Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States

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Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States

TARA HELFMAN*

ABSTRACT

In interpreting and evaluating the history of the Supreme Court's corporate jurisprudence, legal scholars have deployed three broad theories of corporate legal personality: the aggregate entity theory, the artificial entity theory, and the real entity theory. While these theories are powerful ways of conceptualizing the corporation, this article shows that they have not been as central to the Supreme Court's corporate jurisprudence as recent scholarship suggests. It instead argues that historic transformations in the high court's corporate jurisprudence are best understood in light of contemporary intellectual currents rather than through an ex post facto application of the aggregate, artificial, and real entity theories. This article revisits the Supreme Court's early corporate jurisprudence, focusing on the Court's reception of English and continental theories of corporation during the antebellum period. It argues that the Marshall Court's approach to corporate legal personality was deeply reliant on early modern English precedents, which were preoccupied with the nature of the corporation as a locus of political authority bounded by constitutional constraints. It further suggests that the Taney Court's transformative decision in Louisville, Cincinnati & Charleston Railroad v. Letson (1844)—that a corporation is a citizen of the United States—was directly influenced by the writings of the German jurist Friedrich von Savigny. Here, the article bridges a significant gap in the history of American legal thought by illustrating the role that

* Associate Professor of Law, Syracuse University. The author wishes to thank the organizers of and participants in Law in the Lighthouse (University of Turku) and the Syracuse University College of Law Faculty Workshop for their thoughtful, challenging, and constructive comments on drafts of this article. She is particularly indebted to Robert A. Ashford, Tal Kastner, Edgar J. McManus, Chantal Nadeau, Susan Sterett, and an anonymous reviewer at the Indiana Journal of Global Legal Studies for their input. Special thanks go to Justin St. Louis for his tireless research assistance.
Attorney General Hugh Legaré played in presenting to the court a compelling and novel synthesis of English precedent and contemporary continental theory. The article concludes by considering the long shadow these rulings have cast on recent Supreme Court decisions regarding the rights of corporations as citizens of the United States.

INTRODUCTION

When U.S. courts have been called on to adjudicate the rights of corporations, they have frequently had to consider the very nature of corporate personhood. A living, breathing, palpitating individual has rights to life, liberty, and property, but does an incorporeal legal fiction enjoy those same rights? A natural person has a right to the free exercise of religion under the First Amendment to the U.S. Constitution, but does a corporation? Even if we agree that corporations possess these rights, how do we ascertain their scope? In addressing these questions, the federal judiciary has considered the degree to which corporations have an existence separate from that of their shareholders. Corporations, like individuals, can sue and be sued; they can enter contracts and breach them; they can own, acquire, and convey property; and they can be held liable for civil damages. But unlike individuals, corporations can survive indefinitely and they can enjoy certain legal immunities, like tax exemptions, that individuals do not. Both individuals and corporations are volitional beings, but characterizing the nature of the corporation has in many ways proven as contentious an enterprise as characterizing human nature itself.

Looking back through nearly two hundred years of precedent, scholars have identified three distinct theories underlying the federal judiciary's approach to the nature of corporate legal personality: the aggregate entity theory, the artificial entity theory, and the real entity

1. "Congress shall make no law . . . abridging the free exercise [of religion]." U.S Const. Amend. I.
2. In these respects corporations are very much Maitland's "right-and-duty-bearing unit[s]." FREDERIC WILLIAM MAITLAND, Moral Personality and Legal Personality, in 3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MAITLAND 304, 307 (H.A.L. Fisher ed., 1911).
3. JAMES D. COX & THOMAS LEE HAZEN, 1 TREATISE ON THE LAW OF CORPORATIONS PRELIMINARY MATERIALS § 1:5 (2015) (discussing benefits of incorporation, generally); 1 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 6 (rev. vol., 2015) (perpetuity of corporations); COX & HAZEN, supra note 3, at § 1:2 (perpetuity of corporations); id. at § 1:10 (tax considerations); 14 FLETCHER ET AL., § 6952.50 (tax considerations); 10 FLETCHER ET AL., § 4942 (criminal liability); COX & HAZEN, supra note 3, at § 8:21 (criminal liability).
theory. Under the aggregate entity theory, the corporation is merely the sum of its parts, an assemblage of the rights of its individual shareholders. Under the artificial entity theory, the corporation is more than the sum of its parts: the corporation, as a creature of the law, possesses a distinct personality separate from that of its members. Finally, under the real entity theory, the corporation is a creation of the market with a capacity to act that is different in kind from that of its members. But the distinction between these three theories of corporate personhood is not as tidy in practice as commentators might suggest. Moreover, these theories are not necessarily an apt way to approach cases that predate their formulation.

Until recent decades, scholarship on American corporate theory emphasized legal developments during the postbellum period, which witnessed the rapid transformation of the American economy. Alfred D. 4. See, e.g., Jason Iuliano, Do Corporations Have Religious Beliefs? 90 IND. L.J. 47, 55-62 (2015) (surveying the history of the three theories in federal jurisprudence); Darrell A.H. Miller, Guns, Inc.: Citizens United, McDonald, and the Future of Corporate Constitutional Rights, 86 N.Y.U.L. REV. 887, 914-31 (2011) (discussing the manner in which the three theories of corporate personhood have influenced the constitutional rights of corporations); Reuven S. Avi-Yonah, Citizens United and the Corporate Form, 2010 WIS. L. REV. 999 (tracing the history of the three theories of corporate personality and discussing the place of Citizens United within them); Michael J. Phillips, Reappraising the Real Entity Theory of the Corporation, 21 FLA. ST. U. L. REV. 1061 (1994) (evaluating the implications and validity of the real entity theory); David Millon, Theories of the Corporation, 1990 DUKE L.J. 201, 201 (providing an overview of the theories' development over the prior hundred and fifty year period).

5. The artificial entity theory of the corporation has also been referred to as the concession theory of corporate personality. See John Dewey, The Historic Background of Corporate Legal Personality, 35 YALE L.J. 655, 667 (1926) ("[T]he concession theory may be indifferent as to the question of the reality of a corporate body; what it must insist upon is that its legal power is derived [from the state].").

6. See Phillips, supra note 4, at 1068 ("Real entity theories differ considerably, but they all distinguish themselves from the aggregate theory by maintaining that a corporation is a being with attributes not found among the humans who are its components. This corporate being, moreover, is a real thing." (citation omitted)); Arthur Machen, Corporate Personality, 24 HARV. L. REV. 253, 260-61 (1911) ("[I]n recognizing the existence of a corporation as an entity, the law is merely recognizing an objective fact, while in refusing to recognize fully the existence of a partnership or voluntary association as an entity the law is shutting its eyes to facts. . . A corporation exists as an objectively real entity, which any well-developed child or normal man must perceive: the law merely recognizes and gives legal effect to the existence of this entity.")


8. CHANDLER, supra note 7, at 1.
Chandler, Jr. mapped this transformation through the changing organization of the American firm from the 1870s through the early twentieth century, showing that during this period, vertical integration and horizontal combination resulted in the rise of large, multiunit firms.9 Robert H. Wiebe focused on the Progressive Era—what he called "An Age of Organization"—in demonstrating how a heterogeneous community of businessmen were instrumental in shaping American laws governing business enterprises.10

Scholars such as Herbert Hovenkamp, Naomi Lamoreaux, and Gregory A. Mark have enriched and expanded the field by exploring economic and legal developments relating to the corporate form during the antebellum years. During this period, the corporate form began to proliferate throughout the young nation, giving rise to questions about the nature of the corporate charter, the nature of the rights of the corporate shareholder, and the nature of corporate personality itself.11 Mark and Lamoreaux have drawn attention to the states as the central units of corporate law, policy, and entrepreneurship;12 Hovenkamp has shown how classical political economic theory came to dominate state economic policy and federal and state jurisprudence.13 This article adds further insight, demonstrating how the Supreme Court's early reception of English and continental theories of the corporation shaped its changing views of the nature of corporate legal personality. In particular, it bridges a significant gap in the history of American

9. Id.; Alfred D. Chandler, Jr., The Beginnings of 'Big Business' in American Industry, 33 BUS. HIST. REV. 1 (1959) (arguing that while some large-scale mergers were motivated by market control, many others were prompted by a desire to increase efficiency and access to materials.); see also Naomi R. Lamoreaux, The Great Merger Movement in American Business, 1895-1904 (1985); Glenn Porter, The Rise of Big Business, 1860-1910 (1973); Lamoreaux, Entrepreneurship in the United States, 1865-1920, in The Invention of Enterprise: Entrepreneurship from Ancient Mesopotamia to Modern Times 367 (Landes et al., eds., 2010).

10. Wiebe, Businessmen and Reform: A Study of the Progressive Movement 16-41 (1962). This economic transformation was accompanied by a legal transformation no less far-reaching. Gregory Mark has written, "The transformation of the private law of corporations from 1819 to the 1920s is best described as a move from a circumstance in which a corporation could do only those things specifically allowed by its charter to one in which a corporation could do anything not specifically prohibited to it." Gregory A. Mark, The Personification of the Business Corporation in American Law, 54 U. CHI. L. REV. 1441, 1455 (1987).


12. Id. at 412-13.

corporate law by explaining how, in the landmark case of *Louisville, Cincinnati & Charleston Railroad v. Letson*, the Taney Court came to overturn decades of federalist jurisprudence and conceive of the corporation as "capable of being treated as a citizen of [the] state, as much as a natural person."\(^\text{14}\)

For much of its early history, the U.S. Supreme Court closely followed English precedent in its approach to the rights of corporations. But during the mid-nineteenth century, the influence of continental jurisprudence became palpable in the opinions of judges grappling with the increasingly expansive role of corporations in American life. This article maps developments in U.S. jurisprudence onto transatlantic intellectual currents, noting the influence of English and continental jurists on U.S. law. Part I of this article introduces the historical foundations of the business corporation in the United States. Part II demonstrates the manner in which the federal judiciary, under the leadership of Chief Justice John Marshall, carefully followed English precedent in interpreting the scope of corporate legal personality. In so doing, it challenges the view that Marshall began his tenure as Chief Justice as a proponent of the aggregate entity theory of corporate personality but ended his tenure as a proponent of the artificial entity theory.\(^\text{15}\) Part III discusses the influence of continental theory on U.S. corporate law at a time when corporations were playing a more varied role in the American economy than ever before. In particular, it notes the pivotal role Attorney General Hugh Legaré played in bringing continental theory to the attention of the Supreme Court. Part IV suggests that in many respects the Supreme Court’s approach to corporate legal personality has come full circle over the centuries, returning to the Marshall Court’s understanding of the corporation as an aggregation of the rights of its shareholders.

This article takes as its methodological foundation the notion that judicial opinions can be understood not only as authoritative statements of legal rules but also as expositions of legal theory. Yet that theory is not pure. It exists not in the lofty philosophical ether but in the judicial chamber, where it is influenced by the writings of jurists and theorists, and in the courtroom, where it is inextricably bound up with facts on the ground. This untidy reality is further complicated by the fact that common-law judges frequently deploy theories of corporate personality


after the fact in order to rationalize decades of precedent. Thus did Frederick Pollock remark,

English lawyers have never taken dogmatic theories of any kind much to heart. Our doctrines get settled either by a gradual process of semi-conscious consent worked out in the solution of particular cases, or by the development, in the same manner, of conflicting tendencies in professional and judicial opinion until at last a decisive practical choice is called for. 16

The same might be said of American corporate law.

I. WORKS OF PUBLIC UTILITY AND PRIVATE ADVANTAGE: THE EARLY AMERICAN CORPORATION

The corporate form has played a central role in the economic history of the United States, not least because it was through corporations that the American colonies were planted and early American cities took root. 17 Limits on the British crown's ability to rule its colonial subjects directly made the corporate form an effective structure through which to assert and organize political power around the globe. By the time the United States gained its independence, Americans had more than 150 years of experience with municipal, religious, and eleemosynary corporations. This section offers a critical introduction to the history of the corporation during the early decades of the Republic, focusing in particular on the rise of the business corporation in the United States.

In their critique of the Supreme Court's decision in Citizens United 18, David H. Gans and Douglas T. Kendall argue,

[I)n the Founding era, corporate activities were significantly limited. Corporations existed only at the behest of, and by the creation of, the government, to serve public purposes, such as "supplying transport,

16. Frederick Pollock, Has the Common Law Received the Fiction Theory of Corporations?, 27 L.Q. REV. 219, 219 (1911).
THEORIZING THE CORPORATION IN THE UNITED STATES

water, insurance, or banking facilities,” and had only the legal rights provided by the government in the corporate charter.¹⁹

This is only partly correct. Joseph Stancliffe Davis has shown that of the 317 businesses incorporated during the eighteenth century, 243 provided highway, water, and docking services; sixty-two provided banking and insurance services; but thirteen were engaged in manufacture and other enterprises.²⁰ While it is true that most early corporations were preoccupied with the transportation and financial infrastructure of the nation, they were not the only business corporations around.²¹ Furthermore, the small number of corporations engaged in manufacture is not to be discounted when considered in context. Between 1783 and 1801, 350 businesses were incorporated in the United States, a striking contrast to the approximately twelve corporations chartered in England during the entire eighteenth century.²²

²⁰. See JOSEPH STANCLIFFE DAVIS, Eighteenth Century Business Corporations in the United States, in 4 ESSAYS IN THE EARLIER HISTORY OF AMERICAN CORPORATIONS 27 tbl.3 (Cambridge: Harvard University Press 1917). For an example of a business incorporated for a non-public purpose, see Act for Incorporating Certain Persons by the Name of the Proprietors of the Beverly Cotton Manufactory, ch. 43, 1788 Mass. Acts 71. It is worth noting that at least one woman is listed as proprietors of the company. Id.
²¹. To be sure, the founding generation recognized the utility of the corporate form to the development of such infrastructure. At the Philadelphia Convention, James Madison proposed that the Constitution authorize the federal government “[t]o grant charters of incorporation in cases where the public good may require them, and the authority of a single state may be incompetent.” JAMES MADISON, DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 420 (Gaillard Hunt & James Brown Scott, eds., 1920). That language was never included in the final document, but Madison’s proposal reflects the prevailing view of incorporation as a means of ensuring that private enterprise also serve the public good. Given the array of businesses incorporated in the early republic, it is evident that the “public good” was conceived in broad terms.
²². See Oscar Handlin & Mary F. Handlin, Origins of the American Business Corporation, 5 J. ECON. HIST. 1, 3 (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. Until well into the nineteenth century the corporation was used extensively only in the organization of canal companies. Not until the Companies Act of 1844 did it become common, and full growth awaited the coming of limited liability after 1855 and the enactment of the Consolidated Statute of 1862.” (internal citation omitted)). John Steele Gordon places the number of businesses incorporated in the United States in the last four years of the eighteenth century at 335.
Over that century and the early part of the nineteenth, Americans used the same principal business forms as their English counterparts: trusts, unchartered joint-stock companies, and partnerships. But in the early years of the Republic, the corporate form emerged as a device to encourage investment in enterprises requiring large amounts of capital that government was unable or ill equipped to provide. Public works were, of course, among these enterprises, but so were manufacture and industry. In the wake of the Revolution, the United States struggled to develop domestic manufacturers that would render the new nation economically as well as politically independent of Britain. State governments incentivized entrepreneurs to enter a competitive marketplace by offering bounties for production. On October 28, 1789, George Washington visited one such venture, the Boston Sail-Cloth Manufactory, which had been founded the year before in response to a bounty offered by the Massachusetts legislature.

He made note of what he saw:

Went after an early breakfast to visit the duck [cloth] Manufacture which appeared to be carrying on with spirit, and is in a prosperous way. They have manufactured 32 pieces of Duck of 39 or 40 yds. each in a week; and expect in a short time to increase [sic] to . They have 28 looms at work & 14 Girls spinning with both hands (the flax being fastened to their waste). Children (girls) turn the wheels for them, and with this assistance each spinner can turn out 14 lbs. of thread pr. day when they stick to it, but as they are pd. by the piece, or work they do, there is no other restraint upon them but to come at 8 Ocloc [sic] in the Morning and return at 6 in the evening. They are the daughters of


23. See Handlin & Handlin, supra note 22, at 5–6 (describing American business methods of organizing and managing capital). For a time, these forms of business proved sufficient to meet the needs of businesses. State legislatures could confer privileges upon business associations by special statute. For example, in order to promote iron manufacture in New York, the state legislature passed a statute in 1786 conferring a seven-year term of limited liability on the businessmen associated with the Associated Manufactoring Iron Company of the City and County of New York. See DAVIS, supra note 20, at 260.

24. WILLIAM R. BAGNALL, I THE TEXTILE INDUSTRIES OF THE UNITED STATES 112–17 (1893); Resolve on the Petition of Thomas Walley and Others, Manufacturers of Sailcloth, Entitling Them to Such Bounty, As Shall Bear the Same Proportion to the Bounty Expressed in a Resolve of March 1788, 1789 Mass. Acts 333, 333–34 (promising a bounty of eight shillings for each piece of sailcloth produced in the state).
decayed families, and are girls of Character—none others are admitted. The number of hands now employed in the different parts of the work is [ ] but the Managers expect to encrease them to [ ]. This is a work of public utility & private advantage. 25

This visit was not unique—Washington recorded numerous visits to manufacturers in his diaries 26—but this particular account illustrates the array of interests served by economic ventures in the early republic.

The corporate form was another incentive that state legislatures could offer entrepreneurs. On January 15, 1789, a group of investors petitioned the Massachusetts legislature for a statute incorporating a cotton manufacture at Beverly. After discussing the private risks and public benefits associated with the proposed enterprise, the petitioners wrote,

[I]t is absolutely necessary to the establishment of such a manufacture as this that the Legislature should grant some particular favors to the first adventurers, otherwise to them even success will be attended with a certain and considerable loss, a sacrifice which they presume the community cannot reasonably expect. []Your petitioners, therefore, pray this Honorable Court to take the premises into their consideration, and grant them the powers and privileges of an incorporation for the purpose of establishing and carrying on the manufacture of cotton and other goods; with such immunities and favors as they, in their wisdom, shall think necessary to counterbalance the disadvantages and expenses peculiar to its introduction. 27

One month later, the legislature passed a resolution incorporating the company, granting it lands valued at £500 and prescribing a seal for


26. Id. at 468-69 (visit of October 20, 1789, to a textile manufacture in Hartford Connecticut, which received bounties and tax exemptions from the state). Id. at 486-87 (visit of October 30, 1789, to the Beverly Cotton Manufactory in Massachusetts, which had been incorporated earlier that year). Id. at 491-92 (visit of November 4, 1789 to the Sailcloth Manufactory at Haverhill, New Hampshire, which received bounties from the state.)

the corporation. Incorporation brought Beverly Cotton some property advantages but no tax breaks.

The benefits enjoyed by the early American corporation were different from the ones enjoyed by the modern corporation. Early manufactures may have incorporated to receive preferential treatment from the state, but the benefits of incorporation were entirely dependent on the applicable instrument of incorporation. For example, the first business incorporated in the United States was a Connecticut silk manufacture that, unlike Beverly Cotton, enjoyed a twelve-year exemption from taxes on profits. A 1797 charter incorporated a New Jersey glass manufacture for a period of fourteen years but, unlike other corporate charters of the era, made the shareholders liable for the debts of the company. The chief benefit of incorporation, as opposed to alternative organizational models, was continuity. As Judge Spencer Roane of the Supreme Court of Virginia noted, “Those artificial persons are rendered necessary in the law from the inconvenience, if not impracticability of keeping alive the rights of associated bodies, by devolving them on one series of individuals after another.”

During the early decades of the Republic, incorporation occurred on an ad hoc basis by special legislation only. New York was the first state to pass a law establishing general procedures for the incorporation of businesses. The 1811 Act Relative to Incorporations for Manufacturing Purposes stipulated that any group of five or more persons wishing to form a company manufacturing textiles, glass, or metal might, upon filing a certificate with the appropriate authorities, become a body corporate and politic, in fact and in name, by the name stated in such certificate, and by that name they and their successors shall and may have continual succession, and shall be persons in law capable of suing and being sued, pleading and being impleaded, answering and being answered unto, defending and being defended, in all courts and places whatsoever, in

28. Id. at 94–95 (quoting the resolution passed by the Massachusetts Legislature on February 17, 1789).
30. See Handlin & Handlin, supra note 22.
31. See DAVIS, supra note 20, at 269–70 (discussing the Director Inspectors and Company of the Connecticut Silk Manufacturers).
32. Id. at 279.
all manner of actions, suits, complaints, matters and causes whatsoever; and they and their successors may have a common seal, and the same may make, alter and change at their pleasure, and that they and their successors, by their corporate name, shall in law be capable of buying, purchasing, holding and conveying any lands, tenements, hereditaments, goods, wares and merchandize whatever, necessary to enable the said company to carry on their manufacturing operations mentioned in such certificate.  

The 1811 law made incorporation a matter of right for those who met New York's statutory requirements. Connecticut followed in 1837, enacting the first general incorporation statute allowing entities to incorporate for any lawful purpose. Other states followed suit.

Early American business corporations were not exclusively a means of developing financial and transit infrastructure through private investment. Nor, for that matter, were private corporations seen as serving private interests alone. As Morton J. Horwitz memorably wrote,

For a time, the corporation continued to occupy a twilight zone in the eyes of the law, sometimes conceived of as a public instrumentality, at other times regarded as a private entity. While they sought to emphasize their recently acknowledged private nature when claiming constitutional protection of corporate property, corporations continued to underline their public service functions in order to claim both the power of eminent domain and freedom from competition.

The public/private dimensions of the corporation in the early Republic reflected fundamental ambiguities in corporate law at the state level that have been explored at length by Horwitz, Hovenkamp, Lamoreaux, and Mark. The coming section attempts to enrich the

35. Id. § 2 (emphasis added).
38. Id. at 109-39.
41. Mark, supra note 11.
field by focusing on the way the Supreme Court addressed the ambiguous nature of the corporate form during the Marshall era.

II. THE MARSHALL COURT AND CORPORATE METAPHYSICS

In 1793, Stewart Kyd's widely circulated Treatise on the Law of Corporations explained the common law's sometimes confounding approach to the legal personality of corporations:

Several . . . epithets have been given to a corporation, which, unless particularly explained, are apt to bewilder and mislead the understanding: thus it has been said, that a "corporation aggregate of many, is invisible, immortal, and rests only in intendment and consideration of the law"; that it is "a mere metaphysical being, a mere Ens rationis."42

Kyd here singled out Sir Edward Coke's characterization of the corporation as "invisible, immortal, and rest[ing] only in intendment and consideration of the law."43 The phrase had become a juridical commonplace since the Lord Chief Justice formulated it in 1612, but it left many questions about the nature of corporate personality unresolved.

This section situates Chief Justice John Marshall's corporations jurisprudence within the broader English legal tradition, to which he appealed in deciding cases relating to the legal personality of corporations. In so doing, it challenges the view that Marshall began his tenure as Chief Justice as a proponent of the aggregate entity theory of corporate personality but eventually abandoned it for the artificial entity theory.44 This section argues that, instead, Marshall's corporations jurisprudence was heavily influenced by English precedent, particularly the decisions of Sir Edward Coke in the Case of Sutton's

42. 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 15 (1793) (internal citations omitted). The notion of the corporation as an ens rationis had appeared in a 1682 case in which the Court of King's Bench held that a corporation "is but a name, an ens rationis, a thing that cannot be seen, and is no substance." Proceedings between the King and the City of London, (1682) 8 S.T. 1039 (K.B.) 1137. For a colorful biographical sketch of Stewart Kyd, see Edward Solly, Stewart Kyd, 6 NOTES & QUERIES 12 (1880).

43. Case of Sutton's Hospital, (1612) 77 Eng. Rep. 960 (K.B.) 973; 10 Co. Rep. 23 a, 32 b ("[A] corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of law . . . . They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney." (citation omitted)).

44. See sources cited supra note 15.
Hospital and of Sir John Holt in *City of London v. Wood.* In interpreting and following these precedents, the Chief Justice seems to have taken his cue from Kyd, adopting Coke's basic view of the corporation as a creature of the law while recognizing the legal personality of its members where broader constitutional imperatives so required. The corporate charter was thus not a law exclusively unto itself. Rather, the corporate form could be set aside in order to comply with broader constitutional imperatives.

In *Bank of the United States v. Deveaux* the Supreme Court had occasion to consider for the first time the nature of the corporation as a legal person. In 1805 the state of Georgia levied a tax on the Savannah branch of the Bank of the United States, which had been incorporated by federal statute. When the bank refused to pay the tax, two Georgia officials, Peter Deveaux and Thomas Robertson, broke into the branch and seized two boxes of silver bullion in satisfaction of the debt. The officers and directors of the bank, all Pennsylvania citizens, sued Deveaux and Robertson in the Sixth Circuit for recovery of damages, arguing that the federal courts had diversity jurisdiction over the case. The defendants countered that the bank was, in fact, "a body politic and corporate" with citizenship in Georgia, making state court the appropriate venue for the case. When the Sixth Circuit found for the defendants, the bank appealed to the Supreme Court.

In its most basic sense, the issue before the Court was a constitutional one: did the federal judiciary have jurisdiction to hear the case in diversity? Reviewing the bank's charter, the Court noted that

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47. 9 U.S. (5 Cranch) 61 (1809).
48. The Act of Congress incorporating the first Bank of the United States stipulated that

[All those, who shall become subscribers to the said bank, their successors and assigns, shall be, and are hereby created and made a corporation and body politic, by the name and style of The President, Directors and Company, of the Bank of the United States; . . . And by that name, shall be, and are hereby made able and capable in law, to have, purchase, receive, possess, enjoy, and retain . . . lands, rents, tenements, hereditaments, goods, chattels . . . and the same to sell, grant, demise, alien or dispose of; to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any place whatsoever . . .

Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, 1 Stat. 191, 192 (Feb. 25, 1791).


the capacity of the corporation to engage in judicial process was a settled matter: legal personality, "if not incident to a corporation, is conferred by every incorporating act . . .". But just because the Bank of the United States was a legal person, it did not follow that the bank was a "citizen" within the meaning of Article III. To Marshall, the Constitution reserved the term citizen for real (i.e., natural) persons only. He explained:

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 . . . . Aliens, or citizens of different states, . . . [cannot] be supposed to be less the objects of constitutional provision, because they are allowed to sue by corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted.

The corporation was indeed a legal person: an entity with certain rights. But from the standpoint of diversity jurisdiction, the corporation existed in name alone; it was simply the vehicle through which the natural persons who comprised it exercised their rights.

Marshall did not construct this theory of corporate personality from whole cloth. Rather, he drew richly from the existing body of English law:

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law. invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations

51. Deveaux, 9 U.S. at 85.
52. Id. at 91 ("[T]he term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.").
53. Id. at 86–87.
have been included within terms of description appropriated to real persons.54

Here Marshall seems to have been persuaded by the bank's attorney, Horace Binney,55 who cited Stewart Kyd's treatise: "To say that [a corporation] is an 'ens civile, a jus habendi et agendi, an ens rationis, a mere metaphysical being, and that it rests only in consideration and intendment of law,' are terms calculated to mislead the understanding."56 Rather than get mired in the metaphysics of corporate personhood, Marshall turned to legal precedent, drawing heavily from the 1701 case City of London v. Wood.57

One of the main issues in that suit was whether the Mayor of the City of London could serve as a judge in a case in which he himself was a litigant. The full background of the case is murky, but Thomas Woods,58 "being duly chosen sheriff did not serve, or otherwise discharge himself"59 by paying a fine in the amount of £400.60 The city therefore brought suit against Woods in the name of the Mayor and Commonality of London in a court constituted under the municipal corporation's charter. The mayor and aldermen served as judges on that court, also as required by the charter. When the tribunal ruled in the city's favor, Woods challenged the holding in the Court of King's Bench on the ground that the mayor could not be the judge in his own case.

The City of London argued that the decision should stand because

54. Id. at 88. R. Kent Newmyer's observation regarding Marshall's contract jurisprudence is also apt here: "When Marshall applied traditional common-law reasoning to settle the matter, he was not aiming to disguise the doctrinal constitutional innovations he was about to make but instead was doing what he had done since he began the practice of law in the 1780s and what every other American lawyer of the age did: reasoning by common-law analogy and using common-law definitions and principles to interpret the words of the Constitution." R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 249-50 (2001).
55. In 1808, Binney was named a director of the Bank of the United States. CHARLES CHAUNCEY BINNEY, THE LIFE OF HORACE BINNEY 61 (1903). In the same year, he anonymously authored the notes to the American edition of Kyd's treatise on the law of awards. See id. at 59.
56. Deveaux, 9 U.S. at 64.
57. (1702) 88 Eng. Rep. 1592; 12 Mod. 669; see Deveaux, 9 U.S. at 90.
60. Id. at 1592. Philip Hamburger explains that the by-laws of the Corporation of the City of London required those nominated for the position of sheriff either to assume office and serve or pay a fine of £400. Nominating sheriffs unwilling to serve became a way of "[f]ishing for Sheriffs or for Money"—that is, raising revenue for the City. Hamburger, supra note 58, at 2122.
the mayor had a dual existence of sorts: as "head of the corporation, [he] acts in his politick capacity, and judges in his natural capacity." The mayor-as-plaintiff and mayor-as-judge were, in effect, two different people. But the Court of King's Bench unanimously rejected this argument, with Chief Justice Sir John Holt writing that

[The true great point is, that the Court is held before the mayor and aldermen, and the action brought in the names of the mayor and commonalty; and that very man, who is head of the city, and without whom the city has no ability or capacity to sue, is the very person before whom the action is brought; and this cannot be by the rules of any law whatever, for it is against all laws that the same person should be party and Judge in the same cause . . . .]

The court acknowledged that the corporation had legal rights all its own, but when the statutory rights of the corporation conflicted with constitutional imperatives, the court could set aside the corporate form.

According to Chief Justice Marshall in Deveaux, Wood was "a full authority for the case now under consideration." He explained:

In that case the objection, that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual.

Likewise, Marshall ruled, the Court could look beyond the corporate name of the board of the Bank and notice the citizenship of its individual shareholders in deciding the question of Article III jurisdiction. He concluded that the federal courts could exercise

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62. See id. Compare id. (treating the mayor as having two distinct existences of sorts), with Ernst H. Kantorowicz, The King's Two Bodies: A Study in Mediaeval Political Theology (7th ed. 1997) (tracing the concept of a king having a political body and a natural body). For a discussion of the constitutional implications of Wood, see Hamburger, supra note 58.
65. Id.
diversity jurisdiction only when the citizenships of the bank’s shareholders gave rise to it.

Both *Wood* and *Deveaux* are as much cases about the scope of judicial power as they are statements of corporate theory. For just as allowing the Mayor of London to be the judge in his own case would have compromised the basic principles of justice enshrined in the English Constitution, so too would treating the Bank of the United States as a citizen independent of its members have been contrary to Article III. Thus Marshall emphasized the precedential value of *Wood* as follows: “The case . . . is the stronger [precedent], because it is on the point of jurisdiction.” In this respect, both cases deal with the complex reality of the corporation as a unit of legal authority in political society. The corporation has legal rights and powers that can be invoked externally with regard to the state and internally with regard to its individual members. But all these powers are subordinate to broader constitutional imperatives.

The full implications of Marshall’s decision to treat the corporation as an aggregation of the rights of its members for the purpose of federal jurisdiction became more apparent in the 1829 circuit case of *Bank of the United States v. McKenzie*, in which Chief Justice Marshall, riding circuit, had to consider whether a corporation might have a place of residence. “The president and directors, at Philadelphia, are neither the nominal nor real plaintiffs,” he explained; rather, “[t]he nominal plaintiffs, are the president, directors and company; the real plaintiffs, are all the stockholders.” Elaborating on the theory he had introduced in *Deveaux*, Marshall explained that the court

might look behind, or through the name of the corporation, and see the individuals who were the actual plaintiffs who constituted that legal entity in whose name the corporation acted . . . . [*Deveaux*] makes the [corporation] a resident of every place where any member of the corporation resides.

Just as the corporation lacked citizenship independent of its members’ citizenship, so too did it lack a domicile independent of the respective domiciles of its shareholders.

Taken in this context, Marshall’s description of corporate

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66. Id.
67. 2 F. Cas. 718 (Cir. Ct. D. Va. 1829) (No. 927).
68. Id. at 721.
69. Id.
personality in Trustees of Dartmouth College v. Woodward⁷⁰ is not quite the turning point that some have claimed it to be.⁷¹ In Dartmouth College, the Chief Justice described the corporation as “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.”⁷² To be sure, Marshall here casts the corporation in terms evocative of the artificial entity theory of corporate personality. But this approach can be reconciled with his ruling in Deveaux. There, he likewise described the corporation as “a mere creature of the law, invisible, intangible, and incorporeal,”⁷³ but a creature whose form had to be set aside for jurisdictional purposes and in order to avoid an improper exercise of diversity jurisdiction.

Unlike in Deveaux, where the issue was the nature of the corporation as a legal person, in Dartmouth College the issue was the nature of the corporate charter as a legal instrument. In 1816, the state of New Hampshire amended the charter of Dartmouth College, effectively turning it into a public institution. A number of trustees challenged the constitutionality of the state laws on the ground that they impaired the trustees’ contract rights in violation of the Contract Clause of the U.S. Constitution.⁷⁴ The Chief Justice found for the trustees, holding that the corporate charter was indeed a contract between two parties—in this case, King George III and the original trustees of the college.⁷⁵ Under this contract, “[a]n artificial, immortal

⁷¹ Liam Seamus O’Melinn, Neither Contract nor Concession: The Public Personality of the Corporation, 74 GEO. WASH. L. REV. 201, 207 (2006) (discussing the role of social contract theory in Dartmouth and noting, “The celebrated Dartmouth College decision of 1819 announced a sea change in corporate theory and law that was already well under way. Relying on familiar principles of American political and constitutional theory, the case declared that the corporation was an immortal being with a soul - a group of trustees endowed with the power to govern the corporation.”).
⁷² 17 U.S. (4 Wheat.) at 636.
⁷³ See supra note 53 and accompanying text.
⁷⁴ U.S. CONST. art I, § 10, cl. 1. (“No State shall . . . pass any . . . Law impairing the Obligation of Contract . . . .”).
⁷⁵ See Dartmouth Coll., 17 U.S. at 643–44 (“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, unless the fact, that the property is invested by the donors in trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the constitution.”). The decision built upon the Court’s previous holding in Fletcher v.
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.\textsuperscript{76}

According to Marshall, the corporation constituted under this contract represented the aggregate aims of the original trustees and perpetuated those aims through its immortal form. In each successive generation, Marshall explained, the trustees are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted and protected, by the corporation.\textsuperscript{77}

On this view, the trustees had assigned their rights to the corporation under the charter. The corporation could, in turn, exercise those rights to further the interests of the trustees and the intended beneficiaries.

The implications of this ruling for the development of corporate law in the United States were far reaching. As R. Kent Newmyer notes, by allowing the corporation to "derive its legal rights by analogy to the individuals who comprised it . . . the corporation, in addition to the power accrued by its associative character, would fall heir to the impressive body of property rights given to individuals by Anglo-American law."\textsuperscript{78} However, the Court's ruling in \textit{Dartmouth College} in no way negates the approach to corporate personality it adopted in

\textsuperscript{76.} \textit{Dartmouth Coll.}, 17 U.S. at 642.

\textsuperscript{77.} \textit{Id.} at 642-43.

Deveaux. The corporation is indeed a creature of the law, but one that represents the aggregate rights of its shareholders, one that can exercise the right of contract, and one whose form may be set aside in order to avoid a violation of the Constitution.

Furthermore, when Marshall refers to the “properties which the [corporate] charter... confers upon [the corporation], either expressly, or as incidental to its very existence” or to the corporation as “one entire impersonal entity,” he is appealing directly to the common law’s conception of the corporation as formulated by Coke. In The Case of Sutton’s Hospital, Coke offered a summation of the rights of corporations under the common law:

[When a Corporation is duly created, all other incidents are tacit annexed to it]... [Therefore divers clauses subsequent in the charters are not of necessity, but only declaratory, and might well have been left out. As 1. By the same to have authority, ability, and capacity to purchase, but no clause is added that they may alien, ... and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a Seal, ... that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising but in certain form ... 5. That the survivors shall be the corporation ...]

On this view, the corporation is not entirely dependent upon the express terms of its charter for its powers. Some capacities are implicit in (“tacit annexed to”) the corporation by its very nature.

79. See Head v. Providence Ins. Co., 6 U.S. (2 Cranch) 127, 169 (1804) (“The act of incorporation is to [corporations] an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode ...”).
80. See supra note 72 and accompanying text.
83. Id. at 970.
84. Blackstone offered a more modern iteration of Coke's view of the corporation in his Commentaries, explaining:

After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities ... . Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course. As, 1. To have perpetual succession ... 2. To sue or be sued, implead or be impleaded, grant or receive, by it's [sic] corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors ... 4. To have a common
Although this conception of the corporation had begun to develop in England during the Middle Ages, Holdsworth links its florescence in Coke's writings to contemporary developments in constitutional theory. Just as a royal charter could not alter the common law or fundamental rights of the individual, so too could a royal charter not alter the common law or fundamental rights of corporations. City of London v. Wood represents the first of these two propositions in a particularly salient way. There, the royal charter in question was the charter of the corporation of the City of London. In nullifying one of its provisions, Chief Justice Holt invoked Coke's decision in Bonham's Case, noting:

[W]hat my Lord Coke says in Dr. Bonham's case ... is far from any extravagancy, for it is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament.

In Terrett v. Taylor, the Marshall Court had occasion to consider the second proposition: whether a statute could alter the common law rights of a corporation. In that case, the corporation in question was the Episcopal Church in Virginia. In 1801, the Virginia legislature passed a statute expropriating all property of the Episcopal Church and authorizing the state to sell it for the benefit of the parish poor. When the members of the church challenged the statute, Justice Story, writing for the Court, noted that "the common law of the land ... is a tacit seal. For a corporation, being an invisible body, cannot manifest it's [sic] intentions by any personal act or oral discourse: it therefore acts and speaks only by it's [sic] common seal ... 5. To make by-laws or private statutes for the better government of the corporation."

85. See W. S. Holdsworth, English Corporation Law in the 16th and 17th Centuries, 31 Yale L.J. 382, 385–92 (1922) (discussing the deduction of corporations' powers, capacities, and liabilities during the Middle Ages).
86. See id. at 392.
87. See id. ("It was well recognized that the king's charter could neither change the common law nor alter the rights and duties of private persons as fixed by law. To hold, therefore, that the king could neither give nor take away powers from a corporation which he could not give or take away from a natural man was quite in accordance with this constitutional doctrine.")
condition annexed to the creation of every . . . corporation."\textsuperscript{89} Thus, under the common law a state could treat as forfeit the property of a corporation that lost its franchise; but as long as the corporation was in good standing, "the principles of natural justice, . . . the fundamental laws of every free government, . . . the spirit and the letter of the constitution of the United States, and . . . the decisions of most respectable judicial tribunals"\textsuperscript{90} applied to it.

In many respects, the Marshall Court’s approach to the legal personality of corporations has more in common with early-modern corporate theory than with modern corporate theory. To Coke and his English successors, the corporation was "invisible, immortal, & resting only in intendment and consideration of the law."\textsuperscript{91} To Marshall and his brethren, it was likewise "an artificial being, invisible, intangible, and existing only in contemplation of law."\textsuperscript{92} To be sure, jurists on both sides of the Atlantic debated the nature of the corporation as a creature of the law. But central to the Anglo-American approach until the mid-nineteenth century was the notion that the corporation was not solely a creature of positive law;\textsuperscript{93} rather, the corporation was as much a creature of the common law as it was of legislative enactment.\textsuperscript{94}

III. THE CIVIL LAW IN THE SUPREME COURT: LIKE SCENERY IN TWILIGHT?

The previous section explored how the English conception of corporate personality was transplanted onto American soil in the early decades of the Republic by the Marshall Court’s fidelity to common law precedent. To Marshall, the corporation was indeed an "artificial being" recognized by positive law but protected from legislative intrusion by the common law and the Constitution. Thus did the Marshall Court

\textsuperscript{89} Terrett v. Taylor, 13 U.S. (9 Cranch) 43, 51 (1815).
\textsuperscript{90} Id. at 52.
\textsuperscript{91} Case of Sutton's Hospital, (1612) 77 Eng. Rep. 960 (K.B.) 973; 10 Co. Rep. 23 a, 32 b.
\textsuperscript{92} Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 636 (1819).
\textsuperscript{93} See Case of Sutton's Hospital, 77 Eng. Rep. at 970 ("[D]vers [sic] clauses subsequent in the charters are . . . only declaratory.").
\textsuperscript{94} See id. For an opposing view, compare Maximilian Kossler, The Person in Imagination or Persona Ficta or the Corporation, 9 I.A. L. Rev. 435, 441 (1949) ("This idea, which has meanwhile become obsolete in the Anglo-American law, ran somewhat like this: Since the corporation was a legal rather than a natural creature, it could not exist without an individual license for its creation, to be granted by the legislative body which, in those early days, was the king. Later on, an act of Parliament or, in the American states, a so-called private statute, authorizing the establishment of a specifically indicated corporation, took the place of a Royal Charter. As a final development, statutes would in a general way, that is, without reference to a specific corporation, fix in advance the conditions under which corporations could be created with validity before the law.").
nullify laws that altered or abrogated the rights recognized under corporate charters. During the mid-nineteenth century, however, the Court began to conceive of corporations as creatures of positive law whose rights were derived entirely from the charters constituting them. This section focuses on the role that continental theories of corporate personality played in guiding that positivist turn.

The earliest movement in this direction can be detected in the groundbreaking case of *Louisville, Cincinnati & Charleston Railroad v. Letson.* In that case, the Court revisited its jurisdictional holdings in *Bank of United States v. Deveaux* and *Strawbridge v. Curtiss.* *Strawbridge* required complete diversity of citizenship between the parties for the federal judiciary to exercise jurisdiction. Taken together with the *Deveaux* holding that courts must set aside the corporate form when ascertaining citizenship, *Strawbridge* made it all but impossible to establish federal jurisdiction over corporations, which were by now playing an increasingly expansive role in the national economy. *Letson* overturned Marshall's ruling in *Deveaux,* ruling:

> A corporation created by a state to perform its functions under the authority of that state and only suable there, though it may have members out of the state, seems to us to be 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.

The decision profoundly altered corporate law in the United States, making the corporation a citizen of the state that had created it. From then on, corporate citizenship would be ascertained independently of shareholder citizenship.

The reasoning in *Letson* is confoundingly opaque. That *Deveaux* had become unworkable seems to have been reason enough for the Court to overturn the precedent. But the Court did suggest that the oral

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98. Thus, if one of the plaintiffs is a citizen of the same state as one of the defendants, there is no diversity of citizenship. See *Strawbridge,* 7 U.S. (3 Cranch) at 267.
100. *See id.* ("After mature deliberation, we feel free to say that the cases of Strawbridge and Curtis [sic] and that of the Bank and Deveaux were carried too far, and that...")
arguments presented by counsel helped shape the ruling: "Deveaux [was decided] after argument of great ability. But never since that case has the question been presented to this court, with the really distinguished ability of the arguments of the counsel in this—in no way surpassed by those in the former." 101 Indeed, the court reporter thought the oral arguments so important to the case that he included them in the case report, explaining, "The case was submitted upon printed arguments; and, on account of its great importance, the reporter has thought it proper to insert these arguments in extenso." 102

Reviewing the record of the oral arguments, one finds that the case made by the attorney for the railroad contained no surprises: Deveaux barred the court from treating the corporation as a citizen under Article III and Strawbridge required the Court to dismiss the case for lack of diversity jurisdiction. 103 The matter was effectively res judicata. But Letson’s attorneys advanced two novel lines of argument. James Louis Petigru and Henry Lesesne, law partners from South Carolina, 104 were the first to argue for the respondent. They proposed a highly technical approach: the Court should narrowly interpret Deveaux to allow the Court to consider only the citizenship of the corporate officers—not that of shareholders—for the purposes of federal jurisdiction. 105

They were followed by their friend and fellow South Carolinian Hugh Swinton Legaré, then Attorney General of the United States. 106 Legaré urged the Court to consider the corporation in an entirely different light and overturn Deveaux:

A corporation, or to speak in the more accurate and scientific language of the continental jurists, "a juridical person," is, as I have said, a creature of the law, known

101. Id.
102. See id. at 498
103. See id. at 499–500.
104. WILLIAM HENRY PEASE & JANE H. PEASE, JAMES LOUIS PETIGRU: SOUTHERN CONSERVATIVE, SOUTHERN DISSENTER 76 (2002).
105. Letson, 43 U.S. at 507–514.
106. WILLIAM HENRY PEASE & JANE H. PEASE, JAMES LOUIS PETIGRU, 36, 43 (2002) (on the friendship between Petigru and Legaré). Pease and Pease claim that Legaré argued the case in his capacity as attorney general, but this is highly unlikely. Id. at 108. The United States government had no direct interest in the case, and the record states clearly that Legaré was representing Letson as co-counsel. Until 1853, when Caleb Cushing became Attorney General of the United States, it was the norm for United States Attorneys General to maintain a private legal practice while in office in order to supplement their meager salaries. Henry Barrett Learned, The Attorney-General and the Cabinet, 24 POL. SCI. Q. 444 (1909).
to it under a given name, whose essence is in that name, and the social identity it implies—whose capacities are defined in its charter—whose will is expressed under its seal—whose unity is affected by no change in the parts that compose it—and whose existence survives the deaths of its members.

It is, properly considered, a personification of certain legal rights under a description imposed upon it by the power that created it. Its name is a thing—it is every thing [sic]: this creature of law is a standing fiction and style—stat nominis umbra.

The first consequence of this definition is, that the whole is essentially and unchangeably different from all the parts, which are as completely merged and lost in it as the ingredients are in a chemical compound.107

Here, Legaré urged the Supreme Court to abandon the common law conception of the corporation as a legal entity representing the aggregate rights of its members and instead adopt the continental approach, which conceived of the corporation as a legal fiction.108 This distinction is important from a theoretical standpoint. In referring to the corporation as an artificial person, common law judges from Coke through Marshall conceived of it as an actual entity in contradistinction to a fictitious one. To be sure, this conception is not identical to the modern "real entity" theory of the corporation. Rather, by "artificial person," the common law tradition conceived of the corporation as an artifact, a legal person created "in accordance with the rules of art"—the lawyer's art."109 Corporate personality as a legal artifact was no more fictitious than a house built of bricks and mortar or a table built of wood and nails. None of these things exist in nature, but they are brought into existence by human craft. And unlike with Legaré's "chemical compound," we can still discern the parts in the corporate whole.

Legaré's argument before the Court is also important for historical reasons because it anticipates by more than three decades John Austin's formulation of corporations as "[f]ictitious or legal persons."110 Peter

107. Letson, 43 U.S. (2 How.) at 520.
108. See id. at 520–21.
110. See JOHN AUSTIN, Analysis of the Term 'Right', in LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 159, 164 (John Murray Albemarle Street ed., student ed. 1880) ("The nature of legal persons is various, and the ideas for which they
Stein suggests that Austin was first to introduce the phrase “legal person” into English as a translation of the civil law concept of the “juristische Person.” While Legaré seems to have beaten Austin to it, Austin certainly takes the credit for the diffusion of the term.

Like Austin, Legaré had been profoundly influenced by the writings of Carl Friedrich von Savigny, whose works he quoted at length in oral argument:

“A corporation,” as the greatest jurist of our day expresses it, “consists of the whole, formed of its members. The will of a corporation is not merely concurring the will of all its members, but that even of a bare majority of them. Therefore, the will of a bare majority of all its existing members is to be regarded as having the disposal, and being invested with all the rights of the corporation. This rule is founded on the law of nature, inasmuch as, if unanimity were demanded, it would be quite impossible for any corporation to will and to act. It is also confirmed by the Roman law.”

stand extremely complex. They are persons by a figment, and for the sake of brevity in discourse. By ascribing rights and duties to feigned persons, instead of the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them.”

111. Peter Stein, Nineteenth Century English Company Law and Theories of Legal Personality, 11/12 QUADERNI FIORENTINI 503, 509–10 (1982/1983) (It.). This notion had its roots in the concept of the persona ficta, which flourished in medieval political thought. Joseph P. Canning, Ideas of the State in Thirteenth and Fourteenth-Century Commentators on the Roman Law, 33 TRANSACTIONS OF THE ROYAL HISTORICAL SOC’Y, 1, 23-24 (1983) (“Developing the formulation... that the corporation was a persona ficta (fictive person) the Commentators maintained that through legal fiction the state was a persona in law, that is to say, through a legal construction they attributed to the state in its abstract aspect legal existence and capacity—legal personality in short. Overt use of the term, persona, to denote a legal person was an invention of the thirteenth-century jurists: persona was not used in that sense in the Corpus Iuris Civilis, although that usage was anticipated to some extent in theological terms by the Augustinian identification of Christ as the persona ecclesiae.”).


113. Letson, 43 U.S. at 522. A review of the citation provided by Legaré reveals that he was translating directly from the German edition in his oral argument. See id. (“Savigny’s System of the Roman Law, as it now is, vol. 2, p. 329, sect. 97, cites L. 160, sect. 1, reg. jur., Dig. 50, 17.”). At the time of his death in 1843, Legaré’s library contained German-language copies of Savigny’s Recht des Besitzes (1837), System des heutigem Römischen Rechts (1840), and Geschichte des Römischen Rechts in Mittelalter (1834). CATALOGUE OF
Again, Legaré appears to urge the Court to adopt the civil law approach. But then, in a surprising logical leap, he synthesizes the continental view of corporate personality with the common law view:

And so it is by the common law, of which I have just cited the received maxim on this head. Indeed, as Savigny remarks, it must be so in the nature of things, and the consequence is irresistible, that, to set up the will of a few members of a society, artificially organized into a body corporate, against that of the majority or the governing part of it, is to violate fundamental principles, and to confound all ideas of such an association.  

There is no talk here of the Constitution, Article III, or of the meaning of citizenship. To Legaré, the civil law approach to corporate personality reflects the law of nature, and the law of nature is part of the common law. Therefore, the Court should assimilate the civil law theory of corporate personality into the common law.

For Legaré, these were not arguments borne purely of expedience. The Attorney General was a true believer in his cause. Indeed, when Legaré died prematurely at the age of forty-six, President Tyler eulogized:

It may be said without fear of mistake that he was more...
deeply read in the civil law, than any other man in the Union. On all questions involving its principles, he was the Magnus Apollo of the court. With all his reverence for the common law, he had a still greater for the civil, as a more perfect system of justice. He sought on all occasions to soften down the seeming asperities of the first, by an infusion into it of the principles of the last.¹¹⁶

As a young man Legaré had spent a year at the University of Edinburgh studying the civil law.¹¹⁷ He renewed these studies with great enthusiasm from 1832 to 1836, when he served as the first U.S. chargé d'affaires to Belgium. He kept diaries of his time on the continent, including a journal of his travels through the Rhine region of Prussia in 1835. Here Legaré described his immersion in the study of contemporary continental legal writings, notably those of Savigny.¹¹⁸ In one journal entry, Legaré recounted a dinner conversation with Prussian historian Friedrich Ancillon:

Conversation turns on M. de Savigny, who, I regret to learn, is not in Berlin, it being a vacation. M. Ancillon says, excellent as his works are, his lectures are still better; delivered with a charming ease, grace and clearness, and giving you the idea of a man who is quite above the subject he treats of, and makes a pastime of it. I tell him it is just the impression made on me by his famous History of the Roman Law in the Middle Ages. [We] [s]peak of his general doctrine, and that of the historical school . . . . [I] [p]rofess myself of that school hautement.¹¹⁹

But Legaré’s enthusiasm was not shared by his friend, German poet and translator August Wilhelm Schlegel. In a different journal entry, Legaré recorded the poet’s remark on Savigny’s work: “[T]he civil law [is] like scenery in twilight,—you may make what you please of it.”¹²⁰

¹¹⁶. Speech by John Tyler, The Dead of the Cabinet (delivered Apr. 24, 1856) in 23 SOUTHERN LITERARY MESSENGER 81, 83 (1846).
¹¹⁹. Id.
In a sense, Schlegel’s remark evocatively captures the role of the civil law in *Letson*. The Court does not explicitly cite any of the other continental sources adduced by Legaré nor does it cite Savigny;¹²¹ but the presence of the civil law is palpable in the twilight of the decision’s murky reasoning when the *Letson* Court goes farther than it must in deciding the case. “The case before us might be safely put upon the foregoing reasoning,”¹²² Justice Wayne wrote, referring to the Court’s holding that the corporation is a citizen of the state in which it was incorporated. “But,” he continued,

there is a broader ground upon which we wish to be understood, upon which we altogether rest our present judgment, although it might be maintained upon the narrower ground already suggested. It is, that 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, 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.¹²³

Here the Court does not adopt the civil law’s conception of the corporation as a legal fiction but rather Legaré’s synthesis of the civil law and common law approaches to corporate personality. The

¹²¹. See *Letson*, 43 U.S. at 557. Michael Hoeflich mistakenly claims that the Court cites Savigny’s *System of Roman Law* in its opinion. See M.H. Hoeflich, *Translation & the Reception of Foreign Law in the Antebellum United States*, 50 AM. J. COMP. L. 753, 773 (2002). He can certainly be excused for this small error, as the record of Legaré’s oral argument runs approximately twice as many pages as the court’s ruling. Compare *Letson*, 43 U.S. at 514–29 (recount of oral argument), with *id.* at 550–59 (court opinion). Hoeflich also suggests that “it seems most likely that the reference [in *Letson*] is to the English translation of [Savigny’s *System of the Roman Law*.]” Hoeflich, supra, at 773. However, the work was not available in English translation until 1867. See supra sources cited and text accompanying note 113. It is instead likely that Legaré was working from a German-language edition of Savigny. See supra sources cited and text accompanying note 113. On the availability of translations of some of Savigny’s other works in the United States, see Hoeflich, supra, at 765.


¹²³. *Id.* at 557–58.
corporation is constituted by the laws of the state and derives its powers from it. It is, to be sure, an artificial person, but it possesses a legal status different from that of its members.\textsuperscript{124}

Taken in light of the Court's transformative ruling, Justice Wayne's remark about the quality of oral argument and the unconventional inclusion of those arguments in the case report are highly suggestive. It would probably be going too far to say that Legarde's arguments were responsible for this turning point in U.S. corporate law; it may well be that the Court would have come to the same conclusion even if Legarde had never argued the case. Yet it might also be that Legarde's arguments were reported to give the opinion a gloss of theoretical legitimacy. Whatever the case, Peter Stein's observation of English law seems to apply equally to American law here: "Legal personality is a classic example of the way in which English law manages to avoid theory as long as possible and then turns to contemporary continental doctrine when at last it needs a theoretical explanation of the institutions which it has developed pragmatically.\textsuperscript{125}

From a pragmatic standpoint, recognizing that the corporation was a legal person wholly independent of its members helped the \textit{Letson} Court rationalize its desired outcome: the extension of Article III jurisdiction to corporations on the basis of the state in which they were incorporated. But the Court was not prepared to carry the \textit{Letson} holding on corporate citizenship any further when it came to the Privileges and Immunities Clause of Article IV of the Constitution. In \textit{Paul v. Virginia},\textsuperscript{126} the Court held, "The term citizens as there used applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."\textsuperscript{127}

\textsuperscript{124.} See id. The ruling was affirmed in Covington Drawbridge Co. v. Shepherd, 61 U.S. (20 How.) 227, 233 (1858) ("[I]nasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, he also regarded as citizens of the State from which this legal being derived its existence, and its faculties and powers.").

\textsuperscript{125.} Stein, \textit{supra} note 110, at 503.

\textsuperscript{126.} Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868).

\textsuperscript{127.} \textit{Id.} at 177. Phillip I. Blumberg accounts for this limitation, noting "as a matter of constitutional development, opening the federal courts to litigation involving corporations is a very different issue than permitting states to exclude corporations in matters not involving interstate commerce. The fact that the same constitutional term, 'citizen' was employed did not prevent conflicting conclusions on its applicability to corporations."
THEORIZING THE CORPORATION IN THE UNITED STATES

Whether the corporation enjoyed any substantive rights as a citizen beyond the jurisdictional guarantees of Article III went largely unexamined until the ratification of the Fourteenth Amendment changed the legal landscape of the nation. The Fourteenth Amendment provides in part that

[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{128}

Who, exactly, constituted a "person" protected by the amendment immediately became a point of public contention. In \textit{Santa Clara County v. Southern Pacific Railway Company}, the court reporter included a breathtakingly brief note:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.\textsuperscript{129}


\textsuperscript{128} \textit{U.S. CONST. amend. XIV, § 1.}

\textsuperscript{129} 118 U.S. 394, 396 (1886). \textit{See also} Covington & Lexington Turnpike Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws."); Charlotte & Columbia R.R. v. Gibbes, 142 U.S. 386, 391 (1892) ("[N]o State shall deny to any person the equal protection of the laws. Private corporations are persons within the meaning of the amendment; it has been so held in several cases by this court."); Minneapolis & St. Louis Ry. v. Beckwith, 129 U.S. 26, 33 (1889) ("[T]he Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just."); Pembina Mining Co. v. Pa., 125 U.S. 181, 189 (1888) ("[T]he Fourteenth Amendment does not limit the subjects in relation to which the police power of the State may be exercised for the protection of its citizens. That this power should be applied to railroad companies is reasonable and just."); Mo. Pac. Ry. v. Mackey, 127 U.S. 205, 209 (1888) ("It is conceded that corporations are persons within the meaning of the [Fourteenth] Amendment."); Minneapolis & St. Louis Ry. v. Herrick, 127 U.S. 210, 212 (1888) (holding that a law imposing liabilities on a corporation is not in conflict with the Fourteenth Amendment).
Morton J. Horwitz surveyed the lower court rulings that anticipated Santa Clara in search of the rationale behind this cryptic holding.\textsuperscript{130} All supported a conception of the corporation most notably advanced by Justice Field in the 1882 Railroad Tax Cases\textsuperscript{131}—a conception of which Chief Justice Marshall may well have approved:

Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business. . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation. . . . On the contrary, we think that it is well established by numerous adjudications of the Supreme Court of the United States . . . that whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property . . . the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.\textsuperscript{132}

Horwitz showed that, far from departing from the common law view of the corporation as an aggregate entity, Santa Clara affirmed it, recognizing that the corporate form did not establish a juridical double standard with respect to the protection of property rights. The corporation was a legal person separate from its shareholders, but the property rights of the shareholders could only be upheld by recognizing that the corporation itself represented an aggregation of their rights. However, this meaning was lost in the decision's subsequent reception and interpretation.

The first major departure from the aggregate theory of corporate personality occurred, according to Horwitz, in Hale v. Henkel,\textsuperscript{133} where

\begin{enumerate}
\item[131.] San Mateo v. S. Pac. R.R. Co. (Railroad Tax Cases), 13 F. 722, 744 (D. Cal. 1882) (holding that constitutional and legal protections of property apply as much to corporations as to the members thereof).
\item[132.] Horwitz,\textit{ supra} note 130, at 178 (quoting Railroad Tax Cases, 13 F. 722). Horwitz shows that the attorney for the corporation made this very argument in Santa Clara. See id. at 177–78.
\item[133.] See id. at 182. For a discussion of early twentieth-century decisions rejecting the notion that a corporation enjoys the same rights as a natural person, see also id. at 182, n.46.
\end{enumerate}
the Supreme Court held that corporations are protected by the Fourth Amendment guarantee against unreasonable searches and seizures. The Court explained:

[T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter. Its rights to act as a corporation are only preserved to it so long as it obeys the laws of its creation. . . . [But] in organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises. 134

The Court here recognized that the corporation is a creature of the law, but the corporation is no fiction. It is a real entity bounded by the law and protected by the Constitution. The Court in *Hale* did not explain how to determine what constitutional immunities were “appropriate” to a corporation, but the ruling set in motion the gradual recognition that some provisions of the Bill of Rights applied to artificial corporate persons as well as to natural persons.

Perhaps the most telling part of the Court’s ruling in *Hale* was its passing observation that “[c]orporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.” 135 The rise of the modern business corporation had far outpaced the law’s ability to rationalize and harmonize its role in American life. American legal theorists attempted to fill the breach, finding in contemporary European writings, particularly those of Otto von Gierke, 136 accounts of corporate

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135. Id. at 76.
136. Maitland’s translation of Otto von Gierke’s *Political Theories of the Middle Ages*, together with his own works on the corporate form, were especially influential in this regard, profoundly influencing America’s legal realist school. DAVID RUNCIMAN,
personality ideas that seemed well suited to meet contemporary challenges.

Writing at the end of the nineteenth century, Ernst Freund cautioned that "the analysis of the nature of legal conceptions without immediate or exclusive reference to practical questions . . . is apt to lose itself in metaphysical speculations and refined distinctions of little substantial value." As an additional peril, "there is always some danger that an error in fundamental conceptions may lead now and then to incorrect practical conclusions, or—a less objectionable alternative—to unsound reasoning in order to support a sound decision." Having never theorized the corporation *ex ante*, during the late nineteenth century American jurists instead began trying to theorize it *ex post*. The Supreme Court's ruling in *Letson*, which marked American law's first significant departure from the prevailing common law conception of the corporation, paved the way for the eventual reception of real entity theory. Through that theory, scholars like Freund would attempt to rationalize the body of American corporate law. What would result, though, is an unstable body of case law concerning the rights of the corporation as a legal person.

IV. A CORPORATE CONSCIENCE?

From the early twentieth-century forward, the Supreme Court has generally decided which constitutional rights a corporation enjoys on the basis of the "historic function" of the guarantees of the Bill of Rights. Guarantees deemed to be limited to the protection of individuals, "purely personal" guarantees, have been denied to corporations. Arguably the most controversial protections to be afforded to corporations arise under the First Amendment. This section briefly addresses the role that conceptions of corporate legal personality have played in recent jurisprudence, arguing that in many respects the current Court has returned to the Marshall Court's view of the corporation as an artificial entity representing an aggregation of its members' rights.

In *Terrett v. Taylor*, the Marshall Court held that the incorporation of religious institutions is entirely consistent with the First Amendment


138. *Id.*

139. See, e.g. United States v. White, 322 U.S. 694, 700-01 (1944) (privilege against self-incrimination cannot be invoked on behalf of a labor union).

guarantee of free exercise of religion. However, in recent decades the Supreme Court has had occasion to consider the precise scope of religious corporations' rights to free exercise of religion. In particular, in *Church of Jesus Christ of Latter-Day Saints v. Amos*, the Court considered whether it was constitutional for corporations owned by the Mormon Church to require all employees to certify that they were members of the Church in good standing. Holding for the petitioner, the Court reasoned that,

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. . . . Solicitude for a church's [policies] . . . reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.

The Court noted that participation in a religious community—a religious corporation—broadens the scope of religious liberty because there is an expressive value to community membership that cannot be achieved by the individual in isolation. But the Court went a step further. Not only did individuals have a First Amendment right to practice their religion by incorporating as a nonprofit entity, but that entity also had the right to adopt policies consistent with its religious foundations. In this sense, the corporation itself has a right of free exercise.

Far more contentious has been the extension of First Amendment

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141. See supra text accompanying notes 89–90. Indeed, religious corporations have a rich history that long predates the emergence of the business corporation, so their protection under the First Amendment might not be altogether surprising. See, e.g., Henry Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980).


143. A number of people who had been dismissed from nonreligious jobs claimed that the certification requirement constituted discrimination in violation of §703 of Civil Rights Act of 1964, which provides, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ." 42 U.S.C. § 2000e-2(a) (2014).


145. *Id.* at 341-42.
rights to business corporations in *Citizens United v. Federal Election Commission*\(^{146}\) and *Burwell v. Hobby Lobby Stores, Inc.*\(^{147}\). In *Citizens United*, the Court invalidated key provisions of the 2002 McCain Feingold-Act\(^{148}\) which limited political communication by both nonprofit and business corporations. The 5-4 majority opinion held that laws restricting political speech were subject to the same test of constitutionality regardless of whether they applied to individuals or corporations: strict scrutiny. Under that test, the government must prove that statutory restrictions on speech promote a compelling public interest and are narrowly tailored to achieve that purpose. In overturning provisions of the statute, the Court quoted a previous decision and held that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets. . . . It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights."\(^{149}\)

The majority based its opinion in part on *First National Bank v. Bellotti*\(^{150}\), a 1978 case in which the Court had invalidated a state statute that barred corporations from making political contributions. Looking to the history of the First Amendment, the Court found that . . . a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs. If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether

\(^{146}\) 558 U.S. 310 (2010).

\(^{147}\) 134 S.Ct. 2751 (2014).


\(^{149}\) *Citizens United*, 558 U.S. at 351 (internal quotations omitted). Shortly after the decision was handed down, President Obama took the unprecedented step of rebuking the Court in his State of the Union, accusing it of "open[ing] the floodgates for special interests – including foreign corporations – to spend without limit in our elections." President Barack Obama, State of the Union Address (Jan. 27, 2010), available at https://www.whitehouse.gov/the-press-office/remarks-president-state-union-address.

corporation, association, union, or individual. 151

The right of free speech stemmed not from the nature of the corporation as a legal entity, but from the First Amendment itself. 152

In a spirited concurrence in part and dissent in part, Justice Stevens argued:

[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of the "We the People" by whom and for whom our Constitution was established. 153

But for the majority, the metaphysics of corporate legal personality were beside the point. What mattered was the historical purpose of the First Amendment, and that purpose, according to the majority, was to maximize the volume and variety of speech available to the general public. 154

By contrast with Bellotti, in Burwell v. Hobby Lobby the Court situated the business corporation’s First Amendment right to free exercise in the nature of the corporation itself, rather than in the historical purpose of the constitutional guarantee. In Hobby Lobby, a sharply divided Court ruled that closely held business corporations enjoy the same religious exemptions under the Religious Freedom Restoration Act (RFRA) as do nonprofit corporations. 155 The RFRA stipulates that the federal government “shall not substantially burden a person’s exercise of religion even if the burden results from a rule of general applicability” 156 unless the governmental action satisfies the test of strict scrutiny.

At issue in Hobby Lobby was the constitutionality of regulations promulgated by the Department of Health and Human Services to which some business owners objected on religious grounds. The

151. Id. at 776-77 (internal quotations omitted) (quoting Mills v. Alabama, 384 U.S. 214, 218, 86 S.Ct. 1434, 1437, 16 L.Ed.2d 484 (1966)).
152. For further discussion, see Adam Winkler, Corporate Personhood and the Rights of Corporate Speech, 30 SEATTLE U. L. REV. 863, 867 (2007).
153. Citizens United, 558 U.S. at 446 (Stevens, J., concurring in part and dissenting in part).
154. Id. at 339-40.
156. § 2000bb-1(a).
regulations required the businesses to provide health insurance coverage for contraceptives deemed by the business owners to be abortifacients repugnant to their religious beliefs. The Court concluded that closely held business corporations are "persons" within the meaning of RFRA:

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the people (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people. For example, extending Fourth Amendment protection to corporations protects the privacy interests of employees and others associated with the company. Protecting corporations from government seizure of their property without just compensation protects all those who have a stake in the corporations' financial well-being. And protecting the free-exercise rights of corporations like Hobby Lobby... protects the religious liberty of the humans who own and control those companies.\(^{157}\)

The reasoning here looks less like Belotti and Hale than it does Chief Justice Marshall's dissent in Dandridge. At issue in the latter case was precisely how a corporation, as a creature of law, manifests its will. The Court had to decide whether the Board of Directors of the Bank of the United States had accepted a bond posted by a branch cashier pursuant to the charter and bylaws of the corporation. The Board of Directors argued that it had never accepted the bond, noting that no written record of such acceptance existed. The cashier responded that no written record was needed under the bylaws of the corporation. In a sense, the case turned on a basic question of evidence: how does one prove the will of a corporation? In an opinion by Joseph Story, the majority sided with the cashier, holding that no written record of the Board's approval was needed because the charter of the corporation included no such requirement.

But to Marshall, who found himself uncharacteristically on the dissenting side of the decision, the subsequent testimony of the members of the Board was not enough to prove the will of the

\(^{157}\) Hobby Lobby, 134 S.Ct. 2751 at 2768.
corporation. He explained,

The corporation being one entire impersonal entity, distinct from the individuals who compose it, must be endowed with a mode of action peculiar to itself, which will always distinguish its transactions from those of its members. This faculty must be exercised according to its own nature. . . . Can such a being speak, or act otherwise than in writing? Being destitute of the natural organs of man, being distinct from all its members, can it communicate its resolutions, or declare its will, without the aid of some adequate substitute for those organs? If the answer to this question must be in the negative, what is that substitute? I can imagine no other than writing. The will to be announced is the aggregate will. The voice which utters it must be the aggregate voice. Human organs belong only to individuals. The words they utter are the words of individuals. These individuals must speak collectively to speak corporately, and must use a collective voice. They have no such voice, and must communicate this collective will in some other mode. That other mode, as it seems to me, must be by writing.\textsuperscript{158}

The corporation is an artificial person\textsuperscript{159} animated by the will of its members. Absent its members, the corporation has no discernable will of its own.\textsuperscript{160} This, according to Marshall, is why a writing could serve as the only sufficient proof of the aggregate will of the shareholders. The majority did not appear to disagree with Marshall’s fundamental conception of the corporation but rather with the proper way to “hear” the aggregate voice of the shareholders.

In \textit{Hobby Lobby}, we see a return to Marshall’s vision of the corporation as an artificial person representing the aggregate will of its members. And if the case is any indication of the court’s future trajectory on the nature of corporate personality, Chief Justice Marshall, so often on the winning side in his lifetime, may continue winning the day long after his death. There are compelling reasons to

\textsuperscript{158} Dandridge, 25 U.S. at 91-92 (emphasis added).
\textsuperscript{159} See, e.g., Dartmouth College, 17 U.S. at 691 (referring to the corporation as an “artificial person”).
\textsuperscript{160} C.f. \textit{Hobby Lobby}, 134 S.Ct. at 2768 (“Corporations, separate and apart from the human beings who own, run, and are employed by them, cannot do anything at all (internal quotations omitted).”)}
believe that Hobby Lobby has very limited applications to future cases. The ruling was heavily qualified by two factors. First, the majority emphasized the unique nature of Hobby Lobby as a closely held (rather than publicly traded) corporation. Second, the net effect of the ruling for female employees was zero, as they could receive the contraceptives in question free of charge through an accommodation provided by the Department of Health and Human Services. Whatever the long-term implications of the ruling, Hobby Lobby underscores the centrality of the Court’s conception of corporate legal personality in weighing constitutional claims.

CONCLUSION

In 1903 Frederic Maitland delivered an address at Newnham College, Cambridge, titled Moral Personality and Legal Personality. Of the contemporary debate over whether the corporation was a real or fictitious entity, he remarked:

Much disinclined though [one] may be to allow the group a real will of its own, just as really real as the will of a man, still [one] has to admit that if \( n \) men united themselves in an organized body, jurisprudence, unless it wishes to pulverize the group, must see \( n + 1 \) persons. And that for the mere lawyer should I think be enough.

However, for the contemporary American lawyer, Maitland’s formula is not enough. The question is not whether the corporation is a person or not. Nor, for that matter, is the question whether the corporation is a real person or artificial person. Rather, the question is whether the corporation, as a legal person, enjoys the same rights as a natural person. It is a problem that grows no less challenging as the federal judiciary continues to grapple with the very real impact of “invisible, intangible, and incorporeal” entities in political society.

The purpose of this article has not been to harmonize or rationalize federal jurisprudence on the legal personality of the corporation. Nor has it been to offer an integrated theory of the corporate form. Rather, by re-examining the federal judiciary’s approach to competing views of corporate personality—particularly during the antebellum period—this

161. Id. at 2759-60.
article has attempted to enrich our understanding of a complex and, at times, inconsistent body of law and legal theory. A close reading of the Marshall Court's jurisprudence reveals the enduring influence of English law on the young nation. Indeed, Chief Justice Marshall's views of corporate personality probably shared more in common with Lord Coke's than with Justice Wayne's. This fact underscores just how significant the Court's Letson ruling was not only for the subsequent development of the corporation in America, but for the reception of new theories of the corporate form by the courts.