Corporations Have Almost as Many Constitutional Rights as Individuals:

How Did This Happen?

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INTRODUCTION

Two recent decisions of the U.S. Supreme Court have substantially enlarged the scope of fundamental rights accorded corporations. In *Citizens* United v. F.E.C., the Court determined that Citizens United, a non-profit corporation, has a First Amendment right to spend unlimited amounts of money to broadcast "electioneering communications" supporting candidates for public office.¹ In doing so, the Court described corporations as "associations of citizens" deserving fundamental rights just like living persons. The Court noted that "[p]olitical speech is indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."² In *Burwell v. Hobby* Lobby Stores, Inc.,³ the U.S. Supreme Court decided that the United States Department of Health and Human Services' (HHS) requirement that closely held corporations provide health-insurance coverage for methods of contraception, which were contrary to the genuine religious beliefs of the companies' owners, violated the Religious Freedom Restoration Act of 1993 (RFRA).⁴ RFRA requires that strict scrutiny applies to any federal government action which substantially burdens the exercise of religion, *i.e.*, the government action is illegal unless it is the least restrictive means of advancing a compelling government interest.⁵ In short order, corporations' exercise of political and religious expression is deemed to be protected by the First Amendment, despite the fact corporations cannot vote or hold political office and possess neither human dignity nor a religious conscience. How this transformation of fundamental rights from individual freedoms to corporate entitlements has occurred is a fascinating story that shows how four dramatically different approaches - artificial entities, corporate personhood, constitutional purpose, and associations of persons morphed over the past two hundred and twenty five years and paved the way to the constitutional enshrinement of corporations.

¹ Citizens United v. F.E.C., 558 U.S. 310, 372 (2010).

² Id. at 349.

³ Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

⁴ 42 U.S.C. §§ 2000bb *et seq*. (2016).

⁵ *Hobby Lobby*, **573** U.S. at 690-91.

The purposes for telling this story are threefold: (1) to determine what fundamental constitutional rights automatically accorded to individuals under the Constitution have been extended to corporations and which constitutional rights have not; (2) to parse the U.S. Supreme Court decisions extending constitutional protections to corporations to understand how the views of the Founders have been altered by these decisions; and (3) to show how corporations, like individuals, have used their constitutional protections to evade government regulations and restrictions.

A more fundamental objective for assembling this story is to clearly illustrate the ebb and flow and evolution and retreat of fundamental constitutional rights from the time of the Founders to the twenty-first century. Only a story can convey how magnificent it is that law can be made and unmade, reformed and repaired, recast and enshrined. This story starts with the Founders' views of the fundamental rights protected by the U.S. Constitution: digests the debates over the renewal of the First and Second National Bank charters; reviews the early U.S. Supreme Court decisions which struggled to fit corporations into a constitution designed to protect the interests of natural persons; examines the text and passage of the Fourteenth Amendment and the conflicting views and tales of its enactors; observes the evolution of the U.S. Supreme Court's views of corporations from the mid-nineteenth to early twentieth century Lochner era, as the Populists gave way to the Progressives who gave way to the Conservatives; considers the resurgence of Lochner in the U.S. Supreme Court's rebuff of the New Deal and the counterattack by the New Deal following a significant and honest change in view by one U.S. Supreme Court justice and a disastrous attempt by President Franklin Roosevelt to pack the U.S. Supreme Court: explores the accumulation of fundamental rights by corporations starting in the middle decades of the twentieth century extending into the last guarter of the twentieth century and the first two decades of the twentieth-first century; and demonstrates the significant role political campaign reform and the response of the U.S. Supreme Court to that reform played in that explosion. All of this is indeed a tale worth telling.

VIEWS OF THE FOUNDERS

The Founders wrote the Constitution and added the Bill of Rights to protect the fundamental rights of the new nation's citizens, and neither the Constitution nor the Bill of Rights specifically mentions corporations.⁶ The Founders "recognized a fundamental difference between corporations and 'We the People' who founded the Nation and created the Constitution. The Founders viewed corporations as legally distinct from natural persons, treating them as powerful artificial entities that needed to be carefully regulated to ensure that they did not abuse the special privileges they alone received."7 During the 1st Congress, James Madison summarized the Founders' vision of corporations: "[A] charter of incorporation . . . creates an artificial person previously not existing in law. It confers important civil rights and attributes, which could not otherwise be claimed."⁸ As noted by Chief Justice Marshall, a "corporation is an artificial being, invisible, intangible, and existing only in the contemplation of the law. Being the creature of the law, it possesses only those properties which the charter creation confers on it."9 Hence, the Founders believed individuals had fundamental rights by virtue of their status as humans, but corporations did not. Rather, the government created corporations to serve public purposes, and corporations had only "the special privileges and protections" delineated in their charters and were subject to far stricter government scrutiny to insure they served the purposes for which they were created.¹⁰ Those privileges included perpetual life, limited liability, and the right to

⁶ DAVID H. GANS & DOUGLAS T. KENDALL, A CAPITALIST JOKER 6-7 (2010).

⁷ CONSTITUTIONAL ACCOUNTABILITY CENTER, THE CONSTITUTION AT A CROSSROADS: THE IDEOLOGICAL BATTLE OVER THE MEANING OF THE CONSTITUTION, CHAP. 4: THE FIRST AMENDMENT, POLITICAL SPEECH, AND THE FUTURE OF CAMPAIGN FINANCE LAWS 2 (2012).

⁸ Annals of Congress, 1st Cong., 3rd Sess. 1949 (1791).

⁹ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819), discussed below at notes 78-106. *See also Head & Amory v. Providence Ins. Co.*, 6 U.S. (2 Cranch.) 127, 167 (1804) (A corporation is "the mere creature of the act to which it owes its existence" and is "precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes.")

¹⁰ Gans *supra* note 6 at 6-7.

undertake activities as an artificial entity, all of which enabled the corporation to promote the public good.¹¹ None of those privileges was enjoyed by ordinary citizens.

Indeed, it was these special privileges that caused the Founders to be suspect of corporations. Having experienced the exclusive trading privileges given to trading companies chartered throughout the British Empire, the former colonies were highly suspicious of corporations and associated them with monopolies.¹² James Madison's proposal to give Congress an express power to charter corporations, "where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," was defeated, probably because the Founders worried that the creation of, and conferral of special privileges on, corporations would convey enormous power to corporations and "would lead to corporate monopoly power."¹³ George Mason of Virginia opposed the motion, because he feared the power to create corporations would lead to monopolies of every sort,¹⁴ as did Rufus King of Massachusetts, who objected to the conferral of such a power on congress on the grounds it would lead to "mercantile monopolies."¹⁵

Their concerns are corroborated by the purposes for which corporations were formed by special charter. Between 1780 and 1801, states issued 317 single-enterprise charters, two-thirds of which were for transportation (inland navigation, turnpikes, toll bridges), 20 percent were for banks or insurance companies; 10 percent were for local public services (mostly water supply); and less than 4 percent were for general business corporations.¹⁶ Chartering these single enterprises permitted "the grantees to act in ways not open to the general run of men."¹⁷ Tacking on the rights to sue and be sued, to hold and transfer real and personal property, to have perpetual existence, and to provide limited liability of shareholders created powerful enterprises about which the Founders were suspicious. These

¹⁷ Id. at 20.

¹¹ Id. at 7.

¹² Daniel A. Crane, *Antitrust Antifederalism*, 96 CAL. L. REV. 1, 6 (2008).

¹³ Id. at 8.

¹⁴ Id.

¹⁵ Gans *supra* note 6 at 7. Professor Crane opines the reason for the defeat of Madison's proposal is inconclusive. It could have been defeated because the delegates feared monopolies, or it could have been because the delegates believed Congress had an incorporation power anyway and were reluctant to raise a red flag for the Antifederalists. Crane *supra* note 12 at 9.

¹⁶ James Willard Hurst, The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970 17 (1970).

corporations needed careful regulation, not the protections of fundamental rights.

The text of the Bill of Rights also underscores the differentiation between individual rights and corporations' privileges. The Founders protected the rights of individuals, not corporations, to engage in political speech, participate in religious exercises, peaceably assemble, and bear arms.¹⁸ The Fourth Amendment protects "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."¹⁹ The Fifth Amendment secures to all "persons" the right not to be charged with a capital crime except on a presentment or indictment of a grand jury, the right not to be subject to double jeopardy of "life or limb" for the same offense, the right not to be "compelled in any criminal case to be a witness against himself," and the right "not to be deprived of life, liberty, or property without due process of law."²⁰

In short, the Founders clearly differentiated between the fundamental rights of persons and the privileges given to corporations in their charters. The Founders considered corporations to be artificial beings which existed only in the eyes of the law. The Founders were suspicious of corporations because they feared the powers conferred to corporations in their charters. The Founders drafted the Constitution and Bill of Rights to protect individuals' rights and, in doing so, never explicitly or implicitly mentioned corporations.

¹⁸ Gans *supra* note 6 at 8.

¹⁹ U.S. CONST., amend. IV. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

²⁰ U.S. CONST., amend V. The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

DEBATES OVER CHARTERING FIRST AND SECOND BANKS OF THE UNITED STATES

James Madison strongly reiterated his wariness with corporations during the Congressional debates over the bill to charter the First Bank of the United States as a private commercial corporation. In support of his argument that there was no enumerated or implied power in the Constitution authorizing Congress to charter the bank,²¹ he noted the proposal called for the creation of an "artificial person" to which "important civil rights and attributes" are conferred. These rights and attributes, Madison insisted, can neither be claimed by individuals nor effectively restrained given the "scantiness" of the corporation's charter. This would provide the bank with "a power never before given to a corporation," creating a "monopoly which affects the equal rights of every citizen."²² Madison's objections to the bill, however, did not prevail. Congress passed the bill, and the First Bank of the United States was created in 1791. That Charter later expired in 1811, and the Second Bank of the United States was chartered by Congress in 1816 with a twenty year life.²³

In 1832, President Andrew Jackson vetoed a bill renewing the charter of the Second Bank of the United States. In his veto message, Jackson vilified the special privileges conferred on the Second Bank in its charter:

In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to the protection law but when the laws undertake to add... artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humbler members of society... who have neither the time nor the means of securing like favors, have a right to complain of the injustice of their government.²⁴

²¹ The U.S. Supreme Court ruled that Congress was empowered to charter a banking corporation as part of its power to "[raise] revenue and [apply] it to national purposes," *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 409 (1819).

²² Annals of Congress, 1st Cong., 3rd Sess. 1945-1952 (1791).

²³ Gans *supra* note 6 at 9 and note 34.

²⁴ *Id. at* 9-10, citing 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1908, at 590 (James D. Richardson ed. 1908).

Echoing Madison's concerns, Jackson urged all Americans to "take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our government to the advancement of the few and the expense of the many \ldots "²⁵

Following his veto, Jackson continued to protest the legislative chartering process that granted special privileges to corporations not available to individuals, and condemned the misuse of corporate special privileges. He accused corporations of spending money to influence the outcome of elections contrary to their charters, and questioned "whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."²⁶ He condemned corporations' promoting candidates for political offices across the country as anathema to the constitutional system, succeeded in removing federal funding from the Second Bank, and watched its charter expire in 1836.²⁷

Despite Jackson's protests, the chartering of corporations by states expanded and provided a potent engine for economic growth.

There had been only about a half dozen business corporations chartered in the entire colonial period. Now such corporate grants for businesses virtually became popular entitlements. The legislatures incorporated not just banks but insurance companies and manufacturing concerns, and they licensed entrepreneurs to operate bridges, roads, and canals."²⁸

"Between 1800 and 1817, the [states] granted nearly 1,800 corporate charters. Massachusetts had thirty times more business corporations than the half dozen or so that existed in all of Europe. New York . . . issued 220 corporate charters between 1800 and 1810."²⁹ The pace of chartering corporations shortly grew faster: "from 1790 to 1860, states chartered 22,419

²⁵ *Id. at* 10, citing Richardson *supra* note 24 at 591. Interestingly, Professor Hovenkamp opines that "Jackson's outspoken opposition to reincorporation of the Second National Bank was based on his hatred of hard money and the National Bank's dominance over state banks rather than any general hostility toward the corporation as a method of doing business." Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 Geo. L.J. 1573, 1635 (1988).

²⁶ Gans *supra* note 6 at 10-11, citing 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 30 (James D. Richardson ed. 1898).

²⁷ Gans supra note 6 at 10.

²⁸ GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 320-321 (1992).

²⁹ Gans *supra* note 6 at 10-11. Wood *supra* note 28 at 321.

business corporations . . . and several thousand more under general incorporation laws that were introduced mostly in the 1840s and 1850s," a number that far exceeded that of any other country.³⁰

The sharp contrast between the vehement arguments against the chartering of the First and Second Banks of the United States - the only two business corporations created by Congress before the Civil War - and "the matter of fact style in which state legislatures continued throughout to produce special charters by the scores" recommends "caution in interpreting what was afoot."³¹ "If more weight is given to what was done than to what was said . . . there was never any serious challenge to basic legislative authority to determine the uses of the corporate device."³² The heart of the matter was not an attack on either the granting of corporate existence or the authority of the legislature to create corporations; rather, it was a dispute over whether all individuals "should have reasonably equal access to the benefits of incorporation."³³

 ³⁰ Ralph Gomory and Richard Sylla, *The American Corporation*, 142 DAEDALUS 102, 104 (2013).
 ³¹ Hurst *supra* note 16 at 119, 140.

³² *Id*. at 119-120.

³³ Id. at 120.

TREATMENT OF CORPORATIONS IN EARLY U.S. SUPREME COURT DECISIONS (1809-1839)

Early decisions of the U.S. Supreme Court addressed claims involving corporations, and provide insight into how the new Republic regarded corporations. The decisions addressed three principle issues: (1) whether corporations were citizens for the purposes of diversity jurisdiction, (2) whether corporations were citizens entitled to the protection of the Privileges and Immunities Clause of Article IV, and (3) whether corporations were citizens entitled to the protection under the Contracts Clause.

(1) Corporations as Citizens for Purposes of Diversity Jurisdiction

In *Bank of the United States v. Deveaux*,³⁴ officers of the state of Georgia entered the branch bank premises of the Bank of the United States in Savannah "with force of arms" and seized "two boxes... containing each one thousand dollars in silver" as payment of an overdue tax allegedly owed by the Bank of the United States to Georgia. The Bank of the United States, seeking to recover the value of the seized silver, brought an action in trespass against the officers in federal circuit court. In its complaint, the Bank of the United States alleged that its president and directors were citizens of Pennsylvania and the defendant was a citizen of the State of Georgia. Defendant officers filed a demurrer to the complaint, claiming the court lacked jurisdiction to hear the claim because Article III of the Constitution conferred jurisdiction to hear a claims involving "citizens of different states" and the Bank of the United States was a corporate body, not a citizen.³⁵ Chief Justice Marshall, who delivered the opinion of the

³⁴ 9 U.S. (5 Cranch) 61 (1809). *Deveaux* launched the "associational view of corporate citizenship," which dominated the Marshall period until *Deveaux* was overruled by the Taney Court in Louisville, Cincinnati & Charleston Railroad v. Letson, 43 U.S. (2 How.) 497 (1844), and replaced it with the "fictional" view which dominated most of the nineteenth century. Hovenkamp *supra* note 25 at 1598-1599. ³⁵ Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 62-63 (1809). Article III, Section 2 provides: "the judicial Power shall extend to all Cases, in Law and

10 Treatment of Corporations in Early U.S. Supreme Court Decisions (1809-1839)

Court, agreed. The Court ruled that the conferral of authority to the First Bank in its charter to make contracts, acquire property, and sue and be sued neither "enlarge[s] the jurisdiction of any particular court" nor confers "capacity to the corporation to appear, as a corporation, in any court which would, by law have cognizance of the cause, if brought by individuals."³⁶ The Court therefore decided that the First Bank of the United States was not a citizen and could not pursue a lawsuit in federal court:

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.³⁷

Chief Justice Marshall stated his decision was "derived entirely from the English Books" that defined the character of corporations. He noted that under British law corporations are considered "persons" for certain purposes. For example, under the "statute of Henry VIII" which imposed taxes to fund the repair of bridges and highways on "inhabitants of the city. shire or riding," corporations that owned land within the city, rather than the members of the corporation who might reside on the lands, were liable for the tax, Likewise, the case of The King v. Gardner, decided by the Court of the King's Bench, determined that corporations that owned land were liable for taxes imposed on the land because they gualified as an "inhabitant" or "occupier." Hence corporations, while incorporeal, may be considered as having corporeal qualities.³⁸ Those qualities, however, were insufficient to satisfy the requirements for jurisdiction. In Mayor and Commonality v. Wood, also decided by the Court of the King's Bench, the corporation of London, a member of which was the Mayor, filed a lawsuit against Wood. The matter was tried before the mayor and aldermen, and judgment was entered against the defendant. On appeal, the court looked "beyond the corporate name." noticed the identity of the individuals who composed it. and reversed the entry of judgment in favor of "an invisible, intangible"

Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases . . . between Citizens of different states;" U.S. CONST., art III, § 2. ³⁶ *Id.* at 86.

³⁷ Id. at 86-87.

³⁸ Id. at 88-89.

corporation rather than its individual members.³⁹ Notably, Chief Justice Marshall observed, Congress could have provided in the judicial act that corporations can sue in federal courts or that its members can sue in the name of the corporation in federal courts. Because Congress did not do so, Madison concluded that the term "citizen" means "the real persons who come into court . . . under the corporate name," and therefore "to look to the character of the individuals who composed the corporation" in determining jurisdiction exists. Hence, while the member of a corporation may bring suit in the corporation's name in federal court, jurisdiction applies to the plaintiff-members as individuals rather than to the corporation.⁴⁰ In short, the corporation cannot be a citizen, and the citizenship of the corporation's members inheres to the corporation and provides the basis for determining jurisdiction of federal courts.⁴¹

The central problem with this decision is that the members of a corporation are not merely its president and directors but all the shareholders in the company. Because diversity lawsuits require that "each and every stockholder of the Bank of the United States, of which there were hundreds, was a citizen of a different State than was each of the defendants," the Bank of the United States could not easily sue or be sued in federal district court.⁴² In short order, Chief Justice Marshall's opinion quickly proved unworkable. Corporations evaded federal court jurisdiction

³⁹ *Id*. at 90.

⁴⁰ *Id*. at 91-92.

⁴¹ Chief Justice Marshall noted that, if all of the members of the corporation were citizens of states different from the states in which all of the plaintiffs were citizens, federal courts could exercise jurisdiction and resolve the claim, because the corporation represents the members: "If the constitution would authorize congress to give the courts of the union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name." *Id.* at 91.

⁴² Wm. Overton Harris, *A Corporation as a Citizen in Connection with the Jurisdiction of the United States Courts*, 1 Va. L. Rev. 507, 509 (1914). *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806), overruled in part by Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844). The following question was submitted without argument in *Strawbridge*: "If there be two or more joint plaintiffs, and two or more joint defendants, each of the plaintiffs must be capable of suing each of the defendants, in the courts of the United States, in order to support the jurisdiction." The Court ruled affirmatively, stating: "[E]ach distinct interest should be represented by persons, all of whom are entitled to sue, or may be sued, in the federal courts."

whenever any of its members resided in the same state as each of the defendants.⁴³

These difficulties are reflected in the U.S. Supreme Court decision in *Vicksburg v. Slocomb, Richards & Co.*⁴⁴ In *Vicksburg*, three citizens of Louisiana, trading under the firm name of Slocomb, Richards & Co., brought suit in federal court against the Bank of Vicksburg on a certificate of deposit. Two of the defendant's shareholders were citizens of Louisiana. The circuit court rendered judgment in favor of the plaintiffs. Noting that each plaintiff must be able to sue each defendant in order to support jurisdiction by a federal court, the U.S. Supreme Court reversed, ruling that the lower court lacked jurisdiction because two of the shareholders were citizens of Louisiana. One of the complicating factors in *Vicksburg* was the impact of the first section of the Judiciary Act of February 28, 1839, which provided:

That where in any suit at law or in equity, commenced in any court of the United States, there shall be several defendants, any one or more of whom shall not be inhabitants of, or found within the district where the suit is brought, or shall not voluntarily appear thereto, it shall be lawful for the court to entertain jurisdiction, and proceed to the trial and adjudication of such suit between the parties who may be properly before it; but the judgment or decree rendered therein, shall not conclude or prejudice other parties, not regularly served with process, or not voluntarily appearing to answer.⁴⁵

The Circuit Court, relying on the Judiciary Act of February 28, 1839, rejected the argument of the defendant that the court lacked jurisdiction, and permitted the matter to proceed without the Louisiana shareholders as parties.⁴⁶ The U.S. Supreme Court disagreed, ruling that, while the Act of 1839 permitted a lawsuit to proceed when persons were not residents of the district or could not be found within the district, that provision did change the fundamental jurisdictional requirement that "each of the plaintiffs must be capable of suing, and each of the defendants, capable of being sued:

⁴³ Gans supra note 6 at 12-13.

⁴⁴ Vicksburg v. Slocomb, Richards & Co., 39 U.S. (14 Peters) 60 (1840), overruled in part by Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

⁴⁵ *Id.* at 65. *But see* Louisville, Cincinnati & Charleston R. Co. v. Letson, 43 U.S. (2 How.) 497, 556 (1844), discussed below at notes 49-56, which ruled the act of 28th of February, 1839, enlarges the jurisdiction of the courts and reversed *Deveaux*, and Harris *supra* note 42 at 509-519 (the jurisdictional rule laid down in *Deveaux* and consistently followed in *Bank of Vicksburg* would remain in effect for thirty-five years, until *Letson*.)

⁴⁶ Vicksburg v. Slocomb, Richards & Co., 39 U.S. (14 Peters) at 64.

which is not the case in this suit; some of the defendants being citizens of the same state with the plaintiffs."⁴⁷ This jurisdictional requirement must be fulfilled, because:

[T]he defendants in this case being a corporation aggregate, any judgment against them must be against them in their corporate character: and the judgment must be paid out of their corporate funds, in which is included the interest of the two Louisiana stockholders; and, consequently, such a judgment must of necessity prejudice those parties, in direct contravention of the language of the law.⁴⁸

Because of increasing dissatisfaction with *Deveaux* and its progeny, the U.S. Supreme Court overruled *Deveaux* in *Louisville, Cincinnati, & Charleston R. Co. v. Letson.*⁴⁹ Thomas Letson, a citizen of New York, brought suit in federal court in South Carolina against the Louisville, Cincinnati, and Charleston Railroad Company ("the Louisville Railroad") for breach of a road construction contract. The Louisville Railroad claimed that the court lacked jurisdiction, because the state of South Carolina was a member of the corporation, two members of the corporation were residents of North Carolina, and two members of the corporation were citizens of New York.⁵⁰ The circuit court denied the plea and entered judgment in favor of Letson, and the Louisville Railroad appealed to the U.S. Supreme Court.

The U.S. Supreme Court ruled that the status of State of South Carolina as a member did not affect the jurisdiction of the court because the state that issues the corporation's charter giving the corporation the right to sue and be sued "voluntarily strips itself of its sovereign character, so far as respects the transactions of the [corporation] and waives all privileges of that character."⁵¹ The Court also ruled that the citizenship of two members in North Carolina did not affect the jurisdiction of the court. It determined two phrases appearing in the judicial act - "citizens of different states" and "citizens of another state" - were equivalent terms, and stated:

A suit then brought by a citizen of one state against a corporation by its corporate name in the state of its locality, by which it was created and where its business is done by any of the corporators who are chosen to manage its affairs, is a suit, so far as jurisdiction is concerned, between citizens of the state where the suit is brought and a citizen of another state. The corporators

⁴⁷ Id. at 65.

⁴⁸ Id. at 66.

⁴⁹ Louisville, Cincinnati, & Charleston R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

⁵⁰ Id. at 550.

⁵¹ Id. at 551.

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as individuals are not defendants in the suit, but they are parties having an interest in the result, and some of them being citizens of the state where the suit is brought, jurisdiction attaches over the corporation,—nor can we see how it can be defeated by some of the members, who cannot be sued, residing in a different state. It may be said that the suit is against the corporation, and that nothing must be looked at but the legal entity and then that we cannot view the members except as an artificial aggregate. This is so, in respect to the subject-matter of the suit and the judgment which may be rendered; but if it be right to look to the members to ascertain whether there be jurisdiction or not, the want of appropriate citizenship in some of them to sustain jurisdiction, cannot take it away, when there are other members who are citizens, with the necessary residence to maintain it.⁵²

In resolving the third argument – that the court lacks jurisdiction because both plaintiffs and two members of the defendant corporation are citizens of New York – the U.S. Supreme Court discredited *Deveaux*, *Strawbridge* and *Vickburg*, because (1) a corporation created by a state and authorized to perform its functions under the authority of that state is "a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled for the purpose of suing and being sued, to be deemed a citizen of that state"; (2) the three cases "have never been satisfactory to the bar" or "to the court that made them . . . always most reluctantly and with dissatisfaction"; (3) the late chief justice questioned their correctness and "repeatedly expressed regret that those decisions had been made," and the majority of the members of the Court "have partaken of the same regret"; and (4) the circuit courts have followed the decisions, not because they were right, but because "the decision had been made."⁵³

The Court then turned its attention to the Judiciary Act of February 28, 1839, and decided that the above quoted language permitting the lawsuit to proceed against the corporation without prejudice to the members who have not been served with process or have not voluntarily entered their appearance enlarged the jurisdiction of the court to proceed with the case whenever "some of the [members] are citizens of the state by which the corporation was created, where it does its business, or where it may be sued."⁵⁴ Furthermore, the Court said, "there is a broader ground upon which we desire to be understood, upon which we altogether rest our present judgment":

[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person,

⁵² Id. at 554.

⁵³ *Id.* at 555-56.

⁵⁴ Id. at 557.

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an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, and in this especially, the manner in which it can sue and be sued, it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued.⁵⁵

Having effectively reversed *Deveaux*, *Strawbridge* and *Vickburg*, the Court affirmed the judgment of the circuit court and, in doing so, repudiated the "associational view of corporate citizenship" that had dominated in the Marshall period."⁵⁶

The U.S. Supreme Court reaffirmed the "citizenship" of corporations for the purposes of jurisdiction in Marshall v. Baltimore and Ohio Railroad Co.⁵⁷ Alexander Marshall, a citizen of Virginia, sued the Baltimore and Ohio Railroad Company ("the Railroad Company") in the United States circuit court for the District of Maryland to recover \$50,000, which he claimed the Railroad Company owed him for his services in obtaining the passage of a Virginia law granting the Railroad Company a right-of-way through Virginia to the Ohio River. The proposal submitted by Marshall and accepted by the Railroad Company provided that, in order to achieve the "requisite secrecy" required to deal with the legislators, the Railroad Company should appoint him as its sole agent and permit him to select other agents who would then promote the right-of-way sought by the Railroad Company. The Railroad Company sought a right-of-way that would intersect the Ohio River at the lowest point possible permitting it to connect directly westward to Cincinnati. The residents of the City of Wheeling, then part of Virginia, wanted the right-of-way to terminate farther north in their city. Marshall promoted the passage of the Railroad Company's preferred route, but the Virginia Legislature approved a bill granting the right-of-way ending in Wheeling.58 The City of Wheeling subsequently modified its demands, and the Railroad Company accepted an altered right-of-way that did not require it to end at the City of Wheeling.⁵⁹

Although Marshall failed to obtain the right-of-way sought by the Railroad Company, he filed suit against the Railroad Company to recover compensation for his efforts. The court instructed the jury: (1) that, if the jury found the agreement between Marshall and the Railroad Company was

⁵⁵ Id.

⁵⁶ Hovenkamp *supra* note 25 at 1599.

⁵⁷ Marshall v. Baltimore & Ohio Ry. Co., 57 U.S. (16 How.) 314 (1853).

⁵⁸ *Id*. at 331-32.

⁵⁹ Id. at 332.

contingent upon his success in obtaining the right-of-way originally sought by the Railroad Company, the jury could find in favor of Railroad Company; and (2) that, if the agreement between Marshall and the Railroad Company provided that he was to promote passage of the law providing the right-ofway without revealing he was acting as an agent the Railroad Company, the agreement would be illegal and void.⁶⁰ The Circuit Court entered judgment in favor of the Railroad Company, and Marshall appealed contending the jury instructions were erroneous.

The U.S. Supreme Court preliminarily addressed the issue of jurisdiction. a matter "brought to the notice of the court, though not argued or urged by the counsel."⁶¹ The Court noted that a "corporation... is an artificial person. a mere legal entity, invisible and intangible," which engages in business through its associates and stockholders and which is empowered by the state to sue and be sued in its "fictitious or collective name." "[T]hese important faculties," however, "cannot be wielded to deprive others of acknowledged rights," by simply alleging the citizenship of its "ever-changing associates" who are "not really parties to the suit or controversy." Otherwise, every corporation "by electing a single director residing in a different State" could "deprive citizens of other States with whom they have controversies" of the constitutional privilege of using federal tribunals to resolve their disputes.⁶² Rather than examining the citizenship of the representatives, shareholders or members of the corporation in resolving questions of jurisdiction, the "presumption arising from the habitat of a corporation in the place of its creation [is] conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it," and the allegation that the defendant is "a body corporate" under the laws of the state is a sufficient averment that the "real defendants are citizens of that state." 63 In short, the state of incorporation alone is sufficient to permit the court to take jurisdiction in a case or controversy involving the corporation

⁶⁰ Id. at 334.

⁶¹ Id. at 325.

⁶² Id. at 327.

⁶³ *Id.* at 328-29. This language created "a conclusive presumption that all shareholders were citizens of the state of incorporation," and, while that presumption has been "widely criticized as the purest legal fiction," it nonetheless "remains good law even though its logic was undermined two years later by *Dodge v. Woolsey*, which entertained a diversity action between a shareholder and a corporation." Hovenkamp *supra* note 25 at 1598. In *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 356 (1855), a shareholder of an Ohio Bank, who was a citizen of the United States and a resident of Connecticut, was permitted to pursue an action in federal circuit court challenging the constitutionality of an Ohio statute imposing taxes on the bank when the directors of the bank refused to do so.

without regard to the residency or citizenship of its directors, shareholders or members. Having resolved the jurisdictional issue, the Court decided that "after a careful examination of the admitted facts of the case, we are fully satisfied of the correctness of the instructions" and affirmed the judgment of the circuit court.⁶⁴

(2) Corporations as Citizens under the Privileges and Immunities Clause of Article IV

*Bank of Augusta v. Earle*⁶⁵ involved litigation over a bill of exchange.⁶⁶ The drawer, Fuller, Gardner, and Co., ordered the drawee, C. B. Burland and Co. of New York, to pay \$6,000 to the payee, Joseph B. Earle. The Bank of Augusta purchased the bill of exchange from Earle, who endorsed and delivered the draft to the Bank of Augusta, a Georgia corporation. When the drawee dishonored the bill of exchange, the Bank of Augusta brought suit against Earle in the circuit court in the southern district of Alabama. The circuit court concluded that, although it was authorized purchase bills of exchange, the Bank of Augusta "could not lawfully exercise that power in the state of Alabama." Hence, the bill of exchange was illegal and void, and the court entered judgment in favor of Earle."⁶⁷

On appeal to the U.S. Supreme Court, the Bank of Augusta argued that, just as *Deveaux* required the court to examine the citizenship of the members of a corporation to determine if diversity of citizenship existed, the court should look through the corporation to its members, all of whom were Georgia citizens, and accord them the same privileges and immunities as Alabama granted to its citizens, including the right to purchase bills of exchanges and to initiate lawsuits enforcing those contracts in Alabama. In short, the Bank of Augusta argued, it was entitled to the privileges and

⁶⁴ Marshall v. Baltimore & Ohio Ry. Co., 57 U.S. (16 How.) at 337.

⁶⁵ Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519 (1839).

⁶⁶ "A bill of exchange is a non-interest-bearing written order once used primarily in international trade that binds one party to pay a fixed sum of money to another party at a predetermined future date. Bills of exchange are similar to checks and promissory notes—they can be drawn by individuals or banks and are generally transferable by endorsements." *Bill of Exchange*, INVESTOPEDIA, accessed on August 31, 2017, at http://www.investopedia.com/terms/b/billofexchange.asp.

⁶⁷ Bank of Augusta, 38 U.S. (13 Pet.) at 521.

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immunity protections provided by Article IV, Section 2 of the Constitution.⁶⁸ The U.S. Supreme Court disagreed, saying:

If ... the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner. The result of this would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found. The clause of the Constitution referred to certainly never intended to give to the citizens of each state the privileges of citizens in the several states, and at the same time to exempt them from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state. This would be to give the citizens of other states far higher and greater privileges than are enjoyed by the citizens of the state itself. Besides, it would deprive every state of all control over the extent of corporate franchises proper to be granted in the state: and corporations would be chartered in one, to carry on their operations in another. It is impossible upon any sound principle to give such a construction to the article in question.69

Hence, the corporation, "a mere artificial being, invisible and intangible; yet . . . a person for certain purposes in contemplation of law,"⁷⁰ is not entitled to claim both the special privileges provided by incorporation and the protections of individual rights provided by the Constitution to living persons. When a corporation enters into a contract, it is the corporation's contact, not the contract of its individual members, and the only rights the corporation has are those provided by the contract.⁷¹

Having determined corporations are not protected by the Privileges and Immunities Clause of the Constitution, the Court turned its attention to the merits of the Bank of Augusta's claim. It noted that: (1) the charter of the Bank of Augusta authorized it to purchase bills of exchange in another state⁷²; (2) although "[e]very power . . . which a corporation exercises in another state, depends for its validity upon the laws of the sovereignty in which it is exercised," and a corporation cannot make a valid contract

⁷² Id. at 588.

⁶⁸ Id. at 586. Article IV, Section 2 provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states." U.S. CONST., art IV, § 2.

⁶⁹ Bank of Augusta, 38 U.S. (13 Pet.) at 586-87.

⁷⁰ Id. at 588.

⁷¹ Id. at 587.

without the state's express or implied sanction,⁷³ corporations created in one state can bring suits in the courts of another state by virtue of the law of comity⁷⁴; (3) "the court of Alabama itself" has decided that "the corporation of another state may sue in its courts"⁷⁵; (4) the contract upon which the Bank of Augusta based its claim was valid⁷⁶; (5) the defense relied on by the defendant cannot be sustained; and, therefore, (6) the judgment of the circuit court was reversed.⁷⁷

(3) Corporations and the Contracts Clause

In *Trustees of Dartmouth College v. Woodward*,⁷⁸ the U.S. Supreme Court considered the constitutionality of legislation approved by the New Hampshire legislature that altered the corporate charter of Dartmouth College by increasing the number of trustees from twelve to twenty-one, empowering the governor to appoint additional trustees, and creating a twenty-five member board of overseers to superintend and control the actions of the trustees.⁷⁹ A majority of the Dartmouth College trustees refused to accept the amended charter, and brought a lawsuit against John Woodward, the former secretary of Dartmouth College who had transferred his allegiance to and became secretary-treasurer of the successor institution,⁸⁰ to recover "two books of records, purporting to contain the records of all the doings and proceedings of the trustees of Dartmouth College, from the establishment of the corporation until the 7th day of October 1816; the original charter or letters-patent, constituting the college;

 $^{^{73}}$ *Id.* at 589. In effect, "corporations of one state could do business in another state, but subject to that state's permission and regulation," and "a corporation has the same power to contract as a stockholder." Hovenkamp *supra* note 25 at 1647. ⁷⁴ *Bank of Augusta*, 38 U.S. (13 Pet.) at 590.

⁷⁵ *Id.* at 596.

⁷⁶ *Id*. at 597.

⁷⁷ *Id.* Notably, the language in *Earle* permitting states to exclude foreign corporations from doing business within its territory enabled the Supreme Court to uphold discriminatory taxes against foreign corporations as late as the 1870s and 1880s. Because corporations were not citizens under the Privileges and Immunities Clause, the prohibition against discrimination on the basis of citizenship did not apply to corporations. Hovenkamp *supra* note 25 at 1650.

 ⁷⁸ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).
 ⁷⁹ Id. at 626.

⁸⁰ The Gale Group, Inc., *Trustees of Dartmouth College v Woodward*, West's Encyclopedia of American Law, edition 2, accessed at http://legal-dictionary.thefreedictionary.com/Trustees+of+Dartmouth+College+v.+Woodward, on August 30, 2017.

the common seal; and four volumes or books of account, purporting to contain the charges and accounts in favor of the college."⁸¹ The jury returned a special verdict in favor of the defendant; the Superior Court of New Hampshire rendered a judgment upon the verdict for the defendant; and the plaintiffs appealed to the U.S. Supreme Court.⁸²

The history of Dartmouth College traces back to about the year 1754. when the Rev. Eleazer Wheelock "at his own expense and on his own estate," established a charity school for the education of Indians in the Christian religion.⁸³ His success in this venture inspired him to launch an extensive and fruitful fundraising campaign in England to support and extend his work. The contributions were placed in a trust and two tiers of trustees were appointed to oversee the funds: "an English board of trustees controlled the school's finances and a colonial board managed the everyday affairs of the school and its missions."84 The trustees authorized Rev. Wheelock to select a site for the College.⁸⁵ He proposed to establish the school on the Connecticut River in western New Hampshire, to enable his school to continue the education of Indians, to "promote learning among the English," and to take advantage of "large offers of land, on condition, that the college should be [so] placed."⁸⁶ Rev. Wheelock "then applied to the Crown for an act of incorporation," and requested that the American trustees be named as members of the proposed corporation for the purpose of providing "education and instruction of the youth of the Indian tribes . . . and also of English youth, and any others."⁸⁷ The charter was issued on December 13, 1769,⁸⁸ by the governor of New Hampshire,⁸⁹ and the trustees of Dartmouth College and their successors were granted "the usual corporate privileges and powers" to "govern" the college and "to acquire real and personal property, and to pay the president, tutors and other officers of the college, such salaries as they shall allow."90 The charter also authorized the trustees to appoint the president of the College, to appoint and displace professors, tutors and other officers, and to fill "any vacancies which may be created in their own body, by death, resignation, removal or

⁸⁶ Id.

⁸⁸ Id. at 626.

⁸¹ Trustees of Dartmouth College, 17 U.S (4 Wheat.) at 519, 624.

⁸² Id. at 624-25.

⁸³ Id. at 631.

⁸⁴ The Gale Group *supra* note 80.

⁸⁵ Trustees of Dartmouth College, 17 U.S (4 Wheat.) at 631.

⁸⁷ Id.

⁸⁹ The Gale Group *supra* note 80.

⁹⁰ Trustees of Dartmouth College, 17 U.S (4 Wheat.) at 631-32.

disability."⁹¹ The charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college was "conveyed to, and vested in, the corporate body."⁹²

The plaintiff trustees contended that the actions of the New Hampshire legislature were unconstitutional under the Contracts Clause of the U.S. Constitution.⁹³ The U.S. Supreme Court was required to address three issues to resolve the trustees' argument: (1) whether the corporate charter qualifies as a contract, (2) if so, whether the contract protected by the U.S. Constitution, and (3) if so, whether the acts of the New Hampshire legislature impaired the contract.

The Court ruled that the issuance of the corporate charter qualifies as a contract: an application was made to the crown to incorporate a religious and literary institution; the application disclosed that significant contributions were made for this purpose and that the contributions would be conveyed to the corporation upon its creation; the charter was granted; and the property was so conveyed.⁹⁴ Dartmouth College was established as an "eleemosynary" (or charitable) institution for the purpose of perpetuating the "bounty" and intended purposes of its donors. It was governed by its trustees who were invested with the power to perpetuate themselves and the responsibility to preserve its property in perpetuity for the purpose for which it was established, namely providing education.⁹⁵ This purpose was charitable, not civic or governmental,⁹⁶ and the chartered corporation was the ideal vehicle to accomplish the donors' charitable intentions:

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property, without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with

- ⁹⁴ Trustees of Dartmouth College, 17 U.S (4 Wheat.) at 626.
- ⁹⁵ *Id.* at 640-41.

⁹⁶ Id. at 641.

⁹¹ Id.

⁹² Id.

⁹³ The Contracts Clause provides: "No state shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. CONST., art. I, § 10,

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these qualities and capacities, that corporations were invented, and are in use. $^{97}\,$

Neither the founders nor the donors nor their descendants retained any vested interest in the corporation created by the charter.⁹⁸ Rev. Wheelock "applied for this charter, as the instrument which should enable him . . . to perpetuate [the donors'] beneficent intention. It was granted. An artificial, immortal being was created by the crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it."⁹⁹ "This is plainly a contract to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract, on the faith of which, real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also "¹⁰⁰

The second question - whether this contract fell within the Contracts Clause - was easily resolved by the Court. The Court noted that Founders were certainly familiar the creation of eleemosynary corporations for religious, charitable or educational purposes,¹⁰¹ but took no steps to include language in the Contracts Clause excluding charitable charters from its coverage. That the Founders would be sympathetic to those charitable endeavors is indicated by their respect for the arts and science "by reserving

By [Marshall's] recitation of the facts, the crown had granted the charter of the college because the college had received private gifts and had a proper mission. Reading Marshall, however, one could not know that the monies had been given to a different institution, Moore's Charity School for Indians, that its grantors had vehemently objected to the transference of those monies to Dartmouth College, that most of the college's property came from grants of public lands, and that the donors, private and public, believed the college to be performing public functions. Whether Dartmouth's charter had 'every ingredient' of a private contract, as Marshall alleged, was a question that mainly concerned the college, but it was a question that Marshall debauched to reach the doctrine that had such consequences in the economy and in constitution law, namely, that the charter of a private corporation has the protection of Article I, section 10 of the Constitution. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 314-315 (1988).

¹⁰¹ Trustees of Dartmouth College, 17 U.S (4 Wheat.) at 645.

⁹⁷ Id. at 636.

⁹⁸ Id. at 641, 642.

⁹⁹ Id. at 642.

¹⁰⁰ *Id.* at 643-644. Leonard W. Levy, a distinguished Constitutional scholar, disputes Chief Justice Marshall's recitation of the facts in *Dartmouth College*.