THE FORGOTTEN VISITORIAL POWER: THE ORIGINS OF ADMINISTRATIVE SUBPOENAS AND MODERN REGULATION

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Abstract

While the concept of government "visitorial" power is absent in modern law and legal history, this article shows that the idea once had a profound impact on the ability of federal and state governments to regulate and inspect corporations. The belief that the government should act as a "visitor" of private corporations, analogous to the King as a supposed "visitor" of certain corporations in England, with expansive authority to inspect and correct corporate malfeasance, became widespread in the early United States. This visitorial theory justified the powers of the earliest business regulatory commissions, which could inspect corporations without court review using new summary methods, including what became known as the administrative subpoena. By the twentieth century, expanded conceptions of visitorial powers, as well as expanded conceptions of the power of legislative investigation, allowed the government to inspect almost all corporate activities with little judicial review, despite increasing judicial protection of Fourth and Fifth Amendment rights elsewhere, and despite the increasing importance of corporate personhood. This article shows that much of the federal government's modern regulatory and inspection power, including in national security investigations, emerged from the now forgotten idea of visitorial authority. The article also shows how reengaging with this history could help control such powers in the future.

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I. Introduction

Few contemporary constitutional debates have elicited as much public fervor as that over the rights of corporations. The Supreme Court's decision in *Citizens United v. Federal Election Commission*, which declared corporations' right to First Amendment protection, has inspired much of the recent discussion.[1] Many commentators, however, trace expansive corporate rights back to earlier Supreme Court decisions, which stated that a corporate charter

[1] 558 U.S. 310, 341–43 (2010) (holding that the government may not suppress political speech protected by the First Amendment based on the speaker's corporate identity); *see also* Barack Obama, President of the United States, State of the Union Address (Jan. 20, 2010), transcript available at http://stateoftheunionaddress.org/2010-barack-obama [https://perma.cc/DGL5-KGXF] (questioning the ruling, stating that *Citizens United* "reversed a century of law to open the floodgates for special interests"); Kent Greenfield & Adam Winkler, *The U.S. Supreme Court's Cultivation of Corporate Personhood*, THE ATLANTIC (June 24, 2015), https://www.theatlantic.com/politics/archive/2015/06/raisins-hotels-corporate-personhood-supreme-court/396773/ [https://perma.cc/2XHR-PEGS] (discussing the many cases which have contributed to the personification of corporations, including *Citizens United*); Nina Totenberg, *When Did Corporations Become People: Excavating the Legal Evolution*, NPR (July 28, 2014), http://www.npr.org/2014/07/28/335288388/when-did-companies-become-people-excavating-the-legal-evolution [https://perma.cc/94GH-Z9SS] ("The decision [*Citizens United*] reversed a century of legal understanding, unleashed a flood of campaign cash and created a crescendo of controversy that continues to build today."); Anthony Dick, *Defending Citizens United,* NAT'L REV. (Jan. 25, 2010), http://www.nationalreview.com/bench-memos/ 49322/defending-citizens-united-anthony-dick (responding to attacks on the *Citizens United* ruling).

was a constitutionally protected "contract," and that a corporation was a "person" under the protection of the Fourteenth Amendment.[2] The supposedly impregnable rights of corporate personhood based on these modern and historical rulings have become a fierce point of contention on the left and the right.[3]

Yet for centuries there have also been judicial limitations on the constitutional rights of corporations.[4] One of the most important of

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[2] Santa Clara Cty. v. S. Pac. R. Co., 118 U.S. 394, 409 (1886) (holding that a railroad company, like a person, was protected by the Fourteenth Amendment guarantee of equal protection and that California's taxation scheme violated the railroad's constitutional rights); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 624–50 (1819) (finding the charter granted to the trustees was a contract within the meaning of Article 1, Section 10 of the U.S. Constitution); Daniel Lipton, *Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century*, 96 VA. L. REV. 1911, 1940–53 (2010) (discussing *Santa Clara County* as the basis of corporate personhood); Elizabeth Pollman, *Reconceiving Corporate Personhood,* 84 UTAH L. REV. 1629, 1642–75 (2011) (tracing the history of corporate personhood in Supreme Court jurisprudence).

[3] David Ciepley, *Neither Persons nor Associations: Against Constitutional Rights for Corporations*, 1 J. L. & CTS. 221, 221–28 (2013) (challenging the extension of constitutional rights to corporations and discussing the history of corporate personhood); Amy Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 579 (2012) (arguing the *Citizens United* decision allowing corporations to fund advertisements in support of candidates for public office will likely favor Republican and pro-business candidates); Editorial, *The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30 ("Disingenuously waving the flag of the First Amendment, the court's conservative majority has paved the way for corporations to use their vast treasuries to overwhelm elections and intimidate elected officials into doing their bidding."); Floyd Abrams, Citizens United *and Its Critics,* 120 YALE L. J. ONLINE 77 (2010), http://yalelaw journal.org/forum/citizens-united-and-its-critics (defending a ruling "based on the most firmly established and least controversial First Amendment principles"); Steve Chapman, Opinion, *The Roberts Court: Champion of Free Speech*, CHI. TRIB., July 27, 2017, at 19 (supporting the *Citizens United* decision, arguing liberal critics have mischaracterized it).

[4] *See* Brandon L. Garrett, *The Constitutional Standing of Corporations,* 163 U.PA. L. REV. 95, 156–62 (2014) (explaining the range of constitutional rights afforded to corporations and the rights not extended even under recent cases like *Citizens United* and *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751 (2014)); Charles R. O'Kelley, Jr., *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after* First

those limitations, though hitherto undiscussed in the modern legal literature, was the so-called visitorial right of the government to supervise and, especially, to inspect its corporate creations for wrongdoing. Although the legal terminology of "visitorial powers" and "visitation" is now forgotten, this idea once justified broad government authority to remove corporate officers, to mandate or forbid corporate actions, to force public accountings, and, most importantly, to inspect the corporation's records and officers without judicial review. In fact, the transformation of the idea of visitorial powers into a general grant of government inspection power eventually engendered another contemporary constitutional debate, one which at first glance may seem to have little relation to the history of corporate law: the debate on warrantless government inspections.

Much of the modern legal discussion about government inspection revolves around the question of whether an individual, after transferring personal information to a third-party, has a constitutional right to the privacy of that information.[5] The U.S. Supreme Court, in

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National Bank v. Bellotti, 67 GEO. L. J. 1347, 1347 (1979) ("Judicial consideration of the extent and nature of the constitutional rights enjoyed by corporations has been sporadic. The United States Supreme Court has extended certain rights to corporations, but has withheld other rights.").

[5] Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 987–1050 (2016) (discussing a potential change to the Fourth Amendment's Warrant Clause to solve constitutional privacy issues currently arising from the third party doctrine); Orin S. Kerr, *The Case for the Third Party Doctrine,* 107 MICH. L. REV. 51, 57–63 (2009) (responding to critics of the third party rule, which states that information loses Fourth Amendment protection after being knowingly revealed to a third party); John Villasenor, *What You Need to Know About the Third-Party Doctrine*, THE ATLANTIC (Dec. 30, 2013), http://www.theatlantic.com/technology/archive/2013/12/what-you-need-to-know-about-the-third-party-doctrine/282721/ [https://perma.cc/ELL9-7LR8] (explaining the origins of the third party doctrine, how it has been applied since the 1970s, and what changes to the doctrine can be expected); David Couillard, *The Cloud and the Future of the Fourth Amendment*, ARSTECHNICA (Apr. 27, 2010), arstechnica.com/tech-policy/2010/04/the-cloud-and-the-future-of-the-fourth-amendment/ [https://perma.cc/6FPC-RNPB] (discussing the current challenges of applying the Fourth Amendment third-party doctrine to modern technologies); RICHARD M. THOMPSON II, CONG. RESEARCH SERV., R43586, THE FOURTH AMENDMENT THIRD-PARTY DOCTRINE (2014), www.fas.org/sgp/crs/misc/R43586.pdf [https://perma.cc/D8J9-MRHM] (reviewing the most important cases in the development of the third party doctrine).

Smith v. Maryland and other decisions, has refused to recognize such a right, and legislative protections for individuals against such intrusions have been minimal.[6] This debate, however, ignores why the government seems to have little difficulty inspecting the information held by these third-parties, most often businesses and corporations, often without a warrant, reasonable suspicion, or probable cause, despite these parties' own supposed Fourth and Fifth Amendment rights.[7] The putative "owners" of such information, such as software and telecommunications firms, often publicly object to such intrusions, but are seemingly unable to limit them, or even challenge them in court.[8] In fact, the roots of these broad powers of inspection lie in the

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[6] 442 U.S. 735, 739–45 (1976) (finding no Fourth Amendment violation when defendant's phone records had already been knowingly revealed to the phone company); United States v. Miller, 425 U.S. 435, 439–40 (1976) (finding no Fourth Amendment protection for personal bank records); *see* Right to Financial Privacy Act of 1978, 12 U.S.C. § 3401 (2012) (adding the requirement, following *U.S. v. Miller*, that notice must be provided before a financial institution can disclose personal information to a federal agency); 12 U.S.C. § 3401–22 (2012) (creating requirements for the government if they wish to access personal financial records); Electronic Communications Privacy Act of 1986, 18 U.S.C. § 2510 (2012) (amending current law to extend restrictions on phone and electronic communication wire-tapping); 18 U.S.C. § 2516–22 (2012) (establishing authorization laws for intercepting and disclosing wire, oral, or electronic communications); Issacharoff &Wirshba, *supra* note 5 (proposing amending the Warrant Clause as a possible solution to the lack of privacy protection).

[7] *See, e.g.*, Bellis v. United States, 417 U.S. 85, 89–91 (1974) (denying Fourth and Fifth Amendment privileges to partnerships and corporations).

[8] *See* Andrew E. Nieland, *National Security Letters and the Amended PATRIOT Act*, 92 CORNELL L. REV. 1201, 1205 (2007) (explaining how the FBI issued National Security Letters to demand records and prevent disclosure of the requests); Neil M. Richards, *The Dangers of Surveillance,* 126 HARV. L. REV. 1934, 1934–43 (2013) (discussing the dangers of modern government surveillance including secret surveillance); Jay Greene & Devlin Barrett, *Microsoft Sues U.S. on Secret Searches*, WALL ST. J., Apr. 15, 2016, at A1–A2 ("The suit . . . raises a fundamental question of how easily, and secretly, the government should be able to gain access to individuals' information in the cloud-computing era."); Brad Heath, *U.S. Secretly Tracked Billions of Calls for Decades*, USA TODAY (Apr. 8, 2015), https://www.usatoday.com/story/news/2015/04/07/dea-bulk-telephone-surveillance-operation/70808616/ (providing an overview of the government's vast information collection process following the September 11th terrorist attacks);

old idea of state visitorial power over corporations, which eventually expanded to justify inspections over any "collective entity" or group, including unions, political parties, and targets of national security sweeps.[9]

This article shows how the rise of a theory of state visitorial power over corporations in the United States first subjected certain companies to expansive government control and inspection. It then will show how visitorial ideas, along with newly discovered inspection powers of legislatures, mutated to allow government inspections of any businesses, and eventually almost any grouping of people, unconstrained by the Fourth or Fifth Amendments. In fact, this article shows that an important impetus behind the rise of the modern regulatory state was the desire to use visitorial authority to inspect businesses without the limitations of courts, by use of new "administrative subpoenas." These inspection powers eventually spread throughout both state governments and the federal government, and became a powerful tool of economic regulation, criminal investigation, and national security. Much of the modern authority for administrative subpoenas and warrantless inspection emerged from the now-forgotten visitorial idea.

This history, however, also reveals many unavoidable conflicts in the idea of visitorial power and the modern authorities that descend from it. While corporations, as government creations, have always been subject to distinctive types of government supervision, an

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Judy Greenwald, *EEOC Can Subpoena Broad Swath of Firm's Personnel Information*, BUS. INS. (Oct. 29, 2015), https://www.businessinsurance.com/article/20151029/NEWS06/151029738 (describing a case where the EEOC attempted to subpoena a broad range of information from a grocery store company based on a single sexual discrimination lawsuit); Declan McCullagh, *IRS Claims It Can Read Your Email Without a Warrant*, CNET (Apr. 23, 2013), http://www.cnet.com/news/irs-claims-it-can-read-your-e-mail-without-a-warrant/ [https://perma.cc/YH2C-PEDA] (detailing IRS' ability to subpoena information such as emails and online communications without a warrant); Andrea Peterson, *The FBI Thinks It Doesn't Need a Warrant to Read Your E-Mail*, THINKPROGRESS (May 9, 2013), http://thinkprogress.org/justice/2013/05/09/1981681/fbi-ecpa-warrant/ [https://perma.cc/QUW2-JQ2T] (describing FBI's reliance on the Electronic Communications Privacy Act to subpoena personal emails without a warrant and the technology companies challenging this rule).

[9] *See, e.g.*, Rogers v. United States, 340 U.S. 367, 376 (1951) (denying Fourth and Fifth Amendment protections to the Communist Party's treasurer).

analysis of such supervision in the past demonstrates that it posed privacy and other dilemmas for the people only tentatively associated with those corporations, such as lower-level employees, customers, or bank depositors.[10] A better understanding of this history shows how reengaged legislatures and courts could police the limits of these inspection powers. This article demonstrates substantial historical and legal precedents for the courts to provide more vigorous oversight of government subpoenas, using general Fourth and Fifth Amendment principles concerning reasonableness, relevance, and potential privilege. Courts could then reemerge as the arbiters of these privacy and corporate conflicts, with a better understanding of the legal and judicial precedents that created them.[11]

This article contributes to three related literatures that have missed some aspects of this history. The literature on corporate law has ignored the rise of comprehensive state visitorial powers over corporations in the United States. By focusing on the rise of corporate personhood and the constitutional protections of corporations, this literature has missed how visitorial powers created limitations on corporate personhood rights in certain areas, especially regarding the government inspection of corporate officers and books.[12] Similarly, the

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[10] *See* discussion *infra* pp. 249, 255, 265.

[11] *See* Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 805–46 (2005) (presenting a contemporary argument for more exacting court reviews of subpoenas).

[12] The history of corporate law is silent on both state visitorial powers in the early 19th century and on the rise of new types of state investigative powers based on this idea later in the century. For typical corporate law histories that fail to discuss "visitation," see LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 329–49 (3d. ed. 2001); HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK (1983); MORTON HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 65–107 (1992); HERBERT HOVENKAMP, ENTERPRISE AND THE AMERICAN LAW, 1836–1937 (1992); Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 YALE L. J. 502 (2006); Phillip I. Blumberg, *The Corporate Personality in American Law: A Summary Review*, 38 AM. J. COMP. L. 49 (1990); Garrett, *supra* note 4, at 156; Lipton, *supra* note 2, at 1940–53; Gregory Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987); Ronald E. Seavoy, *The Public Service Origins of the American Business Corporation*, 52 BUS. HIST. REV. 30 (1978); Joan C.

literatures on both the rise of the regulatory state[13] and on constitutional privacy protections[14] have tended to ignore the conflict between the two, as well as the importance of broad inspection powers in the rise of the regulatory state. By contrast, this article demonstrates how regulatory reformers understood the efficient inspection of business to be one of the most important powers of regulatory government and how those powers spread far beyond the targets of the original advocates, even as the theories of visitorial powers over corporations

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Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369 (1985).

[13] For typical histories of business regulation which do not discuss visitorial powers or administrative subpoenas, see THOMAS K. MCCRAW, PROPHETS OF REGULATION (1984); STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920 (1977). Even legal histories of the administrative state ignore the place of administrative subpoenas and new investigative powers in its rise. *See* DANIEL ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); JOANNA GRISINGER, THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL (2012); JERRY MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012). Philip Hamburger discusses the history of administrative subpoenas and summons, although he focuses on their pre-constitutional English history and on their contemporary use, with little discussion on the transition, and no discussion of visitation as a justification. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 157–90, 217–25, 237–40, 263–76 (2014)

[14] I attempt to expand on the burgeoning literature investigating civil liberties and procedural due process issues in regulation. Most of this literature, however, focuses only on court decisions and not on political battles over rights or the particular nature of administrative subpoenas and compulsive processes, and none discuss the investigative rights emerging from visitorial powers. For the most extensive discussions of this struggle, see KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES: DISCONTINUITIES IN THE DEVELOPMENT OF AMERICAN CONSTITUTIONAL LAW 27–66, 112–20 (2004); Slobogin, *supra* note 11, at 805–46. Studies of the Fourth Amendment have spent relatively little time on administrative subpoenas or on the Fourth Amendment rights of "collective entities" and do not elaborate on these issues' history. *See* THOMAS K. CLANCY, THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION 132–38, 292–94 (2008); PHILIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK, 311–12, 347–50 (2d ed. 2015).

once used to justify them became ignored legal relics. A reexamination of this history, and its contemporary impact, is long overdue.

II. The Visitorial Powers of the Courts

The position of "visitor" is almost unknown today, but it once carried great weight. Under English law, from at least the fifteenth century, a visitor was the representative of the founder of a religious or charitable corporation.[15] A visitor could superintend the operations of the corporation, remove and replace executive officers, and dictate general policies.[16] His position was somewhat analogous to that of a board of directors under modern corporate law, and the courts deferred to almost any decision a visitor made.[17] In the only mention of visitors in Edward Coke's *Institutes,* Coke said that a King could not punish or control visitors when they were managing their corporations.[18] In the most famous early English case on corporations, *Philips v. Bury*, decided in 1694, Chief Justice John Holt said that a professor expelled by a visitor from Exeter College, Oxford could not appeal to the courts for relief, since a visitor was supreme within a corporation.[19]

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[15] The idea of visitation originally came from the power of the Catholic Church to send visitors to supervise entities under its control. WILLIAM CLARK, ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY 340–43 (2006).

[16] *Id.* at 342–43 ("[V]isitors commenced meddling in academic, as well as other matters, for better or worse.").

[17] *See, e.g.*, Philips v. Bury (1694), 90 Eng. Rep. 1294, 1300 (finding "the law gives [the founder] and his heirs a visitatorial power, . . . an authority to inspect their actions, and regulate their behaviour, as he pleaseth").

[18] EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND §136 (Edward Hargrave & Charles Butler, eds., 1832) (explaining the King only acquired visitation power if he was the founder of a religious house, in which case the Chancellor of England, in the King's place, "is appointed by law to be a visitor of them").

[19] Philips, 90 Eng. Rep. at 1302 (finding the law gave the visitor the power to remove a university employee "where ever he seeth cause"). In another case, the English court said the visitor was the supreme power in his realm "and it is almost an arbitrary power." The King v. Alsop (1681), 89 Eng. Rep. 868, 868 ("[T]he visitor has an intire power, and there can be no appeal from him."). *See also* Att'y Gen. v. Governors of the Foundling Hospital (1791), 34 Eng. Rep. 760, 761 ("Questions . . . which properly fall under the cognizance of the visitor of a charitable foundation, cannot be decided by a Court of Equity

Religious or charitable corporations were the most substantial corporations in England in the early modern period, and therefore most of that era's corporate law was formulated through cases involving them and their visitors.[20] There was, however, another type of corporation, a "civil corporation," which included both the corporations governing English towns and those encouraging trade.[21] But as *Philips v. Bury* said, for such civil corporations, "[t]here are no particular private founders and consequently, no particular visitor of these."[22] The lack of a visitor for civil corporations, which would in time come to be the dominant form of corporation, might have kept ideas about visitors and their power away from the mainstream of corporate law.

William Blackstone, however, proposed a conceptual reframing that brought a type of visitor into the theory of civil corporations, and thus into the future of corporate law.[23] In his *Commentaries on the Laws of England,* Blackstone argued the duties of all corporations could be "reduced to this single one, acting up to the end or design, whatever it be, for which they were created by their founder."[24] Blackstone sometimes demanded a rigorous consistency which the law itself did not always provide, and so he was disturbed by the idea that civil corporations had neither a founder nor a visitor to

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. . . ."). Later English decisions marveled at the power of visitors. Att'y Gen. v. Archbishop of York (1831) in 2 REPORTS OF CASES ARGUED AND DECIDED IN THE HIGH COURT OF CHANCERY DURING THE TIME OF LORD CHANCELLOR BROUGHAM 461, 468 (James Russel & J.W. Mylne, eds., 1854) ("Nor can any man doubt what the powers of a visitor are. In practice they are perfectly uncontrolled . . . [and] of a most extensive and arbitrary nature . . . .").

[20] HENRY S. TURNER, THE CORPORATE COMMONWEALTH: PLURALISM AND POLITICAL FICTIONS IN ENGLAND, 1516–1651 xii (2016) (noting that joint-stock or for-profit corporations were "historically speaking, a relative latecomer to the Western world").

[21] James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L. J. 617, 641 (1985) ("Civil corporations received their corporate capacity from the monarch and existed for public purposes of governance. They included local government corporations and those with a public purpose such as the public trading company.").

[22] Philips, 90 Eng. Rep. at 1294 (distinguishing civil corporations from religious or charitable corporations).

[23] 1 WILLIAM BLACKSTONE, COMMENTARIES *467 (discussing the structures and rights of corporations).

[24] *Id.*

carry out the founder's wishes.[25] He instead argued the "founder of all corporations, in the strictest and original sense, is the king only, for only he can incorporate a society."[26] Where there was no specific founder, as in a civil corporation, Blackstone said the King therefore acted as the corporation's visitor, but only through the medium of his courts and only under the general laws.[27] This was something of a conceptual stretch, since by this logic all citizens had a "visitor" in the sense of being overseen by the courts. Blackstone did note that corporations, unlike individuals, were subject to two specific writs (of quo warranto and mandamus) forcing them to live up to their charters.[28] These writs, however, could also be demanded of charitable or religious corporations that had their own visitors, and thus did not differentiate any distinct kingly or court power over civil corporations.[29]

While other contemporary writers noted Blackstone's idea of the King's and his courts' visitorial jurisdiction over civil corporations, most agreed the idea carried only rhetorical weight.[30] Richard Woodeson cited Blackstone but argued that "there is very little similarity between the domestic and discretionary authority of a visitor, properly so called, and the judicature exercised on these occasions by the king's bench."[31] Woodeson cited *Philips* to say that civil corporations had "no particular . . . visitor" but instead were

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[25] *See id*. at *468 (reviewing corporate leadership).

[26] *Id*. ("[W]here there are no possessions or endowments given to the body, there is no other founder but the king.").

[27] *Id.* at *469 ("The king being thus constituted by the law visitor of all civil corporations, . . . the place wherein he shall exercise this jurisdiction . . . is the Court of King's Bench . . . .").

[28] *Id.* at *473 ("By forfeiture of its charter . . . the incorporation is void. And the regular course is to bring a writ of quo warranto, to enquire by what warrant the members now exercise their corporate power . . . .").

[29] *See id.* at *472–73 (explaining that a mandamus writ could compel a corporate officer to perform a duty delegated to him by the charter, while a quo warranto writ was an in extremis writ that could only be used to abrogate a corporations' charter for failure to live up to its terms); 1 RICHARD WOODESON, SYSTEMATICAL VIEWS OF THE LAWS OF ENGLAND 480–82 (1792) (discussing examples of mandamus against charitable corporations).

[30] A search of the English Reports yields no instance of a court deciding on a civil corporation based on the court's visitorial power. *See generally* Eng. Rep. (lacking discussion of visitorial power over civil corporations).

[31] WOODESON, *supra* note 29, at 486–87.

governed merely by the "laws of the land."[32] Stewart Kyd's *Treatise on the Law of Corporations*, the first comprehensive treatise on corporate law, noted Blackstone's idea but also cited a judicial decision explicitly contrasting a "visitor" with a "court of law or equity."[33] Others continued to ignore the new concept.[34]

The earliest American court decisions maintained that the courts lacked any special visitation powers over civil corporations.[35] This absence became important not only because American colonies, and later states, chartered many more corporations than England, but also because, under the clause of the U.S. Constitution forbidding state abridgements of contract, the charter of a corporation was analogized to a contract beyond the power of the state to change or superintend.[36]

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[32] *See* WOODESON, *supra* note 29, at 472.

[33] 1 STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS 255, 260, 286–87 (1793) (finding that a visitor was a better "judge of the comparative fitness and qualification of candidates," as "they were more conversant in matters of that kind").

[34] British law dictionaries of the late 18th century make no mention of the king as general visitor of corporations, nor did a general abridgement of laws of the time. *See, e.g.,* 2 RICHARD BURN AND JOHN BURN, A NEW LAW DICTIONARY: INTENDED FOR GENERAL USE 709–10 (1792); GILES JACOB AND J. MORGAN, A NEW LAW DICTIONARY (1782); 21 CHARLES VINER, A GENERAL ABRIDGEMENT OF LAW AND EQUITY 587–89 (2d. ed. 1793).

[35] Thomas Jefferson's notes on English and American law make no mention of a general visitation power of the King or government. Jefferson only described the King's visiting authority through his chancellor for charities without a founder or with the King himself as a founder. THOMAS JEFFERSON, REPORTS ON CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA 99–102 (1829).

[36] U.S. CONST. art. I, § 10; Oscar Handlin & Mary Handlin, *The Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 3–4 (1945) ("Throughout the whole of the eighteenth century England chartered some half-dozen corporations for manufacturing purposes, and hardly more in any other business sphere . . . . Yet by contrast to English and Continental experience, the less advanced economy of the United States produced almost 350 business corporations between 1783 and 1801."); Seavoy, *supra* note 12, at 30–37 (describing the history of corporations in the United States and the issue of chartering). Under English law the "government," if understood as Parliament, was nearly omnipotent, and could break charters or contracts at their wish. Only the king was limited in his actions relative to Parliament. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *46 ("Sovereignty and Legislature are indeed convertible terms."). This understanding made later U.S. com-

The U.S. Supreme Court's *Trustees of Dartmouth College* v. *Woodward* case is often cited as the culmination of this contractarian view of corporate independence.[37] Yet it is significant that the *Dartmouth College* Court stated that Dartmouth's independence came largely out of the charitable nature of the corporation, and the power of its founder and "visitor" (its trustees).[38] In his decision, Chief Justice John Marshall stated that the corporation was a "private eleemosynary institution" subject to the governance of founder and his legal descendants, not a "civil institution" or "public corporation" changeable by law.[39] Justice Joseph Story, in his oft-cited concurrence,

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parisons of limited government authority over corporations to only the King's authority somewhat strained, but such a transference of restrictions was common across much of early American constitutional thought. *See* GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1969) (comparing American and British forms of government during the period the United States was formed).

[37] *See, e.g.*, Joseph F. Morrissey, *A Contrarian Critique of* Citizens United, 15 U. PA. J. CONST. L. 765, 811–15 (discussing the emergence and evolution of the contractarian paradigm).

[38] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518, 565 (1819) ("The controversy turned upon the power of the visitor, and, in the discussion of the cause, . . . and it was determined that the college was a private corporation, and that the founder had a right to appoint a visitor, and give him such power as he thought fit.").

[39] *Id.* at 629–31. The term "visitor" or its variations are used 30 times in the supporting opinions. Daniel Webster also used the term "visitor" 24 times in his argument before the Court. For instance, he argued, "The trustees were visitors, and their right to hold the charter, administer the funds and visit and govern the college, was a franchise and privilege, solemnly granted to them." *Id*. at 588*;* 4 HENRY WHEATON, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPREME COURT OF THE UNITED STATES 588 (4th ed. 1883). In 1790, John Marshall successfully argued in the Virginia Supreme Court for the corporation of William & Mary against a writ of mandamus against and focused on the importance of private visitors for the independence of the college, arguing, "The Court have no jurisdiction of the subject in the form the case now wears, because this is a mere Eleemosynary institution, with Visitors appointed for its government and direction." Rev. John Bracken v. Visitors of William & Mary Coll.*,* 7 Va. (3 Call) 573, 579–80 (Va. 1790); Florian Bartosic, *With John Marshall From William and Mary to Dartmouth College*, 7 WM. & MARY L. REV. 259, 259–66 (1966); J.W. Bridge, The Rev. John Bracken v. The Visitors of William and Mary College*: A Post Revolutionary Problem in Visitatorial Jurisdiction*, 20 WM. & MARY L. REV.

argued that in "all eleemosynary corporations, a visitatorial power attaches as a necessary incident" and that in such a corporation, "the founder and his heirs are the legal visitors" with full power to manage the corporation.[40] Story said that such visitors were not "placed beyond the reach of the law," since they were subject to an appropriate court, "not as itself possessing a visitatorial power, or a right to control the charity," but only the power to correct abuses.[41] In another concurrence, Justice Bushrod Washington pointed out that Dartmouth College was a classic corporate charity, "subject to the government and visitation of the founder, and not to the unlimited control of the government."[42] Marshall and Story both refused to extend their analysis of corporate independence to "civil corporations" without a visitor, while Washington explicitly said such civil corporations had no constitutional contract protection.[43] Yet New York's James Kent and other judges claimed *Dartmouth College* confirmed the general

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415, 434 (1979) (discussing the visitors' "visitatorial" powers, not the state's power over the corporation).

[40] *Dartmouth College*, 17 U.S. 518 at 674 (Story, J., concurring) (discussing the "visitatorial" power of charitable corporations).

[41] *Id*. at 671–77 (Story, J., concurring) (noting restraints on the "visitatorial" power of the college visitors). Story's decision had been somewhat presaged by his ruling in Terrett v. Taylor, 13 U.S. 43, 43–55 (1816) (concerning Virginia's attempted removal of property from the Episcopal Church). Marshall also used almost identical language about a court "not as itself possessing a visitatorial power" to discuss a court's superintendence of a charity, in a case decided just days before *Dartmouth College*. Trs. of Philadelphia Baptist Ass'n v. Hart's Ex'r, 17 U.S. 1, 100 (1819).

[42] *Dartmouth College*, 17 U.S. 518 at 665 (Washington, J., concurring).

[43] *Compare id.* at 668 (Story, J., concurring) ("It is unnecessary, in this place, to enter into any examination of civil corporations.") *with id.* at 660–61 (Washington, J., concurring) ("It would seem reasonable that such a [civil] corporation may be controlled, and its Constitution altered and amended, by the government in such manner as the public interest may require."). Marshall and Story described the differences between "public" and "private" corporations. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 222 (1827) ("Public corporations . . . are founded by the government, for public purposes, and the whole interest in them belongs to the public. But if the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted . . . .").

independence of all corporations, either charitable, civil, or of any type, from anyone but regular courts interpreting the general laws.[44]

The *Dartmouth College* decision and its later interpretations might have made American corporations almost completely independent of state control, but there was a reaction.[45] Many historians have noted the rise of "reservation" clauses in new corporate charters, which allowed future state legislatures to change these new charters at a whim.[46] Yet the visitorial authority of courts cited in Blackstone provided another means of government control.[47] Some American courts began alluding to an expansive court visitorial power over corporations, seemingly out of an expansive reading of Blackstone.[48] In 1812, the South Carolina Constitutional Court discussed the "visitorial jurisdiction of the court of General sessions" over state-chartered corporations, and the court's power "to regulate

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[44] 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 389–92 (1826) ("The decision in that case did more than any other single act . . . to give solidity and inviolability to the literary, charitable, religious, and commercial institutions of our country."); *see* Att'y Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, 38889 (N.Y. 1817) ("I doubt much whether the visitatorial power exists at all . . . . I should rather conclude, that, under the constitutional administration of justice in this state, all corporations . . . were amenable to the Supreme Court, and to that Court only . . . .").

[45] *See* Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L. J. 1593, 1616–17 (1988) (discussing states enacting general statutes, giving them the ability to amend corporate charters).

[46] *See* FRIEDMAN, *supra* note 12, at 137 ("In later years, it was routine for the legislature to insert in every charter a clause reserving to the state the right to alter, amend, and repeal."); Hovenkamp, *supra* note 45, at 1617 ("During the Taney period, the general reservation clause or statute, giving the state the power to amend corporate charters, became the principal mechanism by which states hedged on commitments to business corporations."); Francis J. Putnam, *State Interference, Under the Reservation Clause, With Contracts Between the Stockholders of Corporation*, 7 N. Y.U. L.Q. REV. 487, 487–94 (1929).

[47] BLACKSTONE, *supra* note 23, at *469 ("The king being thus constituted by the law visitor of all civil corporations, the law has appointed the place wherein he shall exercise this jurisdiction, which is the Court of King's Bench, where, and where only, all misbehaviors of this kind of corporation are inquired into a redressed, and all their controversies decided.").

[48] *See, e.g.*, State v. Bruce, 5 S.C.L. (1 Tread.) 264, 280 (S.C. 1812) (explaining the discretionary power of courts over corporations).

and correct them in the exercise of their discretionary power."[49] One 1828 Massachusetts case offhandedly noted the "visitatorial power which this Court" had in "virtue of its general jurisdiction" to correct misbehavior in corporations.[50]

Legislatures also began using the idea of visitorial power to expand court powers over all corporations, especially by using the more expansive powers of courts of equity.[51] Although equity courts in English law had no powers to interpret civil corporation charters, in America, state governments granted them ever greater power over all corporate actions.[52] Importantly for the future development of

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[49] *Id.* ("Their discretion is limited, by legal restraints; and being inferior magistrates of a mixed character, even though they should confine themselves within the bounds of their jurisdiction: yet they must be subject to the visitatorial jurisdiction of the court of General Sessions, to regulate and correct them in the exercise of their discretionary power.").

[50] *In re* Murdock, 24 Mass. (7 Pick.) 303, 324–25 (Mass. 1828); *see also*, State v. Wilmington City Council, 3 Del. (3 Harr.) 294, 307 (1840) (discussing how visitatorial jurisdiction is exercised by the Court of the King's Bench); Commonwealth v. M'Closkey, 2 Rawle 369, 383 (Pa. 1830) ("By the act of 1722, the powers and jurisdiction of this court, are declared to be the same as those of the King's Bench, which grants writs of *Mandamus,* to restore officers of corporations, and freemen wrongfully disfranchised, as well as informations in the nature of *Quo Warranto,* against usurpers of the franchises of the crown; and, in the exercise of its visitatorial powers, corrects abuses by judging of the circumstances and merits of the complaint.").

[51] Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245, 265, 311 (1996) (indicating courts became "a responsive, quick, inexpensive, and desirable avenue of recourse for those who felt they had been wronged in ways that no other jurisdiction could remedy.").

[52] Blackstone described "the Court of King's Bench; where, and where only, all misbehaviors of this kind of [civil] corporation are inquired into and redressed," as opposed to a court of equity or Chancery Court. BLACKSTONE, *supra* note 23, at *469. The Chancery court did have general supervisory power over "trusts" and "charities," which gave it particular powers to force charitable corporations to adhere to their charters and spend funds according to law. These powers would seemingly make charitable corporations even more subject to court authority than civil corporations, *pace* Blackstone's theory of the authority of courts in the absence of a visitor. Haskett, *supra* note 51, at 265. As early as 1601, the Chancellor of England was given power to inspect charities' use of funds, although not to usurp power of a charity's visitors. The Statute of Charitable Uses Act, 43 Eliz. I c. 4 (Eng.) (1601); *see also* Griffin v. Graham*,* 8 N.C. (1 Hawks) 96, 123–24 (1820) ("Even in the

corporate law, equity courts were the only courts with the power to issue injunctions and to compel discovery of documents through subpoena.[53] In an early example of this extension, after a decision by

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case of a corporation, where the trustees, by the terms of the charter, have in themselves the visitorial power, Equity will not suffer an abuse of the trust . . . . As managers of the revenues, [the trustees] are subject to the superintending power of the Court of Chancery, not as itself possessing the visitorial power or a right to control the charity, but as possessing a general jurisdiction . . . to redress grievances and suppress frauds."). The power of equity courts over trusteeships and bankruptcy (where the assets of an insolvent debtor were considered to be held "in trust" for his creditors) seems to be the original reason state legislatures granted these courts increased powers over "civil" or non-charitable corporations in America. Thus, new equity court powers acted as a sort of prophylactic against eventual failure, bankruptcy, and future trusteeship. The roots of equity court supervision of corporations, such as in Delaware's famous Court of Chancery, emerged from the reforms discussed above, though previous research has not focused on the importance of equity to them. *See* William T. Quillen & Michael Hanrahan, *A Short History of the Delaware Court of Chancery 1792–1992*, 18 DEL. J. CORP. L. 819, 832 (1993) ("[T]he Court, through its equitable doctrines and remedies, was able to provide an excellent forum for resolution of corporate internal controversies. Chancery practice in nineteenth century Delaware already included many of the remedies sought and defenses raised in corporate disputes."); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. LAW 333, 335 (2002) (describing the origination of how the trustee-beneficiary relationship greatly influenced the development of fiduciary duties). For the most extensive analysis of the evolution of equity and corporate law, albeit in one specific area of law, see Bert S. Prunty, Jr. *The Shareholders' Derivative Suit: Notes on Its Derivation*, 32 N.Y.U. L. REV. 980, 980–95 (1957) (explaining the history and development of the shareholder derivative suit).

[53] The subpoena power of equity courts was long contested. 2 WILLIAM BLACKSTONE, COMMENTARIES, *51. Blackstone traced its origin to an English chancellor, who "by a strained interpretation of" the law, "devised the writ of subpoena returnable at the Court of Chancery only," which then became the basis of that court's jurisdiction over documents. *Id*. Blackstone considered books of account and other papers "dangerous species of evidence," which were typical only in civil law countries and should be limited England. He thus supported Parliamentary efforts to restrict their use. *Id.* at *369; THEODORE F.T. PLUNKETT, A CONCISE HISTORY OF THE COMMON LAW (5th ed. 1956), 179–80, 185, 188, 683–84 ("[I]ts process [equity] by bill and *sub poena* was not in its origin judicial, but part of the administrative machinery of the Council . . . ."). For American background, see John R. Kroger,

James Kent which seemed to limit the New York Chancery Court's powers over corporations, the New York legislature in 1825 granted that equity court, as the court later said, "a general superintending and visitatorial power over all corporations and their directors, managers, trustees, and officers."[54] With what one treatise writer called "very broad powers," the court could and did issue injunctions and appoint receivers over those corporations for a violation of law, suspend officers, direct new elections to be held, remove directors, ask the state governor to appoint new directors, and demand an accounting of actions by corporate officers.[55] Other states also expanded their equity courts' jurisdiction over civil and private corporations under a theory of general visitation. One later legal treatise said, "[t]he jurisdiction of courts of equity over corporations has been extended by legislative enactments," and thus courts of equity assumed "visitorial powers over corporate bodies."[56]

New reforms extended visitorial court powers over corporations into even more summary modes. In 1848, the New York Code of Civil Procedure abolished the old writs against corporations, as well as separate equity courts, but gave New York citizens the power to initiate summary actions against corporations based on the

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Supreme Court Equity, 1789–1835, and the History of American Judging, 34 HOUS. L. REV. 1425, 1435 (1998) ("[E]quity courts interpreted documents loosely, often to the extent of rewriting them, in order to achieve a result that the Chancellor believed to be just.").

[54] Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 84, 89 (N.Y. 1831) (Kent, J.); *see* Att'y Gen. v. Utica Ins. Co., 2 Johns. Ch. 371, 385 (N.Y. 1817) (Kent, J.) (stating equity courts could not correct corporate misbehavior). Importantly for the Blackstonian basis of these new laws, the statutes did not apply to religious corporations, which already had visitors. *See* First Baptist Church v. Witherell, 3 Paige Ch. 296, 303 (N.Y. 1832) (noting "the provision in the Revised Statutes excepting religious incorporations from the visitorial power . . . .").

[55] CHARLES EDWARDS, ON RECEIVERS IN CHANCERY WITH PRECEDENTS 165–67 (1839) ("The Legislature of the State of New-York has vested in chancellor very broad powers over the directors, managers, and other trustees and officers of the corporations . . . ."); Verplank v. Mercantile Ins. Co., 1 Edw. Ch. 84, 85 (1831) ("An equitable jurisdiction over directors is expressly given by statute.").

[56] JAMES L. HIGH, A TREATISE ON THE LAW OF RECEIVERS 182–86 (1876).

already expanded equity procedures.[57] Under this code, the courts at a mere complaint from a citizen could issue injunctions against corporations for almost any previous or even potential violation of their charter or the law, as well as to compel removal of officers or performance of duties.[58] The code's authors explicitly cited the "dilatory" nature of the old corporate writs, as well as the problems with earlier court decisions about the legal independence of corporations, to argue "that a summary remedy seems absolutely necessary" to force corporations to obey the law.[59] Many states adopted the code and its corporate provisions, or expanded the ambits of the old writs of quo warranto and mandamus against corporations.[60] Platt Potter, in his *Treatise on the Law of Corporations*, described how New York and subsequent states also gave attorneys general the power to make a bill or petition on behalf of the people in order to investigate a corporation, and declared this power part of the "spirit of facilitating the visitorial power of the courts" over corporations.[61] He admitted that such a power "seems to partake of the more summary visitatorial nature" of private visitors over charities in England, but in America the old visitor's power "became, in effect, under another name," a power

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[57] *See* THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK 409–16 (1850).

[58] *Id*. at 415–16.

[59] People v. Ballard, 32 N.E. 54 (N.Y. 1892) (observing that "the revisers [of the original Code of Civil Procedure] appended the following note: 'The proceedings at law by quo warranto or scire facias are so dilatory that much mischief will generally be done before judgment can be obtained, and are so expensive that a summary remedy seems absolutely necessary.'").

[60] One treatise writer argued that "no session of the Legislature in the different States occurs in which statutes are not passed" expanding mandamus and quo warranto actions against corporations. JOHN SHORT & FRANKLIN FISKE HEARD, INFORMATIONS (CRIMINAL AND QUO WARRANTO) MANDAMUS AND PROHIBITION iv (1st ed. 1888). For example, Mississippi law provided that on filing of any quo warranto action against any banking corporation by a district attorney, a county clerk had to issue an injunction stopping bank activities until the case was decided. The state in its successful argument to the court on the constitutionality of the law said that the "law-making power holds a reserved, supervising and visitorial right" over its corporations, and that any creation of it was "always subject to its supervising or visitorial power." *See* Commercial Bank of Rodney v. State of Miss., 12 Miss. 439, 461 (1845).

[61] PLATT POTTER, TREATISE ON THE LAW OF CORPORATIONS: GENERAL AND LOCAL, PUBLIC AND PRIVATE; AGGREGATE AND SOLE 276, 874 (1879).

of the courts, "with all, and more than all, the function of visitors . . . ."[62] The Wisconsin Supreme Court, in approving an inspection by the attorney general in line with the government's visitorial function, noted that the "grounds on which this [visitorial] jurisdiction rests are ancient; but the extent of its application has grown rapidly of late years, until a comparatively obscure and insignificant jurisdiction has become one of great magnitude and public import."[63]

The courts soon abandoned any lingering idea that their new powers were based on the absence of a private corporate visitor. One reason is that, in America, the division between charitable and civil corporations became less distinct, and instead most courts divided corporations into public (or governmental) and private corporations, and both were eventually subject to the same broad visitorial power.[64] The Alabama Supreme Court said that while an older view said that only public corporations (the closest analog to civil corporations) such as municipalities were subject to visitation of the King through the judiciary, "[t]he modern and better view is that this right of judicial visitation is not confined to public corporations, but extends as well to those of a purely private nature," including both charities and those "organized strictly for business purposes."[65] Virginia courts held that colleges in the state, which even today have official "boards of visitors" based on the old English terminology, were under the inherent visitorial power of the state, precisely the opposite idea of *Philips v. Bury* and arguably of *Dartmouth College*.[66] As the Wisconsin Supreme Court said when discussing "the visitorial or superintending power of the State over corporations[,] . . . every corporation of the state, whether public or private, civil or municipal, is subject to this superintending control."[67]

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[62] *Id*. Potter said visitorial power was especially important for banking, insurance, and other such finance corporations.

[63] Att'y Gen. v. Chicago & Nw. R.R., 35 Wis. 425, 530 (1874).

[64] HARTOG, *supra* note 12 (explaining the evolution of the public/private distinction in corporate law). In Hartog's important work on the growing public and private divide in American corporate law, he only mentions visitors once in a footnote. *Id.* at 198 n.58.

[65] Med. & Surgical Soc'y v. Weatherly, 75 Ala. 248, 253 (1883) (forcing the medical society to restore an expelled member).

[66] Lewis v. Whittle, 77 Va. 415, 424 (1883) (allowing the governor to remove the board of visitors from the medical college and replace them with his own appointees if granted with such authority from the legislature).

[67] State v. Chamber of Commerce, 3 N.W. 760, 763–64 (Wis. 1879).

Government visitation powers gradually migrated from a theory about court powers over corporations to a theory about the general power of state legislatures to control and superintend corporations.[68] Some states not only put a reservation clause in corporate charters, but required those incorporating under their laws to promise to be subject to general visitatorial powers of the state.[69] In an elision between the two ideas of reservation and visitation, the California Supreme Court said the state's reservation clauses in corporate charters meant that the state legislature's "visitatorial power over corporations of its creation is as extensive as its power to authorize this creation, and it may exercise its power directly by itself," which in this case allowed the state to dissolve a corporation at its discretion.[70]

States also used the theory of government visitation to justify an inherent state power over corporations even beyond specific statutes or constitutional provisions.[71] In Thomas Cooley's annotated edition of Blackstone's *Commentaries,* Cooley included a footnote which declared, "[i]n the United States the legislature is the visitor of all corporations created by it."[72] A Delaware Court in 1885 offhandedly mentioned "the visitatorial power held by a creating state over its

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[68] Stevens v. Phoenix Ins. Co., 41 N.Y. 149, 152 (1869) (describing a corporation as an inhabitant of the State, subject to regulation and oversight by the legislature and courts).

[69] *Id*. at 150 (referencing New York's requirements for visitorial authority in its charters). The earliest known example of a reference to direct legislative authority occurred when the General Assembly of Connecticut reserved for itself the right of "inspection" of a toll bridge company, and the state Supreme Court said that "this visitorial authority is too apparent to admit of controversy." New Haven and East-Haven Toll Bridge Co. v. Bunnell, 4 Conn. 54, 59 (1821). For examples of the extensive type of control based on these theories, see 2 ROBERT C. CUMMING, ET AL., THE ANNOTATED CORPORATION LAWS OF ALL THE STATES 34–37 (1899) (providing an overview of Minnesota corporate laws).

[70] State Inv. & Ins. Co. v. Superior Court of San Francisco, 35 P. 549, 553 (Cal. 1894).

[71] 1 THOMAS M. COOLEY & JAMES DEWITT ANDREWS, ED., COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS BY WILLIAM BLACKSTONE 428 (4th ed. 1899) (discussing the broad scope of government visitation).

[72] *Id*. Cooley said the legislature's visitorial powers allowed judicial proceedings only where a corporate action would cause forfeit of its charter under common law, but this older conception was gradually abandoned.

corporations."[73] The Supreme Court of Wisconsin admitted that the state's corporate law "reserves to the legislature, the most extensive visitorial power over all corporations of the state," but the court went further and said that the "visitorial power of the state over its corporations does not depend alone upon the statute, but exists as a necessary and inherent power in the government which creates the corporations, at common law."[74] Justice Orton of the Wisconsin court quoted Blackstone and said that where civil corporations had no founder or visitor, the "common-law right of visitation is in the state or government which creates the corporation."[75]

Treatise writers affirmed this new understanding. The first comprehensive treatise on corporate law in America, written in 1843, had a section "Of the Visitatorial Power" and noted that "corporations, whether public or private . . . properly fall under the superintendency of that sovereign power, whose duty it is to take care of the public interest."[76] Under the treatise's conception, that power was almost unlimited.[77] The treatise said "[i]n this country, where there is no individual founder or donor, the legislature are [sic] the visitors of all corporations founded by them for public purposes."[78] A corporate law treatise early in the twentieth century argued against those who said the visitation was an old or obsolete power, rather stating that "visitorial power has never been so widely and so wisely wielded as at the present time, both by the legislatures and by the courts."[79] Thus,

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[73] Richardson v. Swift, 30 A. 781, 789 (Del. 1885) (affirming the right for a shareholder to demand production of books). *See also* 2 THE STATE OF NEW YORK BOARD OF STATUTORY CONSOLIDATION, CONSOLIDATED LAWS OF THE STATE OF NEW YORK 1339–40 (1909) (outlining the general authority and supervision that the state governor has over institutions of higher education).

[74] State *ex rel.* Att'y Gen. v. Milwaukee, Lake Shore & W. Ry. Co., 45 Wis. 579, 589–91 (1878).

[75] *Id*. at 591 (upholding the state's power to demand a corporation "keep its principal place of business, its records and the residence of its officers" accessible to the process and exercise of the state's visitorial power).

[76] JOSEPH ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 537 (2d ed. 1843) (discussing the visitorial powers of the government over corporations).

[77] *Id.* at 538 ("This power . . . is of infinite use.").

[78] *Id*.

[79] 1 SEYMOUR DWIGHT THOMPSON & EDWARD FRANKLIN WHITE, COMMENTARIES ON THE LAWS OF PRIVATE CORPORATIONS 580–81 (2d ed. 1908) (arguing the visitorial power was more expansive than "police powers"

the visitorial power of the King, once a mere analogy used by Blackstone for select group of corporations, came in America to justify expansive court or legislative control of any corporation, far beyond that imagined by Blackstone or any of his contemporaries.[80]

III. The Visitorial Powers of Regulators

The ability of state legislatures and courts to exercise visitorial power over corporations was powerful, but under traditional theories, that power still had to operate through the cumbersome processes of legislative amendments or actions in court.[81] Most importantly, the ability to inspect corporations for wrongdoing required either warrants and probable cause for criminal issues, or the prosecution of a civil case, which would then allow a court, at its discretion, to summon witnesses and documents from both sides.[82] In English law going back to time immemorial, only courts could summon or subpoena witnesses and documents and evaluate them under oath, and even then only in regards to a particular complaint or suit.[83] Early proponents of business regulation, however, hoped to provide more extensive supervision of corporations, through provision of the power to summon and subpoena witnesses directly to new quasi-executive officials. They created a tool

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of the state because it was an active instead of passive power). *See id*. at 581 ("Police power is exercised, largely, in the way of punishment for default of duty; visitorial power is exercised to prevent default in duty.").

[80] *See* BLACKSTONE, *supra* note 23, at *469 (finding limited visitorial powers for the King in certain circumstances).

[81] *See, e.g.*, EDWARDS, *supra* note 55, at 165–67 (explaining the scope of legislative and court action to exercise supervisory visitorial authority).

[82] *See, e.g.*, THE CODE OF CIVIL PROCEDURE OF THE STATE OF NEW YORK, *supra* note 59, at 409–16 (outlining some civil actions against corporations).

[83] There were a few notable exceptions, such as flood control commissioners, who could issue compulsory processes and summons. Generally, subpoenas were divided into *subpoena ad testificandum*, which required testimony of witnesses under penalty of law, and *subpoenas duces tecum*, which required witnesses and documents. A summons was considered a form of a *subpoena ad testificandum*. *See* HAMBURGER, *supra* note 13, at 222–25, 265–67 (discussing tax subpoenas); Slobogin, *supra* note 11, at 833–34 (explaining the difference between *subpoena ad testificandum* and *subpoenas duces tecum*).

that would eventually be called the administrative subpoena.[84] These reformers used the new, broader conception of visitorial powers to justify their ideas.

Beginning in the late 1820s, states became particularly concerned about the supervision of banking and financial corporations, whose complicated and hidden accounts carried potent dangers to the public, which might arise long before a civil or criminal case became necessary.[85] When the Georgia legislature appointed a committee to directly investigate and subpoena the books of a troubled bank, without court intervention, the bank objected and hid its books.[86] The bank claimed a forced inspection was "illegal, [and] utterly subversive of private right . . . ."[87] The committee, by contrast, said that although it "entertain[ed] no doubt as to the visitorial powers of the legislature" over a "mere creature" of it, they admitted they could not force production in the absence of an intervening court.[88] The committee lamented the "arrogance of an inflated aristocracy" in banking, which "may speculate on [the public's] interests without fear of accountability," and said that the public "requires the exercise of this visitorial power."[89] To answer similar concerns, an 1829 New York state act made a monumental step when it appointed three permanent "Bank Commissioners," who had the power "to visit every monied corporation . . . to examine all the books papers, notes, bonds," and "examine upon oath, all the officers" of the banks.[90] If these officers

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[84] *See* HAMBURGER, *supra* note 13, at 249–50 (describing how an administrative subpoena permits the "broadest possible discovery"); Slobogin, *supra* note 11, at 814 ("Without the ability to readily obtain the records of corporations . . . government agencies would be frustrated in their efforts to ensure that corporate tax laws, bank laws, securities laws, and a host of other regulatory statutes were enforced.").

[85] JOURNAL OF THE S. OF THE STATE OF GA. AT AN ANN. SESS. OF THE GENERAL ASSEMB., 24 (1833) (authorizing a committee to evaluate banks in Georgia).

[86] ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA PASSED IN MIDGEVILLE AT AN ANNUAL SESSION, IN NOVEMBER AND DECEMBER 1833, 399–401 (1834) (discussing the "formal protest" raised by banks that refused to present their books to the assigned committee).

[87] *Id*. at 399.

[88] *Id*. at 400 (explaining why the committee did not overrule the protest).

[89] *Id*. at 400–01.

[90] An Act to create a fund for the benefit of the creditors of certain monied corporations, and for other purposes, ch. 24, Apr. 2, 1829, *in* 1 THE REVISED

found any violations, they could apply for an injunction against the corporation through the newly-empowered courts of equity.[91] One New York politician said that the commissioners "are made visitors of all banks" under their supervision, since "every bank is obliged to open its vaults and its books" to them.[92] An opponent of the law, by contrast, railed against an act "inquisitorial in its character," which subjected corporations to the "inquisitorial powers of these commissioners," "the inquisitorial scrutiny of the commissioners," and the "inquisitorial visits of the commissioners."[93] The opponent thought most private depositors would remove their money to another bank or state "not subject to their visitation."[94] These New York Bank

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STATUTES OF THE STATE OF NEW YORK AS ALTERED BY THE LEGISLATURE 606–15 (1836).

[91] *Id*. at 610 ("If the said commissioners shall ascertain from such inspection and examination, or in any other manner, that any of said corporations are insolvent, or shall have violated any of the provisions of their act or acts of incorporation, or of any other act binding on such corporations, the said commissioners shall immediately apply to the court of chancery . . . for an injunction against such corporation and its officers . . . and the court shall possess the like powers upon such application, as are provided by law, in respect to such applications, when made by the attorney-general, or by any creditor."). *But see id*. at 606 (limiting the supervisory power of the commission to banks chartered or re-charted after the act was passed in 1828, revealing the still limited visitorial powers of states over corporations without a direct authorizing statute).

[92] GENERAL ERASTUS ROOT, THE SPEECHES OF ERASTUS ROOT ON THE RESOLUTION OF MR. CLAYTON, OF GEORGIA PROPOSING A COMMITTEE OF VISITATION TO THE BANK OF THE UNITED STATES 11 (1832).

[93] "A STOCKHOLDER," AN EXAMINATION OF SOME OF THE PROVISIONS OF THE ACT TO CREATE A FUND FOR THE BENEFIT OF THE CREDITORS OF CERTAIN MONIED CORPORATIONS, AND FOR OTHER PURPOSES, 17, 28–30, 32, 39 (1829).

[94] *Id*. at 17; *see* HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY 167–69 (2002) (offering a history of New York banking supervision). The "commissioners" title, which would be repeated in endless other regulatory bodies, emerged from previous, temporary bodies in many states, but was perhaps also influenced by commissioners of courts, subsidiary officers of courts, later designated as magistrates, allowed to issue compulsory processes during a case without direct judicial orders. A 1827 federal law allowed commissioners to issue subpoenas for witnesses "as shall be named in the said commission, commanding such witness . . . to appear and testify before the commissioner" and refusal to obey such subpoena was

Commissioners were arguably the first independent regulatory commission in the United States, and their visiting powers were central in their justification and function.[95] In Massachusetts, a similar 1838 act demanded that the new bank commissioners, as Massachusetts Judge Lemuel Shaw said, "shall visit every bank and shall have free access to its vaults, books and papers, that they may examine under oath . . . ."[96] They could issue subpoenas and summons without any specific complaint or court intervention.[97] The Massachusetts commissioners also had the power to apply to an equity court for an injunction under a myriad of potential regulatory violations they designed.[98] In the first significant case concerning the act, Shaw argued that the commission's authority came from the fact that the commission "assume[s] a visitatorial power over banks."[99] As the

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punishable by a judge "in like manner as any court of the United States may do in case of disobedience to process of subpoena ad testisficandum issued by such court." Act of Jan. 24, 1827, ch. 4, 2 Stat. 197–99, 19th Cong. (1827). Then-Senator Martin Van Buren testified that the purpose of this act, the first passed by the 19th Congress, was "to provide a means whereby Commissioners could obtain evidence," and "to establish the authorities of the Commissioners to compel the attendance of witnesses and the production of papers" without delay in an ongoing court case. 4 REG. DEB. 30 (1827).

[95] An Act to create a fund for the benefit of the creditors of certain monied corporations, and for other purposes, ch. 24, Apr. 2, 1829, *in* 1 THE REVISED STATUTES OF THE STATE OF NEW YORK AS ALTERED BY THE LEGISLATURE 609–11 (1836) (outlining visiting powers of the New York commissioners).

[96] Commonwealth v. Farmers & Mech. Bank, 38 Mass. (21 Pick.) 542, 544 (Mass. 1839).

[97] *Id*. at 544.

[98] *Id*. at 544–45.

[99] *Id*. at 545. Shaw struck down a portion of the act on separate grounds since it demanded that an injunction "shall" issue upon order of the commissioners, without any discretion in the judge. Shaw believed visitorial power resided in the courts, not the legislature, which could not act without a specific reservation clause in the charter. *Id*. at 545 ("In saying that an injunction shall issue, the legislature assume power belonging to the judiciary. An injunction is a judicial writ, granted after a judicial examination. It is not competent to the legislature to direct in what manner this Court shall exercise a judicial act."). The act was later reformed and upheld. This early attempt to give direct regulatory injunctive power to executive officers without court supervision has not been noted in the history of regulatory reforms. THE GENERAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS 300–02 (1860) (detailing the power of bank commissioners, including that "they may apply

writer George Tucker said, "Among all the checks that have been devised to the imprudence of banks, there is no one of greater efficacy than giving publicity to their actual condition; and this has been a discovery of modern times, and seems to be due to the United States."[100] Their greatest innovation was that "states have subjected [banks] to periodical visitations from commissioners."[101]

The federal government absorbed the idea of the visitorial powers of bank inspectors.[102] In 1863, Congress gave the new Comptroller of the Currency and his examiners the ability to inspect the books and papers of new federally-chartered national banks and to examine their officers under oath.[103] The act clarified that this direct regulatory authority was based on the idea of visitorial power by stating that the banks "shall not be subject to any other visitorial powers . . . except such as are vested in the several [state] courts of law and chancery [or equity]."[104] The U.S. Court of Claims declared that

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to one of the justices of the supreme judicial court to issue an injunction to restrain such corporation in whole or in part from further proceeding with its business until a hearing can be had"). Massachusetts, however, passed an earlier but temporary law on bank examination in 1828, which required three temporary "commissioners" to investigate a bank's assets when they first started operations and gave the legislature afterwards "free access to all their books and vaults." 1 REPORT OF THE COMMISSIONER APPOINTED TO REVISE THE GENERAL STATUTES OF THE COMMONWEALTH 237, 240–41, 244–45 (1835) (stating a bank cannot begin operation before it houses the correct amount of money, and "the said money shall have been examined by three commissioners appointed by the governor"); *see also* SHARON ANN MURPHY, INVESTING IN LIFE: INSURANCE IN ANTEBELLUM AMERICA 106–10 (2010) (explaining the increased power of insurance regulators during the same time period).

[100] GEORGE TUCKER, THE THEORY OF MONEY AND BANKS INVESTIGATED 210 (1839).

[101] *Id*. at 212.

[102] *See* National Currency Act, ch. 58, 12 Stat. 665, 679–80 (1863) (stating the visitorial powers of the office of the Comptroller of the Currency).

[103] *Id*. at 679–80 (outlining the Comptroller's expanded powers).

[104] *Id*. at 680. *See* CONG. GLOBE, 37th Cong., 3d Sess. 940, 1117 (1863) (providing explicit citations of the visitorial power under this new system). The steamboat inspectors created by Congress in 1852, which Jerry Mashaw argues were the earliest federal regulators, did have the power to summon witnesses, compel attendance, and administer oaths. The inspector position may have been anomalous, however, because they were appointed by a committee including district court judges and could thus act somewhat as

the Comptroller of the Currency "is the embodiment of [the United States'] visitorial power over corporations created by the government."[105]

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marshals for the court, and the vessels were on waters considered directly owned and under the control of the United States. *See* Steamboat Inspection Act, ch. 106, 10 Stat. 68 (stating the process for appointing inspectors by a committee, which included "the judge of the district court of the United States" for several states). They do, however, fit the pattern proposed here of increased inspection powers as essential to the growth of the regulatory state. *See* MASHAW, *supra* note 16, at 194–95 (providing an overview of the steamboat inspectors). Congress also created general powers of inspection for federal tax officials in this period, but subpoenas and summons for taxing purposes had deeper roots in English and American law and practice and had little influence on the administrative subpoena history described here. *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. 272, 282–85 (1856) (finding the Treasury could properly issue a "distress warrant" on its own authority to recover taxes); *In Re* Meador, 3 West. Jur. 209, 209, 222–23 (D. Ga. 1869) (determining a subpoena issued by "[t]he supervisor of internal revenue, for the States of Florida and Georgia" was lawful against a tobacco firm, where the purpose of the subpoena was for tax purposes). *See* HAMBURGER, *supra* note 13, at 222–25, 265–67 (offering a counter argument about the importance of tax subpoenas in the development of administrative subpoena powers).

[105] Jackson v. United States, 20 Ct. Cl. 298, 305 (1885). The clause preventing national banks from being subject "to any other visitorial power" was at issue in the Supreme Court case of Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009), where Justice Antonin Scalia held for the Court that this clause in the National Banking Act prevented a state attorney general from investigating national bank lending practices through subpoena, but did not prevent the attorney general from enforcing state laws against the banks. Justice Clarence Thomas, dissenting, said the clause also prevented state enforcement actions against the banks. In effect, although never stated as such, their debate was on the changing definition of "visitorial," with Thomas citing largely expansive ideas about visitation involving regulation and superintendence in the pre-1860 period, and Scalia citing largely post-1860 visitation ideas focused on the importance of inspection, with neither discussing the fundamental changing understanding of the term. This case precipitated some of the only contemporary examinations of visitorial power, but only focused on the modern understanding of the term, not its history. *See also* Matthew Nance, *The OCC's Exclusive Visitorial Authority over National Banks after* Clearing House Ass'n v. Cuomo, 87 TEX. L. REV. 811, 811–26 (2009) (discussing the Second Circuit's approach to visitorial power before the case reached the Supreme Court).

Beginning in the 1860s, state railroad commissions, more often acknowledged as the forerunners of the modern administrative state,[106] absorbed the regulatory inspection powers first granted to banking commissioners.[107] The Massachusetts Railroad Commission, often regarded as the first such commission from its creation in 1869, could demand "any information required by" it from the railroads under its supervision, and the railroads had to comply.[108] In 1877 the

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[106] *See, e.g.*, Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, CAL. L. REV. 613, 632 (1999) ("Federal courts encountered regulatory agencies of the modern type when, following the Civil War and Reconstruction, states began to create rate-setting bodies to regulate railroads and other businesses.").

[107] Around this time, states also established "Boards of Charities" to investigate and "visit" charitable corporations. While many such state boards could only visit and investigate state-run public charities, by the late 19th century many state boards could inspect private asylums, and the state boards of four states, including New York, could supervise private charities merely receiving some public aid, as opposed to those wholly supported by the public. *See* H.A. Mills, *The Law Relating to the Relief and Care of Dependents VI: The State Organization and Supervision of Charities*, 4 AM. J. OF SOC. 178, 179 (1898) ("The advisory boards visit and investigate the charitable institutions . . . . Usually all institutions for the dependent, defective, and delinquent classes, wholly or partially supported by the state, are supervised by the state boards."). In similar evolution to the United States, the British government created a permanent "Charity Commission" in 1853 with "investigatory and subpoena powers." James J. Fishman, *Charitable Accountability and Reform in Nineteenth Century England: The Case of the Charity Commission*, 80 CHI.-KENT L. REV. 723, 744 (2005).

[108] MASS. GEN. RAILROAD LAWS ch. 374, § 11–14 (1878) ("Every railroad corporation shall at all times, on request, furnish the railroad commissioners any information required by them concerning the condition, management and operation of its railroad[.]"). As one early writer pointed out, these commissions were independent and discretionary extensions of earlier state requirements that all corporations allow their books, with certain accounting requirements, to be inspected by the state. Frederick C. Clark, *State Railroad Commissions and How They May be Made Effective*, 6 PUBLICATIONS OF THE AMERICAN ECONOMIC ASSOCIATION 11 (1891). Charles Francis Adams, the Commission's first chair said the Railroad Commission was the substitute for "temporary and irresponsible legislative committees." MCCRAW, *supra* note 13, at 15 ("Work hitherto badly done, spasmodically done, superficially done, ignorantly done, and too often corruptly done by temporary and irresponsible legislative committees, is in future to be reduced to order and science by . . . permanent bureaus . . . .").

commission was also given the power to "summon witnesses in behalf of the Commonwealth," administer oaths, and take testimony from any officer of those railroads.[109] Likewise, in 1882 the New York Railroad Commission was given the power to "compel the production of copies of books and papers, subpoena witnesses, [and] administer oaths to them[.]"[110] Although occasionally dismissed as mere information-gathering commissions, without real regulatory authority, the ability to directly subpoena documents and summon witnesses without court intervention was an important expansion of state power over these corporations, and the old visitorial idea was central to it.[111] The 1914 edition of *Bouvier's Law Dictionary* said "[i]t may be considered that, to a certain extent, railroad commissions are the machinery created by law for the exercise of visitatorial power."[112] The later rise of public utility commissions took place in a similar context of visitorial authority.[113] The Missouri Supreme Court redirected a case about utility companies to the state Public Utilities Commission, stating "[i]ts visitorial and administrative powers are so vast and flexible" it would be the forum to handle such questions.[114] One federal court stated that

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[109] MASS. GEN. RAILROAD LAWS ch. 374, § 13 (1878).

[110] *The Railway Commission*, N.Y. TIMES, June 19, 1882, at 2. The act allowed the commissioners to change the forms of the accounts the railroads had to provide to the state, with six months' notice. The commissioners were also given the power to enter into any property of the railroads.

[111] Railroad commissions with the power to control rates, such as the Illinois Railroad and Warehouse Commission, could usually only demand precise information specified by law and did not have broad discretionary inspection authorities. This helps explain why the Massachusetts commission, although supposedly "weaker" than other boards, became the model for future reforms. ANN. REP. OF THE RAILROAD AND WAREHOUSE COMM'N OF THE STATE OF ILL. 56 (1872) (discussing how the commission controlled rates for various railroad lines, but mentions no authority to compel discretionary inspections).

[112] Visitation, 3 BOUVIER'S LAW DICTIONARY 3404–05 (8th ed. 1914).

[113] *See, e.g.*, State *ex rel.* Kansas City v. Kan. City Gas Co., 163 S.W. 854, 860 (Mo. 1914) (extending visitorial power doctrine to other utilities, such as oil companies).

[114] *Id*. at 860. A similar expansion of visitorial inspection authority occurred in other regulatory realms. In Illinois, the Auditor of Public Accounts was given what the Illinois Supreme Court called "supervisory and visitorial powers" over mutual benefit associations which were required to file financials under oath. Ry. Passenger & Freight Conductors' Mut. Aid and Benefit Ass'n. v. Robinson, 35 N.E. 168, 174 (Ill. 1890). A contemporary article on Massachusetts' expanding state regulation highlighted the importance of these

for such commissions, "[r]egulation is no more than a form of sovereign visitorial power."[115]

The justification of state visitorial power over corporations was not a mere fig leaf, since it also imposed limits on commission inspections.[116] In the 1880s, the Minnesota Railroad and Warehouse Commission demanded documents from a railroad partnership, importantly not a corporation.[117] When the partnership refused to hand over documents related to their interstate work, the state supreme court sustained their refusal:

> If it were a corporation . . . the state, by its authorized officers, would have the undoubted right to require full information as to all of its business; for the state has the right to know what its creature, or one of another sovereignty that it permits to come into the state, is doing. If, however, it be not a corporation endowed by law with special franchises and rights, but a partnership existing by virtue of the contract of its members, then the state possesses none of the visitorial powers which it may exercise over corporations.[118]

A New York court likewise said that a private association "has not appealed to the sovereignty of the state for its right to exist, and is, therefore, free from the visitorial powers to which corporations are

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investigatory powers, arguing "[t]he ascertainment and publication of facts have been the means by which Massachusetts has solved the problem of regulating corporations and monopolies. The accounts of steam and street railroads, gas and electric-lighting companies, savings and co-operative banks and foreign mortgage corporations must be kept in the manner prescribed by the various commissioners . . . who are empowered to summon witnesses, including the officers of the corporations . . . ." George K. Holmes, *State Control of Corporations and Industry in Massachusetts,* 5 POL. SCI. Q. 411, 427 (1890).

[115] Ga. Ry. & Power Co. v. R.R. Comm'n of Ga., 278 F. 242, 245 (N.D. Ga. 1922).

[116] State *ex rel*. R.R. & Warehouse Comm'n v. U.S. Express Corp., 83 N.W. 465, 466 (Minn. 1900).

[117] *Id*.

[118] *Id*.

subjected."[119] Most state courts also excluded the government from exercising visitorial powers over foreign corporations, which the government did not charter. The Illinois Supreme Court said that "Courts of one State cannot exercise visitorial powers over corporations of other states."[120]

Gradually, the idea that the summary inspections of corporations was the most salient aspect of state visitorial power attained a broad consensus, until the terms "visitorial" and "inquisitorial" became almost synonymous, and the latter lost some of its old opprobrium.[121] The Oklahoma Constitution of 1907 said that the "records, books, and files of all corporations shall be at all times liable

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[119] Hibbs v. Brown, 82 N.E. 1108, 1117 (N.Y. 1907) (Bartlett, J., concurring). In a similar vein, The New York State Court of Appeals struck down Board of Charities investigation against the Society for the Prevention of Cruelty to Children, saying the minor appropriation received from the city did not make it typical public charity subject to the "visitation by the board." *Gerry Society Decision*, N. Y. TIMES, Jan. 13, 1900, at 9.

[120] Edwards v. Schillinger, 91 N.E. 1048, 1051 (Ill. 1909); *see* Guilford vs. W. Union Telegraph, 61 N.W. 324, 325 (Minn. 1894). Such decisions continued in some states even into the 1940s. *See* Lubin v. Equitable Life Assur. Soc'y, 61 N.E.2d 753, 758 (Ill. App. Ct. 1945).

[121] Exactly when and why the states gave up their broader power to control corporations using visitorial injunctions and other summary powers besides inspections are important questions this article unfortunately cannot fully pursue, although the attitude seems to have shifted after about 1860. Some courts limited the ability of direct visitorial control over corporate actions and officers even as they expanded government inspection power. *See* Commonwealth v. Farmers & Mech. Bank, 38 Mass. (21 Pick.) 542, 545 (Mass. 1839) (upholding the constitutionality of a statute allowing bank commissioners to examine bank officers under oath). Newer forms of state regulatory control over corporations, such as rate-making decisions, could also not be properly justified as visitorial, and thus seemed to supersede earlier visitorial authorities. Perhaps, also, the continuing ability of state judges to subject corporations to varied peremptory processes with little need for legal justification soured lawmakers on the authority. For instance, the comedy of judicial errors, famously chronicled by Charles Francis Adams in *A Chapter of Erie*, whereby conflicting New York state courts issued a blizzard of mandatory injunctions, receiverships, and orders to Erie Railroad, implies the broad authority of over corporations granted to New York courts under visitorial authority. CHARLES FRANCIS ADAMS, A CHAPTER OF ERIE 58–59 (1869). Similar cases illustrated the dangers of broad but non-investigative visitorial powers. *Id.*

and subject to the full visitorial and inquisitorial powers of the state" through the state's new corporation commission.[122] Arizona's constitution of 1910 also gave the state corporation commission "full visitorial and inquisitorial powers" over corporations.[123] Although earlier *Bouvier's Law Dictionary* editions had continued to cite Blackstone's idea of the power of state visitation "through the medium of the courts of justice," by 1897 the dictionary defined visitation as "the act of examining into the affairs of a corporation."[124] By 1914 the dictionary would argue that "[u]nder the visitorial powers of a state . . . it is competent for it to compel such corporations to produce their books and papers for investigation and to require the testimony of their officers and employees."[125] Future decisions and acts would make summary inspections the *sine qua non* of the government's visitation power over corporations.

IV. Congressional Powers of Inspection

For the U.S. federal government, state visitorial power offered little leverage for federal authorities to conduct their own inspections. With few corporations besides banks directly chartered by the federal government, there seemed to be scant opportunities to use visitorial power in order to regulate and inspect the expanding industrial economy.[126] One potential authority for investigation, however, rested

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[122] FREDERIC JESUP STIMSON ED., THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 178 (1908).

[123] *The Document*, ARI. REPUBLICAN, Dec. 10, 1910, at 9 (detailing the corporate commission's duties under Article XV of the state constitution). One progressive newspaper called the Oklahoma Constitution a model for other states because it provided for a corporation commission with "full visitorial and inquisitorial powers" over every corporation. *The Oklahoma Constitution*, THE COMMONER, June 21, 1907, at 1–2.

[124] *Compare* 2 BOUVIER'S LAW DICTIONARY 644 (14th ed. 1874) *with* 3 BOUVIER'S LAW DICTIONARY 1199 (Francis Rawle, ed. 1897).

[125] 3 BOUVIER'S LAW DICTIONARY 3404 (8th ed. 1914).

[126] The federal government did charter some intercontinental railroads in this period, and this arguably subjected these railroads to the federal government's visitorial power. In one famous Supreme Court decision, The Sinking Fund Cases, the Court said the government could force the chartered railroads to establish a sinking fund for debt due the government because of the reservation clause in its charter, which many courts analogized to a visitorial power. Sinking Fund Cases, 99 U.S. 700 (1878). The dissent, relying on an

in the ability of the U.S. Congress to summon and subpoena witnesses and papers to itself.[127] Congress was once understood, in the manner of the English Parliament, as the highest court in the land, and it was allowed to issue summons and subpoenas in a similar way.[128] Yet Congress's subpoena power was limited to Congress acting in its judicial capacity, as when it tried particular cases before it, and not over any potential subject of its interest.[129]

Some congressmen, however, desired to expand Congress's authority of summary inspection to address regulatory needs for the new economy.[130] In 1827, a resolution in the House of Representatives, providing that "the Committee on Manufactures be vested with the power to send for persons and papers," as part of a reevaluation of tariff laws, occasioned a sharp debate.[131] One representative noted that since the resolution did not describe any particular law broken, the compulsory summons were an "inquisition, which every Court of law abhors. It is odious, and oppressive."[132] Two representatives remarked of its "extraordinary character," and two more of its "extraordinary power."[133] The defender of the inspections, by contrast, said that previous voluntary requests for information from businesses led to false answers, but if they could be forcibly

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older conception of visitation, said the power to legislatively amend the charter "cannot rest upon what is generally denominated the visitatorial power of the government over its own corporation, though it is upon this power the opinion of the majority of the court largely relies," since, as the dissent said, that power could only be exercised through courts of justice. *Id.* at 743 (Strong, J., dissenting).

[127] *See e.g.*, Christopher F. Corr & Gregory J. Spak, *The Congressional Subpoena: Power, Limitations, and Witness Protection*, 6 BYU J. PUB. L. 37, 38–43 (1992).

[128] *Id*. at 41 (explaining how the separation of power doctrine prohibited courts from interfering with Congress' subpoena powers).

[129] *See* Anderson v. Dunn, 19 U.S. 204, 234 (1821) (upholding Congress' ability to summon and punish individuals and comparing this power to a court protecting the dignity of its operations).

[130] *See* U.S. Senate, *A History of Notable Senate Investigations*, http://www.senate.gov/artandhistory/history/common/briefing/Investigations.htm [https://perma.cc/6T3W-FATW] (using the Senate's investigatory powers to develop regulation pertaining to interstate commerce).

[131] *See* 4 REG. DEB. 862, 20th Cong., 2d Sess. (1827).

[132] *Id*. at 883.

[133] *Id*. at 861–84 (providing an account of debates between representatives).

summoned and questioned "by a cross examination on oath, the truth would have appeared."[134] He said that the committee would use "reasonable discretion" in their powers and not summon people or businesses from too great a distance.[135] The resolution passed 102 to 88, establishing a tenuous but important precedent.[136] In 1857, Congress passed a law allowing any congressional committee to summon witnesses and papers at any time.[137] Although this was part of a congressional bribery investigation of its own members, attempts to restrict the proposed summons and subpoena authority to only limited or judicial functions of Congress were voted down.[138]

The Supreme Court, however, brought an abrupt stop to any general congressional investigations in the case of *Kilbourn v. Thompson*.[139] In a unanimous decision, the Court said the power to summon and to punish under English law was based on the idea of Parliament as a "High Court," and that its power to summon or condemn for contempt only carried to those issues of a "judicial

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[134] *Id*. at 873.

[135] *Id*.

[136] *Id*. at 889–90 (listing members voting in favor and in opposition of the bill). The only earlier subpoena power case in *Hinds' Precedents* involved an 1812 investigation into a violation of the House's own rules regarding secrecy. The only other precedent before 1857 involved an 1837 investigation of the executive branch, considered acceptable under Congress' impeaching powers and because of the absence of any private right at issue. *See* 3 ASHER C. HINDS, HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES 1–11 (1907).

[137] CONG. GLOBE, 34th Cong., 3d Sess. 445 (1857) (expanding the scope of Congressional summon powers).

[138] *Id*. at 443 (showing how amendments to constrain the subpoena power were rejected). In 1855, Congress did establish the Court of Claims, which, although not headed by an Article III judge with lifetime tenure, had the power to "appoint commissioners to take testimony" and "to issue subpoenas to require attendance of witnesses" with "the same force as if issued from a district court of the United States." This court also acted as an arm of Congress to gain information on cases that would be referred later to Congress itself. Court of Claims Act, ch. 122, 10 Stat. 612–14 (1855). *See* CONG. GLOBE, 33rd Cong., 2d Sess., 113 (1854) (debating the need for the "dignity of a court" to "compel the attendance of witnesses").

[139] 103 U.S. 168, 196 (1880) ("We are of opinion . . . the resolution of the House of Representatives authorizing investigation was in excess of the power conferred on that body by the Constitution[.]")

character" involving particular cases or controversies.[140] Some in Congress tried to find a way around this decision by creating a temporary commission, one that functioned outside of Congress, to investigate the western railroads and issue subpoenas under its broad authority.[141] One congressional opponent noted both the originality of the commission form in the federal government and the unconstitutionality of its power under the recent *Kilbourn* decision.[142] He said, "Never before in the case of these mere outside commissions has the power to compel the attendance of witnesses been given. Congress sometimes seeks to compel such attendance through its own committees, but the Supreme Court in the recent *Kilbourn* case sheared this power down very materially."[143] He noted that this new bill gave the "[c]ommission power to throw its lasso in every direction and to roam all over the country and bring in every person . . . ."[144] In 1887, Supreme Court Justice Stephen Field, as part of the federal Circuit Court of California, affirmed this understanding in *In re Pacific Railway Commission,* where he claimed only a judicial body in a case or controversy could "compel the production of private books and papers of citizens for its inspection," citing *Kilbourn*.[145] He said "[c]ompulsory process to produce such papers, not in a judicial proceeding, but before a commission of inquiry, is as subversive of 'all the comforts of society' as their seizure under the general warrant [has

[140] *Id*. at 185 (citing recent English decisions indicating the judicial character of Parliament had been abandoned to reach the same conclusion for the U.S. Congress).
[141] 16 CONG. REC. 569 (1885).
[142] *Id*. at 568–69 (providing an overview of the opponent's position).
[143] *Id*. at 569.
[144] *Id*. Congress rejected earlier attempts to lodge subpoena powers directly in executive officers. In the debate on the act creating a Bureau of Labor Statistics, which originally gave the bureau chief the power to send for persons and papers, Senator John Sherman said that subpoenas were "an exercise of power that can not be trusted to any executive officer" and the power was removed from the final act. 15 CONG. REC. 1747 (1884).
[145] *In re* Pac. Ry. Comm'n, 32 F. 241, 250 (N.D. Cal. 1887) (citing *Kilbourn* for the proposition that only the judiciary can exercise wide discretion in its visitorial powers).

been] condemned" throughout American history.[146] The Supreme Court later cited this decision.[147]

The necessity of investigating new business enterprises, especially railroads that spanned several states, forced many in Congress to look for a constitutionally-acceptable way to inspect them. Towards this end, the earliest bill creating what became the Interstate Commerce Commission (ICC) was introduced in February 1880, just as the *Kilbourn* case was coming to a conclusion, and it seemed to offer a means around the constitutional prohibitions on inspections.[148] The ICC's authority to investigate was limited to those complaints provided to it by citizens against railroad corporations, and the ICC could summon witnesses and direct production of books only in relation to those specific complaints, which seemed to justify its uses of judicial procedures in a semi-judicial "case or controversy."[149] The goal, however, remained more information for Congress.[150] One advocate, giving his opinion on the "chief merit of the bill," noted the ICC had the power

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[146] *Id*. at 251.

[147] ICC v. Brimson, 154 U.S. 447, 479 (1894) ("As said by Mr. Justice Field in *In Re Pacific Ry. Commission* . . . of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, . . . not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.").

[148] By February 1880, the district court had already ruled against Congress. *See Kilbourn v. Thompson*, 103 U.S. 168, 177 (1880). Before the case was finally decided in 1881, however, many thought Congress still had sufficient power to summon and investigate witnesses themselves without the necessity for commissions. Senator Henry Blair questioned one joint resolution to set up a temporary interstate commerce commission to gather information by stating, "If this commission is simply to gather knowledge . . . what real occasion is there to do more than simply appoint a committee of members in the ordinary way, and endow them with the power of summoning person and obtaining papers in the usual way." 10 CONG. REC. 2508 (1880). Senator Samuel Maxey likewise said, "I can see no reason why Congress should go outside of its own bodies . . . for they have the power to summon witnesses, [and] send for books and papers." *Id.* at 2509. Such comments were not made after *Kilbourn*.

[149] *Id.* at 2507.

[150] *Id*. (stating one purpose "is . . . to acquire information").

> to investigate all grievances brought to its notice . . . thus taking the detailed examination for the complaints upon which the demand for legislation is based out of Congress in the first instance, and placing it in the hands of commissioner, who have not only more time to devote to it, but who, by the inspection of books and papers, schedules and contracts, by the investigation of real instead of hypothetical cases of complaint, can act more intelligently than a committee of Congress can possibly do.[151]

He said that a "capable board is created to hear and examine, as no Congressional committee can, all complaints."[152] Another supporter said the purpose of the commission was to provide Congress information on which to legislate, "in short, to be the eyes, ears, and fingers of Congress."[153] He compared the body to the information-gathering Massachusetts Railroad Commission and noted, "It has been tried in Massachusetts for nearly twenty years and has worked with unqualified success, . . . the great remedy for all such wrongs is to let on light, more light."[154] The ICC would thus take the place of specific congressional committees and their investigations into specific railroad

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[151] 16 CONG. REC. 41 (1884) (quoting Representative Seymour).
[152] *Id*. at 42.
[153] *Id*. at 44 (quoting Representative Long).
[154] *Id.* Some, of course, objected to new investigation powers. One Senator objected to an early commission bill as "unconstitutional" and said it was "but a search-warrant given to five blind men to hunt for iniquity." *Id.* at 359 (quoting Senator George). Another said, regarding the "compulsory process" of the commission, such a power should be given to no one "except a judge of the United States, who holds his position for life." 16 CONG. REC. 568 (1885) (quoting Senator Garland). To alleviate some of these concerns, Senator Thomas Platt amended the original bill, which said that a circuit court "shall" declare those failing to appear before the ICC in contempt of court, to state that a court "may" declare them in contempt of court, and only after the court itself had demanded that the witness appear before the commission. As Platt said, "There might be some technical difficulty about a court punishing for contempt to the commission and not to the court." 17 CONG. REC. 4318–19 (1886). Such reforms resting final punishment with a court remained in the federal statutes creating subsequent commissions, but later court decisions obviated almost any judicial attempt to supervise these subpoenas. *Infra* p. 252–57.

malfeasance, and allow them to use subpoenas and summons to investigate without the restrictions of *Kilbourn*.[155]

After the ICC's creation in 1887, the Supreme Court upheld the ICC's summoning and subpoena powers as an exercise of semi-judicial authority in the 1894 case of *Interstate Commerce Commission v. Brimson*.[156] In that suit, a circuit court had refused to enforce an ICC subpoena on the ground that the commission was a non-judicial body.[157] John Marshall Harlan, for a slim Supreme Court majority, held an ICC complaint was "judicial in form," and therefore the ICC could use judicial process.[158] But he also argued given Congress's expansive power over interstate commerce, and the

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[155] The ICC's subpoenas inspired a flood of legislative changes and court decisions, only some of which are detailed here. Although Congress strengthened the ICC's subpoena power in three later acts, the subpoena power fell afoul of Supreme Court concerns about Fifth Amendment self-incrimination in civil cases, was reformed again to allow broad immunity against any penalties or forfeitures, and was finally upheld. *See* Amendment to Interstate Commerce Act, ch. 382, 25 Stat. 855–63 (1889) (explicitly stating ICC's power of subpoena); Amendment to Interstate Commerce Act, ch. 128, 26 Stat. 743–44 (1891) (stating witnesses and documents "may be required from any place in the United States, at the designated place of hearing" and testimony may be taken by deposition in any court by judge or court officers (this later authority had been requested by the commission, see 22 CONG. REC. 643–44 (1890); 3 ANN. REP. ICC 108 (1889))); Amendment to the Interstate Commerce Act, ch. 83, 27 Stat. 443–44 (1893) (providing broad immunity, and prescribing specific remedies for failure to obey subpoena, up to $5000 fine and imprisonment for one year); Brown v. Walker, 161 U.S. 591, 596–604 (1896) (upholding the amended act); Counselman v. Hitchcock, 142 U.S. 547, 584–86 (1892) (overturning an ICC subpoena that did not provide immunity for testimony). One ICC annual report reproduced the form of the first federal administrative subpoena which could be issued by a lone commissioner. 5 ANN. REP. ICC 372 (1892). *See* Hiroshi Okayama, The *Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State*, 15 J. GILDED AGE AND PROGRESSIVE ERA 129, 129–48 (2016) (providing a history of the ICC and arguing it began as semi-judicial body).

[156] 154 U.S. 447, 485–90 (1894).

[157] *Id*. at 456 (discussing the circuit court's decision).

[158] *Id*. at 487 ("We cannot assent to any view of the constitution that concedes the power of congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form.").

Necessary and Proper clause, Congress could organize administrative organs to investigate cases for it.[159] Harlan said an adverse ruling that

> [C]ongress could not establish an administrative body with authority to investigate the subject of interstate commerce . . . would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by congress . . . cannot be obtained . . . otherwise than through the instrumentality of an administrative body.[160]

Justice David Brewer, for a three-person dissent, with Field absent and almost certainly a fourth, said that the Commerce Clause "carries with it no right to break down the barrier between judicial and administrative duties."[161] The decision therefore "informs congress [sic] that the only mistake it made in the Kilbourn Case was in itself attempting to punish for contempt, and that hereafter the same result can be accomplished by an act requiring the courts to punish for

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[159] *Id*. at 485 ("Without the aid of judicial process of some kind, the regulations that congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced.").

[160] *Id.* at 474. The very strained reading of the case or controversy issue in Harlan's decision is worthy of note. Harlan said the "fundamental inquiry on this appeal is whether the present proceeding is a 'case' or 'controversy,' within the meaning of the constitution." *Id*. at 469. He said a criminal prosecution that demanded witnesses appear before the commission would clearly be such a case or controversy, and therefore the more "direct" method of proceeding by just a subpoena to the witness without a criminal case would obviously be a case or controversy. *Id.* Of course, the entire issue was whether the commission could issue a subpoena for papers without starting a civil or criminal case and being subject to the demands and duties of such a case. In effect, Harlan treated the case before him as a "standing" case, whether the subpoena could now be discussed in court, and not a case as to whether such a process was legitimate in the first place.

[161] ICC v. Brimson, 155 U.S. 3, 4 (1894) (Brewer, J., dissenting). Senator George Sutherland, later a Supreme Court Justice, said on the Senate floor, he would have "undoubtedly" dissented. 51 CONG. REC. 12812 (1914).

contempt" anyone ordered to produce information to a commission.[162] Yet the combined idea of semi-judicial cases and congressional investigative power justified the new federal procedure to the Court majority.[163]

The Supreme Court, however, still policed the limits of independent commissions' subpoena powers due to their justification in semi-judicial cases or controversies.[164] In *Harriman v. Interstate Commerce Commission*, Justice Oliver Wendell Holmes said the ICC could only issue subpoenas for complaints directly offered to it, and not as part of a general and unjudicial investigation.[165] Holmes later wrote to his friend Harold Laski that the ICC's broad and almost limitless subpoena requests "made my blood . . . boil and . . . made my heart sick to think that they excited no general revolt."[166]

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[162] *ICC*, 155 U.S. at 4 (Brewer, J., dissenting) (explaining Congress' mistake in *Kilbourn*). Brewer, in a surprising intimation of the future, said once the power was given to a commission, "why may not like power be given to any prosecuting attorney, and he be authorized to summon witnesses, those for as well as those against the government, and in advance compel them, though the agency of the courts, to disclose all the evidence . . . ?" *Id.* at 8.

[163] *Id.* at 486–90 (explaining the basis for the majority's conclusion).

[164] *See* Harriman v. ICC, 211 U.S. 407, 414–20 (1908) (demonstrating the Supreme Court's power to police subpoena powers).

[165] *Id*. at 422; *see also* Ellis v. ICC, 237 U.S. 434 (1915) (exemplifying the limitation on ICC's power to issue subpoenas). These theories did not implicate the new pure food and drug laws, because they allowed federal inspectors only to examine and certify whatever products or animals entered into interstate or foreign commerce. These laws did not give the government the ability to investigate industrial food companies' actual operations or records. *See* Meat Inspection Act, ch. 839, 26 Stat. 1089–90 (1891); Pure Food and Drug Act, ch. 3915, 34 Stat. 768–72 (1907); Federal Meat Inspection Act, ch. 2907, 34 Stat. 1260–65 (1907) (addressing the government's inability to investigate company operations and records).

[166] KERSCH, *supra* note 14, at 63. Kersch has by far the most expansive discussion of *Harriman* and other subpoena cases described here. Kersch argues the cases were part of back-and-forth negotiation between courts and the regulatory commissions about limited or expansive discretion of regulators, but he does not see a consistent line in the cases revolving around visitation or other ideas. For contemporary opposition to this ruling, see E.A.M., Note and Comment, *Right of the Interstate Commerce Commission to Adduce Testimony*, 7 MICH. L. REV. 409, 417 (1909) (providing an opposing view to the *Harriman* analysis).

When Congress created the Federal Trade Commission (FTC) in 1914, they also hoped it would enhance business inspections and aid congressional investigations.[167] President Woodrow Wilson proposed the Commission "only as an indispensable instrument of information and publicity."[168] When Representative Harry Covington, who wrote the original bill, described it to Congress, he first discussed the commission's "compulsory power" over information.[169] He said:

> It has long been the opinion of lawyers who have represented the Government that there should be some compulsory process whereby the Department of Justice, before bringing suit under the antitrust act, can obtain all the information necessary . . . . Especially valuable will be the provision that agents

[167] 51 CONG. REC. 8845 (1914) (observing the congressional intent behind the establishment of the FTC).

[168] Wilson went on to say it could be a "clearing house for the facts" and as an "instrumentality for doing justice to business." Woodrow Wilson, President of the United States, Address to a Joint Session of Congress on Trusts and Monopolies (Jan. 20, 1914), transcript available at www.presidency.ucsb.edu/ws/index.php?pid=65374&st=commission&st1 [https://perma.cc/B6QQ-GWMF]. The power of the FTC to prosecute crimes and order "stops" was expanded in later congressional amendments. *See also* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 97 (2003) ("These authorities would provide fertile ground for the agency to grow and adapt as it addressed changing times and, at its best, to shape its broad mandate to the needs of those times."); *see* MCCRAW *supra* note 13, at 143–53. The FTC evolved out of the Bureau of Corporations, which was created in 1903 with "the same power and authority in respect to corporations, joint stock companies, and combinations . . . as is conferred on the [ICC] . . . including the right to subpoena and compel the attendance and testimony of witnesses and production of documentary evidence and to administer oaths" and the testimonial immunity given to witnesses in front of the ICC in the 1893 act. Department of Commerce and Labor Act, ch. 552, 32 Stat. 827–28 (1903); *see* United States v. Armour & Co. 142 F. 808, 817–25 (N.D. Ill. 1906) (holding an individual appearing before a commissioner is entitled to the same privileges and immunities as attendance compelled by subpoena).

[169] 51 CONG. REC. 8845 (1914) (describing the purpose of the FTC).

> of the commission shall have the right to examine the files of any corporation under investigation.[170]

Still, under the doctrine of specific administrative complaints elaborated by Holmes, the Supreme Court constrained the FTC's power to investigate as well.[171] In *FTC v. American Tobacco Company*, Justice Holmes said the FTC could only conduct limited investigations based on specific complaints about interstate businesses.[172]

When Congress created a new securities law and the new Securities and Exchange Commission in 1933 and 1934, respectively, the motives were, again, primarily public exposure and investigation for Congress.[173] Felix Frankfurter, who helped design and write both laws, said "[t]he Securities Act is strong insofar as publicity is potent; it is weak insofar as publicity is not enough."[174] Yet in 1936, the

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[170] *Id*. Senator George Sutherland, who later as a Supreme Court Justice who voted to strike down agency subpoenas in the famous Jones v. SEC, 298 U.S. 1 (1936), objected to the bill's subpoena powers as "revolutionary in character" and a "dangerous measure," and said it "is in utter violation of the fourth amendment to the Constitution," quoting Field's decision in the *In re Pacific Railway Commission* case. 51 CONG. REC. 12805 (1914). The act's section on administrative subpoenas was taken from experience with the ICC, with similar provisions and the same penalties for refusal to comply, but for the FTC, these sections and others on investigations made up the majority of the act. 2 ANN. REP. FTC 39–44 (1916).

[171] FTC v. Am. Tobacco Co., 264 U.S. 298 (1924).

[172] *Id*. at 307 ("We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law."). One law review article said the issue was "[c]an Congress, under the Commerce Clause of the Constitution, delegate visitorial powers over private corporations engaged in interstate commerce, to the extent of granting unlimited and unrestricted examination and inspection of private papers and effect, with the right to copy them?" John Leland Mechem, *Fishing Expedition by Commissions*, 22 MICH. L. REV 765, 765 (1924); *see* Leighton P. Stradley, *Constitutionality of Compulsory Statistical Reports of the Federal Trade Commission*, 76 U. OF PA. L. REV. & AM. L. REG. 19, 19–28 (1927) (examining how far the FTC can investigate private matters).

[173] Walsh, *supra* note 52, at 339.

[174] *Id*. The Securities Acts were originally administered by the FTC. For background of the creation of the Commission and its focus on publicity, see JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE

Supreme Court in *Jones v. Securities and Exchange Commission* quashed a broad Securities and Exchange Commission subpoena that was not limited to a specific complaint, citing *Kilbourne* and *FTC v. American Tobacco*.[175] Although independent commissions provided a means to expand the U.S. Congress' authority to directly inspect business, their authority remained limited to direct cases and controversies.[176]

V. Direct Federal Visitorial Powers

To advocates of expansive congressional and regulatory inspection, the Supreme Court seemed to be hampering regulators

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FINANCE (2d ed. 1995). Importantly, for the evolution of the concept of visitation over non-corporations, while the FTC was supposed to act on "corporations," the Securities Acts of 1933 and 1934 explicitly included individuals, partnerships, and trusts under their authority, which included the authority to issue subpoenas and enforce them by contempt. The acts also allowed any "officer" of the agency, not just commissioners, to issue such subpoenas. Securities Act of 1933, ch. 38, 48 Stat. 74, 85–87 (1933); Securities and Exchange Act of 1934, ch. 404, 48 Stat. 900 (1934). James Landis designed the law and broad SEC investigation powers partially out of a concern about judicial limitations on congressional and commission investigation. He therefore included in the law the presumption of legality of agency subpoenas. James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926); MCCRAW *supra* note 13, at 174–75.

[175] Jones v. SEC, 298 U.S. 1, 26 (1936). Although this case is often presented as an argument about whether the Commission could issue a subpoena after a securities registration had already been withdrawn from the SEC, such a withdrawal would have no importance, if not for the legal understanding that administrative agency subpoenas had to be limited to the case at hand. For typical reading, see *The Four Horsemen and* Jones v. SEC, THE SEC. AND EXCHANGE COMMISSION HIST. SOC'Y, sechistorical.org/museum/galleries/ctd/ctd03c_new_era_horsemen.php.

[176] *Jones,* 298 U.S. at 26 ("Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as 'a fishing expedition for the chance that something discreditable might turn up'—an undertaking which uniformly has met with judicial condemnation." (quoting Ellis v. Interstate Commerce Comm., 237 U.S. 434, 445 (1915))).

from acquiring knowledge about the new industrial economy.[177] Yet another Supreme Court decision impeded investigations by federal courts into business affairs—the famous *Boyd v. United States*.[178] This case, which Justice Louis Brandeis later claimed "will be remembered as long as civil liberty lives in the United States,"[179] tackled the assertion that under the Fourth and Fifth Amendments, which the Court said were interlinked, the federal government could not demand the private papers of a trader in order to enforce custom laws, even through a regular court process.[180] A business person's private papers would betray his or her own thoughts, and therefore act as a kind of testimony against him or herself.[181]

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[177] M. Nelson McGreary, *The Congressional Power of Investigation*, 28 NEB. L. REV. 516 (1948) ("The low water mark of the Congressional power of investigation was reached in 1881 when the United States Supreme Court handed down its opinion in the case of *Kilbourn v. Thompson*."); D.B.W. *Blue Sky Laws: Power of Commissioner to Investigate Licensed Broker*, 26 CALIF. L. REV. 498, 499–500 (1938) (stating "[b]ecause of the many benefits which the public may derive from the [Securities] Commissioner's investigations the court should be reluctant to interfere with them").

[178] 116 U.S. 616 (1886) (finding it unconstitutional to compel a private party to surrender private books, invoices, and papers by threat of implicit confession for noncompliance).

[179] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

[180] *Boyd*, 116 U.S. at 616 (finding both that compelling one to produce private papers to be used against themselves need not include physical entry of premises to constitute an unlawful search and seizure in violation of the Fourth Amendment, and that compelling one to use their private papers against them is akin having them testify against themselves in violation of the Fifth Amendment).

[181] *Id*. at 616 ("The seizure or compulsory production of a man's private papers to be used in evidence against him is equivalent to compelling him to be a witness against himself . . . ."); *see* Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting) ("The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case there before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctities of a man's home and the privacies of life."); KERSCH, *supra* note 16, at 46–51 ("Boyd extended the scope of the right to encompass papers seized in advance of the 'quasi-criminal' trial. To do this, Bradley famously fused the Fourth Amendment

The theory of government visitorial power, however, provided a means around such constitutional restrictions. Although the U.S. Supreme Court had not discussed visitorial power since *Dartmouth College*, the idea would re-emerge on the docket in the early twentieth century, and the question at issue was whether corporations, now subject to federal jurisdiction through antitrust and other new laws, had privacy rights against summonses and subpoenas similar to those of individuals under *Boyd*, even if the summonses and subpoenas were issued by a regular court. A 1903 *Columbia Law Review* article argued that the U.S. government and courts had very limited powers to inspect corporate documents, and these powers "are not expressive of a visitatorial power over corporations" such as that held by the states.[182] In 1905, John Henry Wigmore's book on evidence explicitly said corporations had Fifth Amendment privileges against both state and federal inspections of their business documents, citing *Boyd* and other cases, and a number of state courts agreed.[183] Yet that same year, the Supreme Court decided two cases that granted the federal government broad inspection authority over corporations, and the idea of visitorial power was key to justifying them.[184] In *Hale v. Henkel*, the Supreme Court upheld the right of a federal grand jury to summon witnesses and papers of a corporation without concern for *Boyd*.[185] Justice Henry Billings Brown's opinion stated what had become conventional wisdom on inspection, that "the corporation is a creature of the

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search and seizure limitations with common law and Fifth Amendment self-incrimination privileges.").

[182] Carman F. Randolph, *Considerations on the State Corporation in Federal and Interstate Relations*, 3 COLUM. L. REV. 168, 193 (1903) ("[W]hatever rules in respect of 'publicity' Congress can lawfully impose upon State companies engaged in interstate commerce are not expressive of a visitorial power over corporations. They are manifestations of the regulating power to which . . . Congress can subject the petty trade.").

[183] *See* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 901–02 (1999) ("Wigmore, moreover, had stated unambiguously that corporations were covered by the constitutional privilege.").

[184] *See generally* Hale v. Henkel, 201 U.S. 43 (1906) (finding that while corporations were creatures of the state, their interplay in interstate commerce falls under Congress' purview, granting the federal government a right to oversee the corporation in insuring its laws are being followed).

[185] *Id.* at 75.

State,"[186] and said that there was "a reserved right in the legislature to investigate its contracts and find out whether it has exceeded its powers."[187] Brown then extended this idea, long rooted in ideas of a state visitorial power, to the federal government.[188] Brown said that "powers of the General Government" over corporations engaged in interstate commerce "is the same as if the corporation had been created by an act of Congress."[189] Yet he equivocated on the root of this power, saying "[i]t is not intended to intimate, however, that [Congress] has a general visitatorial power over the state corporations."[190] Justice David Brewer, in a dissent similar to that of his in *ICC v. Brimson*, said Brown was merely ignoring the drift of his own arguments.[191] He said "power of supervision and inspection of the inside workings of a corporation" belonged to whomever chartered it.[192] "It is in the nature of the power of visitation," and could be exercised only by the state, not the federal government through the commerce clause.[193] In 1905 in *Guthrie v. Harkness*,[194] the Supreme Court also argued for an explicit visitorial power of the federal government over national banks, which it certainly created, without concern for *Boyd*.[195] Yet in this case the Court also nodded approval of an expansive state visitorial power over corporate documents, since it

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[186] *Id*. at 74.
[187] *Id*. at 75.
[188] *Id.*
[189] *Id.* ("The power of the general government in this particular in the vindication of its own laws are the same as if the corporation had been created by an act of Congress.").
[190] *Id*.
[191] *Id*. at 86 (Brewer, J., dissenting) (finding that visitation power lies with chartering body, not through other powers of oversight).
[192] *Id*. ("[T]here is a power of supervision and inspection of the inside workings of a corporation, but that belongs to the creator of the corporation. If a state has chartered it, the power is lodged in the state. If the nation, then in the nation; and it cannot be exercised by any other authority.").
[193] *Id.* (limiting visitation powers to the state government that created the entity). For discussion of *Hale* without mention of visitation, see William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 428–33 (1995) (discussing the intricacies of *Hale* with reference to its impact on the prior *Boyd* ruling).
[194] 199 U.S. 148 (1905).
[195] *Id.* at 157 (stating that the national government holds visitorial power over any corporation which it has found for a public purpose).

approvingly quoted the Utah Supreme Court to say that in "America there are very few corporations which have private visitors, and, in the absence of such, the state is the visitor of all corporations."[196]

The U.S. Supreme Court began using the idea of general visitorial powers in an ever more expansive and explicit fashion. In 1909, in *Hammond Packing Co. v. Arkansas*, the Supreme Court used the visitorial idea to allow states to enforce production of out-of-state documents, arguing that "[t]he visitorial powers of a state over corporations doing business within its borders . . . [allow] the state to compel the production of the books and papers of the corporation in an investigation to ascertain whether the laws of the state had been complied with."[197] In *Wilson v. United States*, Justice Charles Evans Hughes continued this line of decisions and applied it to both federal and state governments, ruling that a corporation "must submit its books and papers to duly constituted authority," which emerged from "the visitatorial power of the State, and . . . the authority of the national government where the corporate activities" were in interstate commerce.[198] Hughes quoted Brown's 1905 denial of explicit federal visitation power, but made the roots of the authority explicit by saying the federal government retained a kind of "reserved power of

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[196] *Id*. at 158. Later the same year, perhaps buoyed by the Supreme Court decisions, two U.S. Congressmen introduced bills giving the federal government visitorial powers over insurance corporations, although these went nowhere. *For Insurance Control: Bills Extending Federal Visitorial Power Introduced in Congress*, N.Y. TIMES, Dec. 5, 1905, at 1.

[197] Hammond Packing Co. v. Arkansas, 212 U.S. 322, 348 (1909). State courts took these ideas to heart. The Supreme Court of Mississippi, in a ruling on a subpoena against a corporation in an antitrust case, said the protections against compelled testimony in the state constitution did not mean "the state should relinquish any of its visitorial powers over corporations. The reasons for his holding cannot be better stated than in the language of Mr. Justice Brown in Hale v. Henkel." Cumberland Telephone & Telegraph Co. v. State, 98 Miss. 159, 169 (1910). The court added that though the corporation under the subpoena was "foreign" and therefore not directly charted by the state, the corporation's powers had to be "exercised in accordance with the laws" of the state, and thus could be made subject to summary process, for which it again cited *Hale v. Henkel*. *Id.* at 170. This seemed to overcome previous limitations as in Edwards v. Schillinger, 245 Ill. 23 (1909); *see also*, Jonas Guilford vs. Western Union Telegraph 59 Minn. 332, 339–40 (1894).

[198] Wilson v. United States, 221 U.S. 361, 382.

visitation."[199] Hughes even extended the power to say that the government could force a person to hand over corporate papers even if the papers would be self-incriminating, despite previous state decisions.[200] With this visitorial theory, the government made significant chinks in *Boyd*'s protective armor.[201]

Although the Supreme Court danced around the idea of a distinctive federal visitation power, most commentators saw the connection.[202] Columbia law professor Milton Handler said that "[t]he Court itself has recognized the visitorial power of the federal government over corporations engaged in interstate commerce."[203] When Congressman Covington proposed the FTC in 1914, he rooted its authority not only in congressional inspection, but in "an administrative power of visitation," held by the federal government, and said there would "seem to be no doubt that there is ample authority for the full exercise in a constitutional manner of the inquisitorial and visitorial powers conferred upon the commission."[204]

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[199] *Id.* at 384 ("[T]he general government possesses the same right to see that its own laws are respected as the state would have with respected to the special franchises vested in it by the laws of the state.").

[200] *Id.*; *see* Witt, *supra* note 183, at 900–01.

[201] *See also Wilson*, 221 U.S. at 384–85. This justification was reaffirmed the next year in ICC v. Goodrich Transit Co., 224 U.S. 194, 215 (1912). ("[W]hile general visitorial power over state corporations was not asserted to be within the power of Congress, it was nevertheless declared as to interstate commerce that the general government has, in the vindication of its own laws, the same power it would possess if the corporation had been created by an act of congress."). This line of cases seemed to severally limit the holding of Counselman v. Hitchcock, 142 U.S. 547, 586 (1892) (preventing compelled testimony to a regulatory body without immunity). *See* KERSCH, *supra* note 16, at 46–60 (stating generally that grand jury compelled testimony at the behest of a afforded the testifier Fourth and Fifth Amendment protections whereas administrative compelled testimony encouraged an individual to submit papers and records that very well may be self-incriminating). Thus, administrative subpoenas, issued without any judicial process, provided *less* protection for witnesses than subpoenas issued by a grand jury.

[202] Milton Handler, *The Constitutionality of Investigations by the Federal Trade Commission: II*, 28 COLUM. L. REV. 905, 936 (1928) (suggesting the Supreme Court recognized federal visitorial power, albeit not explicitly).

[203] *Id*.

[204] 51 CONG. REC. 8846 (1914). Senator Francis Newland, who managed the bill in the Senate, said that the commission had "large visitorial powers" which justified its investigations. *Id.* at 11,602–03 (1914). By contrast,

Visitorial theories again placed some limits on such investigations. When someone asked Covington if the FTC had the power to investigate individuals instead of corporations, he replied that it could not because, "[i]t is only by virtue of the visitorial power of Congress over corporations enjoying certain franchise privileges but going beyond the confines of the State that the commission finds its power to compel them to make reports."[205] Others in Congress also argued that federal "visitation" power applied only to corporations.[206] A Washington D.C. federal district court decision admitted that *Wilson* invested Congress with "visitorial powers over corporations engaged in interstate commerce," but still held the FTC could not solicit information about intrastate commerce over which it had no visitorial authority.[207] Such limitations would soon become anachronistic.

Senator Sutherland complained that the bill's authors wanted to "give to this commission a general power of visitation over" almost all corporations, and that such authority "does not belong to the Federal Government, but is a power which belongs only to the sovereignty which created the corporation, namely, the State." *Id.* at 12,805–06 (1914).

[205] *Id.* at 14,926 (1914) (statement of Rep. Covington).

[206] *Id.* at 8846 (1914) (debating the extent of the visitorial powers). The final act still said that the FTC's authority in all its clauses only extended to "corporations," but defined the term to include profit-making "associations," which might be unincorporated, and explicitly excluded partnerships. Federal Trade Commission Act, 15 U.S.C. § 44 (1914). I am not aware of any attempts by the FTC in its first decades to use its subpoena or investigative powers against non-corporate entities. For the use of the FTC's non-subpoena powers over non-corporate interstate entities, which were upheld, see FTC v. Pac. States Paper Trade Ass'n, 273 U.S. 52, 66 (1927) (ruling to enforce a cease and desist order issued by the FTC). For further discussion of this power, *see* Carmen Randolph, *The Inquisitorial Power Conferred by the Trade Commission Bill*, 23 YALE L. J. 672, 674–81 (1914) (detailing the FTC's non-subpoena powers).

[207] Maynard Coal Co. v. F.T.C (D.C. 1920) in 3 FEDERAL TRADE COMMISSION, FEDERAL TRADE COMMISSION DECISIONS 562 (1921). Another treatise also described limits to state visitorial authorities even as it described powers of the federal government over interstate corporations: "It has been held that [state] courts have no visitatorial power over a joint-stock company, as it is not a legal entity," but an interstate corporation "comes under the federal powers of visitation and control." WILLIAM CLARK & I. MAURICE WORMSER, HANDBOOK OF THE LAW OF PRIVATE CORPORATIONS 257 (3d ed. 1916).

VI. The Culmination of the Regulatory and Visitorial State

While pre-World War II federal courts placed limits on government investigations due to the twin requirements of quasi-judicial cases and the visitorial authority over corporations, during and after the war, the Supreme Court expanded the idea of government visitorial authority to encompass any potential subject, before discarding the visitorial idea and its limitations entirely.[208] In *Oklahoma Press Publishing Company v. Walling,* Justice Wiley Rutledge upheld an administrative subpoena issued by the Department of Labor, despite the lack of a clear case or controversy.[209] Rutledge based his ruling on the most expansive conception of federal visitation yet, as well as his understanding of expansive congressional investigative powers.[210] He said that "[h]istorically private corporations have been subject to broad visitorial power, both in England and in this country. And it long has been established that Congress may exercise wide investigative power over them, analogous to the visitorial power of the incorporating state."[211] Rutledge went further, however, and argued that it was for Congress to determine where to lodge the visitorial authority to issue subpoenas and how to construe their limits.[212] It was not the courts' duty "to determine the question of coverage in the preliminary investigation of possibly

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[208] *See, e.g.*, Oklahoma Press Publ'g Co., v. Walling, 327 U.S. 186, 200 (1946) (adopting an expansive view of visitorial power).

[209] *Id*. at 195 (holding in favor of enforcement of the subpoena despite the plaintiff's argument that it would allow the administration to conduct "fishing expeditions" into its records).

[210] *Id*. at 215–16.

[211] *Id*. at 204. Rutledge cited a 1930 *Columbia Law Review* article on visitorial review as partial justification. The article, however, admitted that using the Commerce Clause and Congress' authority over interstate commerce as a justification for federal visitorial power was strained at best, stating that "[w]hile this justification may seem at best to be tenuous, inasmuch as the result seems desirable for policy reasons it is submitted that any reasoning which attains it without a sacrifice of logic should be employed." Carmen F. Randolph, *The Fourth and Fifth Amendments and the Visitatorial Power of Congress over State Corporations*, 30 COLUM. L. REV. 103 (1930); *see also* Randolph, *supra* note 182.

[212] *Oklahoma Press*, 327 U.S. at 201 (arguing that to find otherwise would "cut[] squarely into the power of Congress").

existing violations . . . ."[213] Unlike previous decisions, Rutledge thought Congress had the ability to delegate investigation of any subject under any method it chose, "as incidental to both [Congress's] general legislative and . . . investigative powers."[214] Justice Frank Murphy issued a lone and hopeless dissent, just as he had in another administrative subpoena case.[215] Struggling against the tide of history, he argued that "[o]nly by confining the subpoena power exclusively to the judiciary can there be any insurance against this corrosion of liberty."[216]

The Administrative Procedure Act, passed in the same year, placed such administrative subpoenas even further beyond judicial review.[217] The act stated that courts "shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with the law."[218] Later opinions made judicial investigation into administrative subpoenas almost irrelevant, and eventually ignored their erstwhile connection to specific cases and visitorial powers. In the case of *United States v. Morton Salt,* the Court, with no reference to visitation, said an administrative agency "can investigate merely on suspicion that the law is being violated, or even just because

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[213] *Id.* at 214.

[214] *Id*. Of course, after 1937, the Court ignored the importance that was once given to the investigation of "interstate" corporations in justifying or limiting the subpoenas. The Court had also, however, begun to grant Congress more expansive direct investigative powers that they had limited in *Kilbourn*. *See* McGrain v. Daugherty, 273 U.S. 135 (1927) (upholding the execution of a warrant of attachment authorizing an arrest issued by the president of the Senate). See later limitations to congressional investigation in Watkins v. United States, 354 U.S. 178 (1957) (holding that questions asked during a congressional hearing must, upon demand, be clearly explained as to their pertinence to the investigation).

[215] *See* Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 510 (1943) (Murphy, J., dissenting) (arguing if administrative agencies were "freed of all restraint . . . they may at times become instruments of intolerable oppression and injustice").

[216] *Oklahoma Press*, 327 U.S. at 219 (Murphy, J., dissenting).

[217] Administrative Procedure Act, 5 U.S.C. § 555(d) (2012) (instructing that such subpoenas are authorized on "a statement or showing of general relevance").

[218] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946); 5 U.S.C. § 555(d) (2012).

it wants assurance that it is not."[219] The Court soon allowed administrative subpoenas to compel production of documents for any "legitimate purpose" imagined by a government official.[220]

Other cases eroded most remaining limits against government inspections and dismissed the idea that these emerged from a government visitorial authority exclusive to corporations.[221] In 1944, in *United States v. White*, Justice Murphy, perhaps because of his desire for judicial supremacy exhibited in his administrative subpoena dissents, argued that labor unions, not chartered by any state, could not

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[219] United States v. Morton Salt, 338 U.S. 632, 642–43 (1950). For later rulings upholding such authority, see Donovan v. Lone Steer Inc., 464 U.S. 408, 413–17 (1984) (upholding the issuance of an administrative subpoena by a Secretary of Labor agent in a motel lobby despite not having a judicial warrant); EEOC v. Shell Oil Co., 466 U.S. 54, 55 (1984) (upholding a subpoena issued by the EEOC); FCC v. Schreiber, 381 U.S. 279, 294 (1965). In *Schreiber*, the Court said that the FCC's duty to "make annual reports to Congress," helped justify general investigations, and said, "[s]ignificantly, this investigation was specifically authorized by Congress that Congress might 'draw upon the facts which are obtained.'" *Schreiber*, 381 U.S. at 294. The theories behind expanding executive authority to issue subpoenas also helped to limit judicial supervision of subpoenas even in the judicial branch. The 1948 revisions of the Federal Rules of Civil Procedure, Rule 45, gave court clerks the authority to issue blank subpoenas to attorneys with no judicial review of the subpoena. In 1991, amendments allowed attorneys to issue their own subpoenas without even a clerk. The Notes of the Advisory Committee on the rules said Supreme Court opinions such as *Brimson* upholding agency subpoenas justified such behavior, and said the 1948 revision "put the attorney in a position similar to that of the administrative agency, as a public officer entitled to use the court's contempt power to investigate facts in dispute." *See* FED. R. CIV. P. 45; Notes of Advisory Committees.

[220] Powell v. United States, 379 U.S. 48, 57–58 (1964) (creating the "legitimate purpose" test requiring an agency to show an investigation was "conducted pursuant to a legitimate purpose, that the inquiry may be relevant to that purpose, that the information sought is not already within the [agency's] possession, and that the administrative steps . . . have been followed").

[221] *See, e.g.*, United States v. White, 322 U.S. 694, 700–01 (1944) (expanding visitorial authority to encompass to requests for information against labor unions).

assert a Fourth or Fifth Amendment *Boyd* claim against production of documents in a normal court case.[222] He said:

> The fact that the state charters corporations and has visitorial powers over them provides a convenient vehicle for justification of governmental investigation of corporate books and records. Hale v. Henkel, supra; Wilson v. United States, supra. But the absence of that fact as to a particular type of organization does not lessen the public necessity for making reasonable regulations of its activities effective . . . . Basically, the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws . . . .[223]

Murphy argued that a labor union was a large "impersonal" institution that "could not be said to represent the purely private or personal interests of its constituents" and therefore had no particular rights.[224] The Court eventually discarded the idea that only large and "impersonal" organizations could not claim constitutional privilege.[225] A 1974 case, *Bellis v. United States*, denied Fourth and Fifth

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[222] *Id*. at 700 (limiting Fourth and Fifth Amendment protections against administrative subpoenas).

[223] *Id*. at 700–01.

[224] *Id.* at 700–03. This theory was applied to force several communist organizations in the 1950s to produce documents. *See* McPhail v. United States, 364 U.S 372, 373–83 (1960) (upholding a subpoena from the House's Un-American Activities Committee); Rogers v. United States, 340 U.S. 367, 376 (1951) (concerning testimony of the Communist Party's treasurer); United States v. Fleischman, 339 U.S. 349, 350 (1950) (upholding a subpoena issued to the Joint Anti-Fascist Refugee Committee). As early as 1947, an extensive law review article supporting increased investigative powers described the entire history of such investigations without using the terms "visitor" or "visitorial." The author only stated that earlier judges "wrote into the Constitution" certain unfounded limitations on inspection. Kenneth Culp Davis, *The Administrative Power of Investigation*, 56 YALE L. REV. 1111, 1153 (1947).

[225] *See* Bellis v. United States, 417 U.S. 85, 89–91 (1974) (denying Fourth and Fifth Amendment privileges to partnerships).

Amendment privileges to a partnership composed of only three people, and said that such protection did not exist for any "collective entity."[226] The authority of the government over a mere two-person grouping seemed obvious.[227]

Congress used the new avenues of investigation opened by the courts, and expanded administrative subpoenas far beyond their traditional realms. Civil Investigative Demands (CIDs), first created in the late 1950s, can now be issued by a number of officials in the Department of Justice for a number of potential investigations into economic issues.[228] National Security Letters, beginning in 1978 and expanded again in 1986, can also be used by officials to investigate security issues without any connection to a case or court and with little review.[229] The 2001 PATRIOT Act even forbade these letters' recipients from consulting attorneys on their ability to challenge them.[230] The federal government may now issue administrative

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[226] *Id.* at 89–91.

[227] The *Bellis* decision admitted, however, that the case "explore[d] the outer limits of the analysis of the Court in White." *Id.* at 89–91 (1974). *See also*, Braswell v. United States, 487 U.S. 99, 100–19 (1988) (asserting no protection against self-incrimination for a corporation even if held by a single owner). The Supreme Court did deem papers of a sole proprietorship protected under United States v. Doe, 465 U.S. 605, 612–17 (1984).

[228] CIDs were originally granted to the Department of Justice so they would not have to summon a grand jury or pursue a criminal case, or institute a civil case, to retrieve documents in antitrust investigations. This, in effect, gave the DOJ the same powers the FTC had from 1914. Richard K. Decker, *The Civil Investigative Demand*, 21 A.B.A. ANTITRUST SEC. 370, 377–80 (1962) (comparing the DOJ's CID powers to the FTC's); William C. Athanas & Jennifer L. Weaver, *What to Do When the Government Asks for Everything*, 10 A.B.A. HEALTH ESOURCE (2014), https://www.americanbar.org/publications/aba_health_esource/2013-14/january/what_to_do.html [https://perma.cc/JK3P-MZ3Q] ("A CID is similar to a grand jury subpoena in that it obligates the recipient to produce the requested information absent a valid claim of privilege or narrowing, either by agreement or by order of the Court.").

[229] Nieland, *supra* note 8, at 1206–13.

[230] *See* Cedric Logan, *The FISA Wall and Federal Investigations*, 4 N.Y.U. J. L. & LIBERTY 209, 229–32 (2009) (discussing the impact of the PATRIOT Act); Nieland, *supra* note 8, at 1211–13 (explaining the issuance of National Security Letters under the original USA PATRIOT Act, prior to subsequent amendments in 2006); *National Security Letter Timeline*, ELECTRONIC FREEDOM FRONTIER FOUND., https://www.eff.org/issues/national-security-

subpoenas to investigate a number of criminal offenses, including health care crimes, sex offenses, extortion, blackmail, and threats against government officials.[231] These authorities are invested in dozens of separate offices and agencies, including the National Science Foundation, the National Aeronautics and Space Administration, and the U.S. Postal Service.[232] These subpoenas' connection to early conceptions of visitorial power or business regulation is now entirely forgotten.[233] Their power is instead bottomed on a general government right to "investigate" and "enforce its laws," with few limitations.[234] The so-called third-party doctrine, commonly identified as emerging in the case of *Smith v. Maryland* in 1979, was thus merely the culmination of a long trend of decisions that denied constitutional privileges and court protections to information inside any company, business, union, and, eventually, "collective entity," which allowed administrative agencies to issue subpoenas for any "legitimate purpose" without a court's interference.[235] Today, such

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letters/timeline [https://perma.cc/5K5R-SUWH]. Much of modern government surveillance, such as the warrantless "PRISM" search program for internet "metadata," exists under the Foreign Intelligence Surveillance Act of 1978 and its amendments, but these programs are rarely challenged in court and never in the Supreme Court. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§1801–1885c (2012). Thus, it is difficult to know how they relate to earlier administrative subpoena changes and court rulings. National Security Letters, on the other hand, have an extensive legal history closely tied to the administrative subpoenas studied here, which the government has justified using similar defenses to those discussed here.

[231] 18 U.S.C. § 3486 (2012) (listing the possible offenses that can create grounds for an administrative subpoena).

[232] U.S. D.O.J. OFF. OF LEGAL POLICY, REP. TO CONGRESS ON THE USE OF ADMIN. SUBPOENA AUTHORITY BY THE EXECUTIVE BRANCH AGENCIES AND ENTITIES (2001), www.justice.gov/archive/olp/rpt_to_congress.htm#1 [https://perma.cc/X4K3-VK9S] (including an appendix with a list of agencies that can issue a subpoena).

[233] *See* 18 U.S.C. § 3486 (2012) (lacking any mention of visitorial power).

[234] Id.

[235] Smith v. Maryland*,* 442 U.S. 735, 735–46 (1979) (requiring a legitimate expectation of privacy to receive constitutional protections under the Fourth Amendment). *Smith* largely recapitulated ideas from United States v. Miller, 425 U.S. 435 (1976) (holding that bank depositors had no expectation of privacy against an administrative subpoena served on a bank). Thus, the modern third-party doctrine emerged in a debate concerning the privacy of banks and bank depositors, the same debate which inspired the first business

subpoenas are almost completely uninhibited by law, either before or after their issuance.[236]

VII. Conclusion

This article has demonstrated that the roots of expansive administrative inspection powers lay in changing understandings of visitorial power, which was an important justification for and means of expanding the regulatory state. Yet some lawyers saw visitorial power as an alternative, not a complement, to the regulatory state.[237] In 1936, Harvard Law Professor Roscoe Pound, then in the midst of his long war against administrative law, wrote an article for the *Harvard Law Review*, "Visitatorial Jurisdiction over Corporations in Equity," which remains the last substantial analysis of government visitorial powers in the legal literature.[238] In this article, Pound argued that a revived visitorial jurisdiction over corporations by equity courts could provide the only plausible substitute to emerging administrative regulators. He agreed with the English legal historian William Holdsworth that Blackstone's idea of the King's visitation power over corporations through the courts, although adopted by many American states, was "somewhat unhistoric," but he said "this is not the only instance in which doubtful history has made good law."[239] Pound hoped that the

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regulatory commissions in the 1820s. *See supra* notes 85–101 and accompanying text.

[236] *See* 18 U.S.C. § 3486 (2012) (demonstrating the broad scope of administrative subpoenas that can be issued).

[237] In 1895, in an address to the American Bar Association, then-Judge William Howard Taft complained that "insufficient visitorial powers" of the courts were at the root of corporate mismanagement and abuses, and the failure to use this tool explained increased demands for regulation outside of courts. With similar concerns, Taft later attacked the FTC's tendency towards "inquisitorial methods" with the potential for executive abuse. *See* William H. Taft, Charges against the Federal Judiciary, 1 VA. L. REGISTER 389, 389 (1895) (claiming "the entire failure to exercise any stringent visitorial powers over" corporations led to corporate abuses); *Taft Denounces Clayton Act*, N.Y. TIMES, May 27, 1915, at 12 (arguing against "going to the extreme in the inquisitorial methods for the investigation of private business to which this Trade Commission act tends").

[238] Roscoe Pound, *Visitatorial Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369 (1936); ERNST, *supra* note 13, at 107–39.

[239] *Id*. at 370.

history of visitation could provide a new hook on which to hang expanded equity court jurisdiction over corporations, which could judicially investigate business fraud and malfeasance without executive interference.[240] Pound worried, however, that recent trends had caused a "subjection of . . . enterprises to an administrative regime, to which our neglect of the possibilities of equity jurisdiction has led us."[241]

Not only was Roscoe Pound late to the idea of visitorial jurisdiction—he also precisely misread its effects. The idea of visitorial powers was lodged in the very regulatory and administrative state he despised.[242] The idea of broad government visitorial powers became one of the most potent tools of the regulators to both impose their will and to gather information,[243] before the few remaining limitations that were also imposed by that idea were discarded.[244] The justifications and powers of the regulatory state eventually fed the growth of executive criminal investigation and national security powers far beyond those that raised Pound's hackles.[245]

Yet, a judiciary that reengages with the historical precedents concerning visitorial powers could bring new light and understanding to these issues. Such a judiciary, however, would not try to reestablish its own visitorial power, as Pound insisted, but instead try to place new standards and protections on future administrative subpoenas and searches.[246] In fact, a better understanding of the history of visitorial

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[240] *Id*. at 395 ("We shall do well to remember that there is a powerful weapon for the protection of the public in the legal armory waiting to be used effectively in order to meet the ills of today.").

[241] *Id.*

[242] *See* O'Kelley, *supra* note 4, at 1357 ("The state and federal government, therefore, must have reserved visitorial right to inspect . . . .").

[243] *See, e.g.*, Garrett, *supra* note 4, at 123 ("The Supreme Court . . . made clear that extremely broad subpoenas did not violate Fourth Amendment reasonableness requirements . . . . The Court noted that historically corporations had been subject to 'visitorial power' . . . .").

[244] *See, e.g.*, Maynard Coal Co. v. FTC (D.C. 1920), 3 FEDERAL TRADE COMMISSION, FEDERAL TRADE COMMISSION DECISIONS 562, 565 (1921) ("[T]he [FTC has not the power to exact the reports and information sought").

[245] *See, e.g.*, Davis, *supra* note 224, at 1114 (describing broad administrative power to investigate); Logan, *supra* note 230, at 221 (describing ways the government may collect foreign intelligence without warrants).

[246] Pound, *supra* note 238, at 395 (arguing the need for courts of equity to have visitorial power).

authority could help judges, lawyers, and legislators come to new compromises in two of the most fraught areas of contemporary constitutional law: the rights of corporations and the extent of warrantless government surveillance.[247]

For those concerned about corporate personhood, an understanding of the concept of visitorial power, or reserved government rights over corporations, shows why corporate rights are still not synonymous with the rights of natural persons. This history, for instance, helps explain Chief Justice John Roberts's decision in *FCC v. AT&T* (2011), that a corporation could not plead "personal privacy" in demanding that the government not release its records in response to a Freedom of Information Act request.[248] Although the decision focused on statutory interpretation, it was bottomed on the long-term understanding, discussed in this article,[249] that corporations do not have the same privacy rights as others.[250] More decisions in this vein—demonstrating where the government could demarcate the differing rights of corporate and natural persons based on the government's reserved but still limited power over corporations—could calm fears about unchecked corporate power.[251]

The history of visitorial power, however, also reveals the ineluctable conflicts between government supervision of corporations and the rights of individuals associated with corporations.[252] The

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[247] *See* O'Kelley, *supra* note 4, at 1347–49 (discussing the rights of corporations); Logan, *supra* note 230, at 221 (discussing warrantless government surveillance).

[248] FCC v. AT&T, 562 U.S. 397, 410 (2011) (rejecting a corporation's ability to plead personal privacy through the plain meaning of "personal" and statutory construction).

[249] *See, e.g.*, discussion *supra* pp. 240–48.

[250] For contemporary discussions of this debate that do not engage with the history of government visitation, see Anita L. Allen, *Rethinking the Rule Against Corporate Privacy Rights: Some Conceptual Quandries for the Common Law*, 20 JOHN MARSHALL L. REV. 607, 640 (1987) (discussing privacy for corporations on basis of the sociological theory of ascription by which status is acquired); Elizabeth Pollman, *A Corporate Right to Privacy,* 99 MINN. L. REV. 27, 88 (2014) (presenting arguments in favor for and against privacy for corporations).

[251] *See* Garrett, *supra* note 4, at 98.

[252] *See, e.g.*, Braswell v. United States, 487 U.S. 99, 100–02 (addressing whether the president and sole shareholder of a corporation has any protection against self-incrimination).

visitorial power subjected many people only tangentially connected to corporations to summary inspection that the government would not have justified without the corporate connection (or today, a connection to any "collective entity").[253] The only answer to such arbitrary power is a judiciary that once again polices the boundaries of all inspections. The history provided here has shown the continuous evolution and expansion of government inspection authorities, and therefore, cannot advocate for return to a single point of time when government and business and privacy rights were all kept in supposed equilibrium. History has also shown, however, that many expansions of governmental inspection authority are relatively recent, and overstep once commonly held constitutional restraints on inspections.[254] Therefore, if the government is to retain the ability to issue administrative subpoenas, legislatures and lawyers can at least demand that evaluating courts apply the same Fourth and Fifth Amendment analyses, including those used in the celebrated *Boyd* case, that were once applied to any government information request.[255] Legislatures and courts can also force government officials to once again demonstrate reasonableness and relevance of the requested information in light of the putative law being violated, as opposed to relying on the weak and relatively recent "legitimate purpose" standard.[256]

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[253] Rogers v. United States, 340 U.S. 367, 367; ICC v. Brimson, 154 U.S. 447, 468 (describing the ICC issuing subpoenas to the railroads' secretary and the vice president of a related steel company).

[254] *See* FTC v. Am. Tobacco Co., 264 U.S. 298, 306 (1924) (constraining the FTC's investigatory powers to particular cases and controversies, and denying subpoenas for "fishing expeditions into private papers on the possibility that they may disclose evidence of a crime.").

[255] Boyd v. United States, 116 U.S. 616, 638 (1886) (concluding the federal government could not demand the private papers of a trader in order to enforce custom laws, even through regular court process, due to Fourth and Fifth Amendment protections).

[256] *See* Right to Financial Privacy Act, 12 U.S.C § 3401 (2012) (stating protections for bank depositors against such subpoenas); Daniel E. Chefitz, *Fourth Amendment—The Presumption of Reasonableness of a Subpoena Duces Tecum Issued by a Grand Jury,* 84 J. CRIM. L. & CRIMINOLOGY 829, 848 (1992) (describing the reasonableness standard in a government's information requests); Joseph R. Jr. Mangan, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of* United States v. Miller *and Bank Depositor Privacy Rights,* 72 J. CRIM. L. & CRIMINOLOGY 243, 244 (1981)

Recent Supreme Court decisions have demonstrated the Court's discomfort with the extent of modern government surveillance and inspection powers, although they have not directly confronted administrative subpoenas.[257] Some lower courts, meanwhile, have demonstrated suspicions of both the statutory and constitutional support behind modern bulk information collection under administrative authority.[258] Although similar decisions will only marginally limit the ability of government officials to demand private information without court approval, courts can begin the reincorporation of administrative subpoenas and inspections into modern Fourth and Fifth Amendment law. The judiciary could thus help protect Americans who have limited means to protest what was once known as the government's visitation power.

(arguing for a higher standard of reasonableness to give bank customers standing to resist against government's request to access customer records); Slobogin, *supra* note 11, at 806 (stating subpoenas may be resisted on grounds of privilege, burdensomeness, and irrelevance).

[257] *See, e.g.*, Los Angeles v. Patel, 135 S. Ct. 2443, 2456 (2015) (concluding an administrative search of a hotel's registry requires a warrant and opportunity for pre-compliance court review); Riley v. California, 134 S. Ct. 2473, 2494 (2014) (holding searching a suspect's cell phone requires a warrant); United States v. Jones, 565 U.S. 400, 412 (2012) (concluding installation of a GPS device on a car requires a warrant). *Patel* is distinct from most of the decisions described in this article in that the Court placed it in the tradition of "administrative search" decisions, usually involving local police or inspector searches of houses and businesses. The complete divorce of decisions in "administrative search" and "administrative subpoena" cases is surprising, and incorporating the two would provide more consistent Fourth Amendment analysis. *See* Marshall v. Barlow, 436 U.S. 307, 323 (1978) (finding a search warrant is necessary to inspect a business, if not overly burdensome to obtain); See v. Seattle, 387 U.S. 541, 546 (1967) (holding searches of business and residential homes required warrants); Camara v. Municipal Court, 387 U.S. 523, 540 (1967) (concluding probable cause is required to issue a warrant for an administrative search). Though some writers worried *Patel* provided no new "Third Party" protection for hotel guests, it did open up the broader possibility that those most likely and capable of objecting, namely, the owners, could fight police demands in courts. Editorial, *Who's at the Hotel?*, L.A. TIMES, June 24, 2015, at A20 (addressing the possibility of hotel guests receiving privacy protection through hotel owners).

[258] *See, e.g.*, Am. Civil Liberties Union v. Clapper, 785 F.3d 787, 826 (2d Cir. 2015) (stating that the NSA's "metadata" collection program exceeded the PATRIOT Act and raised Fourth Amendment concerns).