wilson, Blair, Iredell, and Paterson not only reinforced the principal meaning of "Department" given above, but also noted that the Constitution distinguishes "Departments" from "executive Departments." *Id.* at 755; *cf.* U.S. CONST. art. II, § 2, cl. 1 (authorizing the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices").

In the foregoing passage, Lawson, Seidman, and their co-authors also maintain that the phrase "Government of the United States" in the Necessary and Proper Clause does not actually refer to the Government of the United States. Instead, they claim that it refers only to one or more subordinate units of that government, "such as joint actors or single houses of Congress." This strained interpretation also cannot withstand analysis. First, the word "thereof" in the Necessary and Proper Clause clearly indicates a "part-to-whole" or subset relationship between the Departments and Officers to which it refers and the Government of the United States. Consequently, even if one grants for the sake of argument the authors' incorrect reading of "Department or Officer" and "Government of the United States," this relationship fails to exist. No one thinks, for example, that the Department of Defense is a part of the Senate or House of Representatives. Moreover, a moment's reflection on the corporate powers of the United States should make clear that the Government of the United States cannot be equated with single houses of Congress or joint federal actors (such as the President and Senate). When the Government of the United States brings suit, owns property, forms contracts, or exercises any of its other corporate powers, it does in its own name: "The United States of America." The same is true, of course, when the United States borrows money, enters into treaties, recognizes other nations, or conducts foreign relations generally. Operating under this name (or "style"), the United States of America is a distinct juridical person, whose legal acts, rights, and duties cannot be reduced to those of one or more of its departments or officers. Finally, the authors' implausible interpretation of "the Government of the United States" is at variance with countless uses of that phrase in founding-era sources, including the documentary records of the Constitution's drafting history.[131]

131. *See, e.g.*, 3 FARRAND'S RECORDS, *supra* note 74, at 595 (The Pinckney Plan) ("The Stile of This Government shall be The United States of America & The Government shall consist of supreme legislative Executive and judicial Powers"); *id.* at 612 (The New Jersey Plan) ("Resolved, That the federal Government of the United States ought to consist of a Supreme Legislative, Executive, and Judiciary"); 2 *id.* at 177 (The Committee of Detail's August 6 draft) ("The stile of the [this] Government shall be, "The United States of America" and "The Government shall consist of supreme legislative, executive, and judicial powers"). *See also, e.g.*, James Wilson, Remarks at the Pennsylvania Ratifying Convention (Nov. 28, 1787), *in* 1 COLLECTED WORKS OF JAMES WILSON, *supra* note 52, at 178 ("The system proposed, by the late convention, for the government of the United States, is now before you."); *id.* at 184 ("Whatever object of government is confined in its operation and effects within the bounds of a particular state, should be considered as belonging to the government of that state; whatever object of government extends in its operation or effects beyond the bounds of a particular state, should be considered as belonging to the government of the United States."); THE FEDERALIST NO. 15, *supra* note 78, at 93 (Alexander Hamilton) ("While they admit that the government of the United States is destitute of energy, they contend against conferring upon it those powers which are requisite to supply that energy."); THE FEDERALIST NO. 44, *supra* note 78, at 299 (James Madison) ("According to the [old system], letters of marque could be granted by the states after a declaration of war; according to the [Constitution], these licenses must be obtained, as well during the war, as previous to its declaration, from the government of the United States."); Ratification of the Constitution by the State of Georgia (1788), *in* 1 ELLIOT'S DEBATES, *supra* note 30, at 323 ("Whereas the form of a Constitution for the government of the United States of America, was, on the 17th day of September, 1787, agreed upon and reported to Congress by the deputies of the said United States. . . .").

Consider finally Lawson and Seidman's claim that "necessary and proper" is a "specialized" phrase or "term of art" that refers to the doctrine of incidental powers.[132] This claim is also difficult to square with the historical record. Because I was skeptical of this claim, along with the popular belief (which Lawson and Seidman properly reject)[133] that "necessary and proper" was a novel phrase constructed "out of thin air" at the Convention, in a previous article I examined every occurrence of "necessary and proper" and three related phrases ("proper and necessary," "necessary or proper", and "proper or necessary"—henceforth "the target phrases") I could find in various archives, records, and databases. These resources included the *James Wilson Papers*; *Robert Morris Papers*; historical records of the Ohio, Indiana, Illinois-Wabash, and other early American land companies; *Journals of the Continental Congress*; *Letters of Delegates to Congress*; Yale Law School's *Avalon Project*; and the *Founders Online*. What emerged from this early "corpus linguistics" investigation was a confirmation that both of the foregoing claims are fundamentally misguided.[134]

In the first place, it seems clear that all of the founders were acquainted with uses of "necessary and proper" and the other target phrases before the Constitution was drafted. The support for this conclusion derives in large part from the fact that this language had already appeared in many well-known documents, including:

- The Townshend Act ("necessary or proper");
- The Massachusetts Government Act ("proper and necessary");
- The Quebec Act ("necessary and proper");
- The Mecklenburg Resolves ("proper and necessary");
- Virginia's Resolution on Independence ("proper and necessary");
- The United States' Treaty with France ("proper and necessary");
- Washington's Circular Letter to the States ("necessary or proper");
- Virginia's Resolution on the Potomac & Ohio Rivers ("necessary and proper");
- Hamilton's Charter for the Bank of New York ("necessary and proper");
- New York's Resolution for Revising the Articles of Confederation ("proper and necessary").[135]

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132. *See supra* notes 114–16, 128 and accompanying text; LAWSON ET AL., *supra* note 56, at 119 (explaining that the word "necessary" was used "as a term of art to signify incidence," while the term "proper" required laws "to be within constitutional authority, reasonably impartial, adopted in good faith, and with due care—that is, with some reasonable, factual basis").

133. *See, e.g.*, LAWSON & SEIDMAN, *supra* note 1, at 80–81.

134. *See* Mikhail, *supra* note 2, at 1114–21.

135. *See id.* at 1118–21.

Moreover, a review of hundreds of uses of "necessary and proper" and the other target phrases in the *Journals of the Continental Congress*, *Letters of Delegates to Congress*, and other sources suggests that these phrases were not primarily terms of art or "specialized" references to legal doctrines, but rather common features of ordinary English, which all of the founders had frequently used or encountered in their daily lives. For example, George Washington was especially fond of the phrase "necessary and proper," and he often used it and the other target phrases in his private correspondence, including approximately *forty times* in the pre-Convention period alone.[136] Although not quite so dramatically, similar claims can be made about John Adams, Benjamin Franklin, Robert Morris, and others.[137] More broadly, the sheer number and variety of occasions in which the target phrases were used by the founders undercuts Lawson and Seidman's claim that "necessary and proper" codifies any technical legal doctrine like the incidental powers doctrine. Finally, to the extent that the phrase "necessary and proper" had any fixed meaning in fiduciary contexts, the evidence suggests that it served as part of a flexible grant of discretion within reasonable boundaries, in a manner akin to the modern business judgment rule. This, at any rate, is how this phrase and comparable language was generally used in the charters of the Ohio Company, Bank of Pennsylvania, Bank of North America, Bank of New York, and other companies.[138]

In the face of evidence like this, why do Lawson and Seidman persist in making such dubious claims about the original meaning of "necessary and proper"? Why do they repeatedly ignore the "all other powers" provision and, when they do engage with it, why do they interpret it in such a strained manner? I am not certain, but my guess is that they may recognize that adequately coming to grips with the historical origins of the Necessary and Proper Clause would force them to acknowledge that many of their core beliefs about that clause and the Constitution as a whole are mistaken and must be revised. I noted one example earlier: their contention that the Constitution never vests powers in the Government of the United States, as distinct from its Departments and Officers. Lawson and Seidman have often repeated this refrain.[139] The claim is doubtful, however, and does not become more persuasive on repetition. The text, structure,

136. *Id.* at 1116.

137. *Id.* at 1116–20.

138. *Id.* at 1109–14, 1118–19.

139. *See, e.g.*, LAWSON ET AL., *supra* note 56, at 1 (2010) ("The Constitution never grants power to the 'national government' or the federal government as an undifferentiated entity, but instead grants various aspects of governmental power to discrete actors."); Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 24 n.78 (2006) ("There are no powers vested by the Constitution in 'the Government of the United States' as a unitary entity; all power grants are addressed to specific institutions or actors."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 336 (2002) ("The Constitution never grants power to the national government as a unitary entity. Every power grant in the Constitution is a grant to some specific institution or actor within the national government."); Gary Lawson, *Delegation and the Constitution*, 22 REG. 23, 24 ("The Constitution nowhere grants power to 'the federal government' as a unitary entity.").

drafting history, and early controversies surrounding the Necessary and Proper Clause suggest otherwise.[140] The implied corporate powers of the United States suggest otherwise.[141] So, too, do recognized incidents of national sovereignty, such as the government's eminent domain, legal tender, and immigration powers.[142] Despite all this, Lawson and Seidman continue to insist on treating an entire clause of the Constitution—one which expressly refers to "powers vested by this Constitution in the Government of the United States"—as if it either does not exist or does not mean what it says. The result is an interpretation of the Necessary and Proper Clause that distorts the basic design of the Constitution as it was understood by its principal draftsmen.

CONCLUSION

The Constitution of the United States is neither a power of attorney nor usefully analogized to a power of attorney. If one seeks to classify it in this manner, then a better characterization is that the Constitution is a corporate charter.[143] The "United States of America" is the name of the corporation for which that charter—the "Great Constitutional Charter" to which Washington referred—was ordained and established. Because it is a legal corporation, the "other powers vested by this Constitution in the Government of the United States" to which the Necessary and Proper Clause refers include the power to sue and be sued; the power to make contracts; the power to own and convey property; and the power to do "all other acts as natural persons may."[144] These "other powers" also include incidents of national sovereignty and the implied power to fulfill every purpose for which the Government of the United States was formed, including the six great ends "within the scope of the Constitution"[145] enumerated in the Preamble. Insofar as Lawson and Seidman are concerned with fidelity to the original Constitution, sooner or later they will need to confront the fact that Benjamin Franklin, John Marshall, Franklin D. Roosevelt, and others who have interpreted the Constitution in this enlightened fashion were probably right. The Government of the United States is vested by the Constitution with the implied power to provide for the common defense and promote the general welfare. Congress, in turn, is authorized to pass all necessary and proper laws to carry into execution those powers. All the rest is commentary.

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140. *See, e.g.*, GIENAPP, *supra* note 96; Mikhail, *supra* note 2; Mikhail, *The Constitution and the Philosophy of Language*, *supra* note 4.

141. *See, e.g.*, Dixon v. United States, 7 F. Cas. 761, 763 (C.C.D. Va. 1811); Cotton v. United States, 52 U.S. (11 How.) 229, 231.

142. *See, e.g.*, Kohl v. United States, 91 U.S. 367 (1875) (eminent domain); Juilliard v. Greenman, 110 U.S. 421 (1884) (legal tender); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (immigration).

143. *Accord* Miller, *supra* note 70, at 145 ("The Constitution, after all, was itself a corporate charter—a document creating a body corporate and defining its powers."); *id.* at 147 ("The Constitution of the United States is a corporate charter.").

144. BLACKSTONE, *supra* note 52, at *308.

145. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819).