A RULE OF THE PEOPLE: WHY A CORPORATION HOLDS NO CONSTITUTIONAL RIGHT OF ITS OWN

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ABSTRACT

A corporation is not a being the law made but a rule the people made: a sovereign's permission that a set of natural persons may act under one name, with two incidents no private agreement can create because each binds strangers, the separation of the body's debts from its members' and the body's survival through every change of them. A name in a rule holds no right against the rule's makers. The being is the Court's own addition, "existing only in contemplation of law" in its definition of 1819, and the word Johnson's Dictionary gives for a thing that so exists is *phantasm*, "something appearing only to imagination"; the rule is real, the people made it, and the article's quarrel is with the being alone, as the holder of a right against the rule's makers. Every constitutional right the Court has attached to the corporate name rests on a presupposition the article's second claim names and tests: that the corporation is bound to a sovereign of one will, a king who can grant, answer and be bound in his own person; the Constitution has no such sovereign. The people grant corporate existence through their constitutions and general laws and keep its terms in the hands they reserved; a right in the name against the people they can grant in one way only, by Article V. This article argues both claims from the history of the rule, from the common law's own law of fictions, and from the pages of the United States Reports. Part One traces the rule from Justinian's Digest, the sixth-century compilation of the Roman jurists'

writings, to the state constitutions of the nineteenth century, which grant corporate existence under general laws, reserve in fifty-two of them the power to alter, amend or repeal in the same section, and define in twenty the thing granted; and it recovers the rule the common law stated from the bench between 1591 and 1625, and carried in the books from Coke to Blackstone, for every fiction of law, that it be of a possible matter, for a necessity, and work no injury to any man. Part Two sorts every right a corporation has been held to possess into two sets, the rights natural persons already hold and carry through the corporate name as a medium, and the privileges of the grant, and shows that nothing falls between them. A census of the terms on which the corporate constitutional right rests, "artificial being," "person," "corporate democracy," "associations of citizens," finds that each is a coined term or a transplant from the law of corporations, entered in a holding, and afterwards cited as though it were a term fixed by the text. Where the Court could not reconcile the name with the clause, it supplied by default what only the sovereign's positive grant could supply; in 1844 it confessed the inability in terms and held the corporation a citizen in the same opinion. From the census the article proposes a test. A holding that rests on a coined term alone has granted by ordinary means what the people's instrument grants only by Article V, and the test is removal: strike the term and look for the clause. A term that survives was a tool of construction; a term that takes the holding down with it was held as law, and a fiction of the impossible, established as a truth by one or some and held as law against the people's instrument, is what the Constitution's supremacy over ordinary means forbids. Run on *Citizens United*, the test finds the First Amendment for the members and nothing for the treasury. Run on *Griswold*, whose judgment the author would keep, it finds the Ninth Amendment and the word "liberty," which is why it is a test of law and not of a side; a holding that survives it is not thereby validated. The remedy is not Article V, which is what was bypassed, but the measurement, holding by holding, of the distance between what the Court said and what the people wrote.

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I. Introduction

In 1809 Chief Justice Marshall wrote that a corporation might be "considered as a mere faculty," or as "a company of individuals, who, in transacting their joint concerns, may use a legal name," and that the name "is considered as an inhabitant, when the general spirit and purpose of the law requires it."[1] Ten years later he wrote that a corporation "is an artificial being, invisible, intangible, and existing only in contemplation of law," possessing the properties its charter confers "either expressly, or as incidental to its very existence," among them "immortality, and, if the expression may be allowed, individuality."[2] The first description is a rule. The second is a being, and the request for leave to use the expression is attached to one of its incidents, not to the being itself. What "existing only in contemplation of law" says, the dictionaries fix: contemplation, in Johnson's entry, is Locke's "keeping the idea, which is brought into the mind, for some time actually in view," the faculty "opposed to the power of action," and the law dictionary of 1891 names a thing so existing an *ens legis*, "a creature of the law; an artificial being, as contrasted with a natural person." American law took the being, dropped the request, and spent two centuries deciding what rights it had. A name in a rule holds no right against the rule's makers.

The second claim lies under the first, and the article states it here because every later part depends on it. The corporation the Court has been describing since 1819 is bound to a sovereign

[1] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87, 89 (1809).

[2] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). For the definition's words at the dictionary page, as the sentence after the hedge reads them: Samuel Johnson, *A Dictionary of the English Language* (London: W. Strahan for J. and P. Knapton et al., 1755), vol. I, s.v. "Contemplation" (leaf 471, left column, signature 5 M: sense 1, with Locke's sentence; sense 3, "The faculty of study; opposed to the power of action"), and vol. II, s.v. "Phantasm" (leaf 345, left column, signature 19 P: "Vain and airy appearance; something appearing only to imagination"), the word the abstract and Section IX.F quote; Henry Campbell Black, *A Dictionary of Law* (St. Paul: West Publishing Co., 1891), p. 422, left column, s.v. "Ens legis" ("A creature of the law; an artificial being, as contrasted with a natural person. Applied to corporations, considered as deriving their existence entirely from the law").

of one will, a king who could hear a petition, give a reply and be bound by it, and the Constitution has no such sovereign; Section II.E states why a rule written for a king who can answer in his own person cannot be applied to a sovereign that cannot, the Constitution the people ratified, and why the one right the people can grant against their own instrument they grant by Article V alone. The article's companion on the immunity of the sovereign's officers finds the same presumption under the other great doctrine the common law bequeathed to a republic that had abolished its premise.[3]

This article returns to the first description and asks what follows from it. The answer is that nothing the Court has attached to the corporate name beyond the rights of the natural persons behind it has a source in the Constitution, and that the holdings which attached those rights did so by a method the Constitution does not allow: a coined term, entered in a holding, and afterwards cited as though it were a term fixed by the text. The same holdings carry a second mark, and the Court itself named it in 1844: where it could not reconcile the corporate name with a clause, it held by default, supplying what, in the system of positive law it professed to apply, only the grant could supply; Section III.B reads the confession.

The argument runs in two parts, and each Part opens by stating its own, so the roadmap is short. Part One is the history of a rule and not of an institution: the Roman jurists' *conceditur*, the canonists' *persona ficta* as a rule of treatment, the king's consent in the English books, the colonies that were corporations before they were States, the Convention's two refusals, and the people's constitutions from the 1840s, which grant corporate existence under general laws, reserve the power to alter, amend or repeal, and define the thing granted. Part Two asks what

[3] The companion is the author's study of the immunity of the sovereign's officers, *The Subject's Unanswered Plea: A Restorative and Comparative History of Immunity* (book manuscript, 2026), cited in the form the sibling articles use; Section II.E carries the argument in full, Section VII states it as the reason for the Article V step, and Section IX.A names the two doctrines as runs of one measure.

such a rule can confer. Section III is the census: every term on which a corporate constitutional right rests, read in the order of its entry into the Reports, each entering as a figure of speech or a transplant. Section IV sorts everything a corporation might claim into two sets, what natural persons already hold and what incorporation alone confers, and finds no third. Section V takes the derivative theory to its edge, where no member's consent can be found. Section VI runs *Citizens United* through the two sets. Section VII derives the test, that a holding resting on a coined term alone supersedes Article V, and refines it. Section VIII runs the test on *Griswold*, whose judgment the author would keep. Section IX states the scope and the remedy, which is measurement, and Appendix A is the census of the state constitutions.

The article coins nothing. The rule of treatment is Marshall's of 1809, and two New York courts stated it in the article's own grammar before the article did: that a corporation "is a mere conception of the legislative mind" which "exists only on paper through the command of the legislature," and that it "is more nearly a method than a thing."[4] The derivative theory is the Court's own from *Deveaux* to *NAACP v. Alabama*, and the modern literature has stated it as a theory of what corporations may claim.

The asymmetry between the two results is the article's conclusion, and Section VIII.F states it on the texts: the people's unenumerated rights have a textual home, because the text was written by and for the people, and the name's have none, because the name is a rule the people made. The remedy for a holding that has granted by ordinary means what only Article V could grant is not Article V, which is what was bypassed, but measurement, in the forms Section IX.C states.

[4] *People v. Knapp*, 206 N.Y. 373, 381 (1912) (Vann, J.) (the Caselaw Access Project volume); *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. 110, 119 (Sup. Ct. N.Y. County 1927) (Bijur, J.) (Wormser's citation of the passage to "116–7" is to the wrong pages). Both are quoted in I. Maurice Wormser, *Disregard of the Corporate Fiction and Allied Corporation Problems* 5–6 (1927), where the article first found them.

PART ONE. THE RULE: HOW SOVEREIGNS PERMITTED NATURAL PERSONS TO ACT UNDER ONE NAME, ROME TO 1907

Part One is the history of a rule and not of an institution. It follows one permission through six settings: the Digest's *conceditur*, the canonists' *persona ficta* and the common law's bounds on every fiction it would admit, the king who alone could incorporate and alone could answer, the English franchise held of its grantor, the colonies that were corporations before they were States, and the people's constitutions from the 1840s. In each the shape is the same. A sovereign permits natural persons to act under one name, attaches to the name two incidents the persons could not create for themselves, and keeps the terms. Nothing in the history gives the name a right against its grantor, and the sovereign of the United States, the Constitution the people ratified, can be bound against the people only by its own amendment. The Part closes on the two sentences of 1809 and 1819, where Part Two begins.

II. The Rule: How Sovereigns Have Permitted Natural Persons to Act Under One Name, from the Digest to the State Constitutions

A. What a Corporation Is, Stated as a Rule and Not a Being: A Name That Functions in a Sovereign's Rule

A corporation is a name that functions in a sovereign's rule. The rule permits a set of natural persons to act under one name for stated purposes, and attaches to the name incidents the persons could not create for themselves: that the body's debts are not the members', and that the body persists through every change of them. That is the whole of it. There is no being behind the

name, no organism with a will, and nothing to be acted upon as true for every purpose. There are natural persons, property, and a rule of the sovereign about how courts will treat them. "The corporation" is a word in the rule.

The common law itself called such a rule a fiction of law, and the article accepts the word in the sense the common law gave it, which Section II.D recovers: a lawful fiction is a disposition of the law against the truth, of a possible matter, for a necessity, and working no injury to any man. The difference between a lawful fiction so bounded and a fiction acted upon as true for every purpose lies in what each licenses. A fiction acted upon as true for every purpose carries into law whatever follows from the truth of it. A rule of treatment, which is what a lawful fiction is, is bounded by the purpose that made it: the name is "considered as" a person, in Marshall's words, "when the general spirit and purpose of the law requires it," and not otherwise. The first licenses everything; the second licenses what its maker's rule requires and no more. The two meet in the third of the terms Section II.D defines: a fiction acted upon as true for every purpose is sooner or later acted upon for an impossible one, and against someone, and at that point a lawful fiction has become what the common law said it would never make, a fiction of the impossible held as law. The whole of Part Two can be stated as the finding that the Court, from 1819 onward, took the first license while citing the second rule, and that a rule cannot be true against the instrument that made it.

The article states this at the outset because the vocabulary of the subject resists it. From the thirteenth century the corporation has been called a *persona ficta*, a fictitious person; from the eighteenth, an "artificial person"; from 1809 in the American Reports, an "artificial being," a "legal entity," a "creature of the law"; and in the historical school of the nineteenth century a "living organism" with a "group-will." Every one of these is a figure of speech, and the figures

are not neutral. A "creature" has a nature from which incidents follow. An "organism" has a will. An "entity" is a thing. Each word carries a metaphysics, and the metaphysics does work in the holdings that use the word.[5] The article's claim about those holdings cannot be made in their vocabulary. So the chapter below tells the history of the rule, not of the creature, and it does not say that the corporation "arose," "emerged," or "was born." It says where sovereigns began enacting rules of this shape, what each rule permitted, and to whom.

The alternative is not the article's invention. Chief Justice Marshall offered it in the first American case on the subject, in 1809, before he offered the creature in 1819. A corporation, he wrote, might be "considered as a mere faculty," a capacity, or as "a company of individuals, who, in transacting their joint concerns, may use a legal name."[6] And the mechanism by which the law treats such a name as a person he stated as a rule of treatment and not a fact about a being: the name "is considered as an inhabitant, when the general spirit and purpose of the law requires it."[7] Two New York courts said the same thing in their own grammar. Judge Vann, for the Court of Appeals in 1912: a corporation "is a mere conception of the legislative mind. It exists only on paper through the command of the legislature that its mental conception shall be clothed with power. All its power resides in the directors. Inanimate and incapable of thought, action or neglect, it cannot hear or obey the voice of the legislature except through its directors."[8] Justice Bijur, in 1927: "a corporation is more nearly a method than a thing," and the law "has no need of defining it as a person or an entity, or even as an embodiment of functions, rights and

[5] Section III (the coinage census) sets out the terms in order of their entry into the Reports with what was afterwards hung on each.

[6] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), from the 1882 Banks reprint.

[7] *Id.* at 89.

[8] *People v. Knapp*, 206 N.Y. at 381.

duties, but may treat it as a name for a useful and usual collection of jural relations."[9] Maitland, in 1900, gave the position a name, the "Bracket Theory" of the corporation, in which personality is "a mere labour-saving device, like stenography or the mathematician's symbols," and "the existing corporators" are "the real 'subjects' of those rights and duties that are ascribed to the corporation."[10] He named it and doubted it on the same page, asking rather than asserting whether the shareholders, "these men of flesh and blood," are "the real and only sustainers of the company's rights and duties," and he noted that American writers, Morawetz among them, had already tried "to open the Bracket and find therein nothing but contract-bound men."[11] The article takes Marshall's rule and Maitland's name, and not Maitland's bracket: Section IV will put the members inside the bracket for their own rights and outside it for the name's debts, which is neither the fiction theory nor the aggregate. It coins nothing.

B. Rome: The Digest's Conceditur, the Name, the Two Incidents, and the Republic as the Model

The rule is older than any theory of the corporation, and the Roman jurists stated it in the verb from which the oldest theory takes its name. The Digest is the compilation of excerpts from the classical Roman jurists that the emperor Justinian promulgated as law in the sixth century, one of the four parts of the codification the later civil law called the *Corpus Iuris Civilis*, and the channel through which the jurists' rules reached the canonists of Section II.C and the English writers of Section II.F. Its title on suits brought in the name of a body opens with Gaius:

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[9] *Farmers' Loan & Trust Co. v. Pierson*, 130 Misc. at 119.

[10] Frederic William Maitland, Translator's Introduction, in Otto Gierke, *Political Theories of the Middle Age* xxiv (Cambridge 1900).

[11] F. W. Maitland, Introduction to Otto Gierke, *Political Theories of the Middle Age* xxiv (1900). Maitland's note on the same page records the American dissatisfaction "with the Fiction—or, as Americans sometimes say, with 'the Entity'," citing Taylor, *Law of Private Corporations* § 60, and Morawetz, *Law of Private Corporations* ch. 1.

Dig. 3.4.1 pr. (Gaius)	**Translation**
Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur: nam et legibus et senatus consultis et principalibus constitutionibus ea res coercetur. paucis admodum in causis concessa sunt huiusmodi corpora: ut ecce vectigalium publicorum sociis permissum est corpus habere vel aurifodinarum vel argentifodinarum et salinarum.[12]	Neither a partnership nor a college nor a body of this kind is conceded to everyone at large; the matter is restrained by statutes, by decrees of the senate, and by imperial constitutions. Such bodies are conceded in very few cases: thus the companies that farm the public revenues are permitted to have a body, and those of the gold mines, the silver mines and the salt works.

The verb is *concedere*. The "concession theory," the name given in the nineteenth century to the view that the corporation exists only by the sovereign's grant, is the Digest's own word for the rule, and the rule is a sovereign's.

The next fragment says what the concession permits:

Dig. 3.4.1.1 (Gaius)	**Translation**
Quibus autem permissum est corpus habere collegii societatis sive cuiusque alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur fiat.[13]	Those to whom it is permitted to have a body, in the name of a college or a partnership or any other such, have as their own, on the model of the republic, common property, a common chest, and an agent or syndic, through whom, as in a republic, what ought to be done in common is done.

Three things are in that sentence. The body exists for those to whom it is *permitted*. What is permitted is to act *in the name*. And the model is the republic itself: the jurist describes the

[12] Dig. 3.4.1 pr. (Gaius, 3 *ad ed. provinc.*), from the shelf's Latin text (pdf 146). Translations in the body are the article's; compare 1 Charles Henry Monro, trans., *The Digest of Justinian* 172 (Cambridge 1904) ("Associations and guilds and similar corporations are not allowed to be formed by all persons without discrimination … It is only in very few kinds of cases that such corporate bodies are allowed").

[13] Dig. 3.4.1.1 (Gaius, 3 *ad ed. provinc.*), from the shelf's Latin text (pdf 146–147); Monro, *supra*, at 172.

permitted body by analogy to the body politic, which is the analogy the English and American law would carry for the eighteen centuries after Gaius wrote, in the second century.

Ulpian, later in the same title, states the two incidents the permission attaches. "*Si quid universitati debetur, singulis non debetur: nec quod debet universitas singuli debent*": what is owed to the body is not owed to the members, nor do the members owe what the body owes.[14] And: "*In decurionibus vel aliis universitatibus nihil refert, utrum omnes idem maneant an pars maneat vel omnes immutati sint*," in a town council or any other body it makes no difference whether all the members remain, or some, or none; and if the body comes down to a single member, that member may still sue and be sued, "*cum ius omnium in unum recciderit et stet nomen universitatis*," since the right of all has fallen to one and the name of the body stands.[15] The separation of the body's obligations from the members', and the body's identity through any change of membership: these are the two features that distinguish a corporation from a partnership, and the Roman law states them not as properties of a being but as rules of the permission. What persists through the change of members, in Ulpian's own word, is the *nomen*: the name under which the permission runs.

So the Roman chapter of the history is complete in one title of the Digest: concession, name, the two incidents, and the republic as the model, all stated as rules. And one fragment from another title shows that, before anyone had called the body a person, the jurists had said what it does. Florentinus, in the Digest's title on sureties, allows a surety to be taken, after a debtor's death and before his inheritance has been entered upon, for what the inheritance now owes, "*quia hereditas personae vice fungitur, sicuti municipium et decuria et societas*," because

[14] Dig. 3.4.7.1 (Ulpian, 10 *ad ed.*) (pdf 148); Monro, *supra*, at 174 ("What is owed to the corporation is not owed to the individual members, and what the corporation owes the individual members do not owe").

[15] Dig. 3.4.7.2 (Ulpian) (pdf 148); Monro, *supra*, at 174 ("the legal position of the whole number has devolved on one person and the appellation of corporation still remains").

an inheritance functions in the place of a person, as do a municipality, a decury and a partnership.[16] The body is described by its function and not by a nature. It stands where a person would stand, for the purpose at hand, and the standing is a rule about the purpose; that is the rule of treatment in the jurists' own grammar, a thousand years before the canonists coined a person for it (Section II.C), and the plainest statement in the sources of what Section II.D calls a lawful fiction of the possible, a function the law performs and not a being the law asserts.

C. The Canonists' Persona Ficta as a Rule of Treatment: A Person by Fiction, Made for the Purpose of Holding, Kept Within the Sovereign's Gift and Denied Natural Rights

The theory came later, and from the Church. The Roman jurists had stated the rule without a theory of what the permitted body was. The canon lawyers of the thirteenth century, who had before them "as the typical corporation, no medieval city, village or gild, but a collegiate or cathedral church," supplied one.[17] The phrase was *persona ficta*, and according to Gierke "the first man who used this famous phrase was Sinibaldo Fieschi, who in 1243 became Pope Innocent IV."[18] Maitland summarizes the doctrine: "The corporation is a person; but it is a person by fiction and only by fiction."[19]

What the *persona ficta* was for is the point. A cathedral chapter had to hold land across generations without the land passing by inheritance at every canon's death. If the chapter were a

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[16] Dig. 46.1.22 (Florentinus, 8 *inst.*), in 1 *Corpus Iuris Civilis* 741 (P. Krueger & T. Mommsen eds., Berlin, Weidmann; the stereotype edition on the shelf, pdf 857; the running head "ET MANDATORIBUS … XXXXVI 1"): "Mortuo reo promittendi et ante aditam hereditatem fideiussor accipi potest, quia hereditas personae vice fungitur, sicuti municipium et decuria et societas." The translation is the article's; "decury" renders *decuria*, a college of officials, and keeps it distinct from the *decuriones*, the town councillors of D. 3.4.7.2 quoted above. The fragment sits in the title on sureties and mandators (D. 46.1) and states the body's standing by what it does; Section II.C for the canonists' *persona ficta*, which Gierke dates to Sinibaldo Fieschi in the thirteenth century, and for the three terms. Section II.A: a corporation is a name that functions in a sovereign's rule.

[17] Maitland, *supra*, at xix.

[18] *Id.* at xix.

[19] *Id.* at xix.

real person it could be excommunicated, which was absurd; if it were only its members, the property would scatter. The *persona ficta* let the law treat the chapter's affairs under one name for the purpose of holding and not for the purpose of sinning. It was, in other words, a rule of treatment, the same thing Marshall would describe in 1809 as the name "considered as" a person "when the general spirit and purpose of the law requires it." The *persona ficta* did not assert that there was a person. It asserted that the law would proceed, for stated purposes, as if there were; and the purposes were the measure of the "as if."

Two things the *persona ficta* carried with it should be marked, because they return in the American law. First, it kept the body within the sovereign's gift. Maitland: the prince's "right to suppress *collegia illicita* was supplemented by the metaphysical doctrine that, from the very nature of the case, 'artificial personality' must needs be the creature of sovereign power. At this point a decisive word was said by Innocent IV."[20] The *persona ficta* was the concession theory's companion, and Maitland's word for the companion is "metaphysical," which is the article's word for every figure in this field. Second, its later form denied the fictitious person any natural rights. Of the Savignian corporation Maitland writes: "Really and truly the property of a corporation—for example a city or university—belongs to no real person or persons … Of 'natural rights' there can here be no talk, for 'artificial persons' can have no natural rights."[21] That sentence, written in 1900 about a German theory of the 1840s, is the position the American Reports had stated in 1869 and would abandon in practice after 1886.

[20] *Id.* at xxx.

[21] *Id.* at xxi.

D. The Common Law's Law of Fictions: The Three Bounds of a Lawful Fiction, the Three Terms the Article Uses, the Line the First Bound Draws Between the Parts, Holmes's "As If," and Gierke's Organism as the Other Figure Struck

The English law received the canonists' device and bound it, and the bounds are the measure this article applies throughout, because they are the law's own. Blackstone states them at the close of his account of the courts: fictions of law, "though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; it's proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law. So true is it, that *in fictione juris semper subsistit aequitas*."[22] In a fiction of law, the maxim says, equity always subsists. His note gives the civil law's definition, from Godefroy on the Digest: against a fiction no proof is admitted, "for what would proof of the truth effect, where the fiction feigns against the truth? For a fiction is nothing else than a disposition of the law against the truth, in a possible matter, from a just cause."[23] The sources Blackstone cites are the bench's own, and they are older than the Commentaries by a century and a half. In *Butler and Baker's Case*, decided in 1591, Coke reported that "the law will never make any fiction, but for necessity, and in avoidance of a mischief," that "relations are fictions in law, which will never do

[22] 3 William Blackstone, *Commentaries on the Laws of England* 43 (Oxford, Clarendon Press, 1768) (the first edition in facsimile, pdf 55). Blackstone's note z cites 2 Roll. Rep. 502 and 3 Rep. 30 for the sentence on injury and mischief; his note a cites 11 Rep. 51 and Co. Litt. 150 for the maxim. On what the maxim's "injury" must weigh when the fiction confers a right: *Black's Law Dictionary* 976 (Bryan A. Garner ed., 9th ed. 2009), s.v. "legal correlative," after Hohfeld: "The correlative duty is a duty owed by all others not to infringe the right. This duty exists even if the person infringing does not know of it." (quoting David Bainbridge, *Intellectual Property* 11 (5th ed. 2002)).

[23] 3 Bl. Comm. 43 n. y: "*contra fictionem non admittitur probatio: quid enim efficeret probatio veritatis, ubi fictio adversus veritatem fingit? Nam fictio nihil aliud est, quam legis adversus veritatem in re possibili ex justa causa dispositio*" (citing Gothofredus on Dig. 22.3). Blackstone's form of the maxim, "*semper subsistit aequitas*," is Coke's in *Mary Portington's Case*, 10 Co. Rep. 35b, 39b, 77 Eng. Rep. 976, 983 (C.P. 1613) ("Note reader, *semper in fictione juris subsistit æquitas*"), where the reporter's note cites 11 Co. 51a and Co. Litt. 150a (English Reports vol. 77, leaf 1014; the court at the report's head and in its text, leaves 1007 and 1009: Trin. 11 Jac., Coke "then Chief Justice of the Court of Common Pleas," the plea "entered Mich. 7 Jac. Regis in C. B.").

wrong," and, in his own note to the reader, that fictions of law "are to certain respects and purposes, and extend only to certain persons."[24] In *Liford's Case* in 1614 the maxim appears as "*in fictione juris semper æquitas existit*," in a fiction of law equity always exists, the reason a fiction that deemed a freehold continuous could not make a stranger who came in by title a wrongdoer.[25] In 1625, in *Sheffeild v. Ratcliffe*, Doddridge J. gave the definition and the bounds together from the bench of the King's Bench: a fiction of law is a disposition of the law against the truth, of a possible thing, from a just cause; and every fiction must be of a possible matter, "for the law imitates nature"; must be for the preservation of a ground of law, and "is never introduced but when necessary"; and must be no prejudice to any man, "for an act in law shall never be a wrong."[26] Coke's *Institutes* in 1628 state the rule in English for the owner of land: "a relation or fiction of Law shall never worke a Wrong or charge to a third person, but *In fictione iuris semper est Equitas*."[27] In a fiction of law there is always equity.

Three terms follow from the common law's statement, and the article uses them in this sense and no other. A *hypothetical* supposes something possible, for argument, and is tested by

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[24] *Butler and Baker's Case*, 3 Co. Rep. 25a, 29b–30a, 76 Eng. Rep. 684, 694–95 (K.B. 1591) (English Reports vol. 76, leaves 705–06): "relations are fictions in law, which will never do wrong" (29b); "the law will never make any fiction, but for necessity, and in avoidance of a mischief" (30a); and at 29b–30a, "Note, reader, not only in this case of relation, which is a fiction of law, but also in all other fictions of law, they are to certain respects and purposes, and extend only to certain persons."

[25] *Liford's Case*, 11 Co. Rep. 46b, 51a, 77 Eng. Rep. 1206, 1216 (K.B. 1614) (English Reports vol. 77, leaf 1249).

[26] *Sheffeild v. Ratcliffe*, 2 Rolle Rep. 501, 502, 81 Eng. Rep. 943 (K.B. Hil. 22 Jac. [1625]) (Doddridge, J.) (English Reports vol. 81, leaf 955; law-French): "*fictio juris est legis adversus veritatem ex rei possibili justa* [causa dispositio]"; "chescun fiction doit estre ex [re possibili], ceo ne serra d'impossible, car le ley imitate nature. 2. Doit estre pur preservation d'un ground del' ley, & pur ceo bien dit, quod est ex necessitate ceo nunquam introducitur nisi quando necessarium. 3. Ne doit estre prejudice al ascun home, car act in ley ne serra tort." The print's "ex ore repossibili" is the compositor's division of *ex re possibili*. The translations in the text are the article's. Bentham's counter-statement, as the American law dictionary carried it: John Bouvier, *A Law Dictionary, Adapted to the Constitution and Laws of the United States of America* (Philadelphia: T. & J. W. Johnson, 1839), vol. I, p. 406, left column, s.v. "Fiction of law": "Fiction is the resource of weakness, which, in order to obtain its object, assumes as a fact, what is known to be contrary to truth: when the legislator desires to accomplish his object, he needs not feign, he commands. Fictions of law owe their origin to the legislative usurpations of the bench. 4 Benth. Ev. 300."

[27] Edward Coke, *The First Part of the Institutes of the Lawes of England* fo. 150a (London 1628) (the first edition, leaf 317), the margin citing "Lib. 3. fo. 29. in Butler et Bakers case."

its consequences. A *lawful fiction* disposes against the truth, but only of a possible matter and from a cause, and works no injury. The chapter treated as one body to hold its land, the freehold deemed continuous in *Liford*, and the ship sued in rem are lawful fictions. A *fiction of the impossible* is the supposition the common law said it would never make. The *persona ficta* of the canonists and the rule of treatment of the Digest are lawful fictions in this sense. The article accepts them as the common law accepted them, as far as their purposes run. Bentham's objection, that a sovereign who can make a rule has no need of a fiction, "when the legislator desires to accomplish his object, he needs not feign, he commands," draws the same line from the other side: a disposition of a possible matter from a cause is a rule of treatment under another name, and only the supposition of the impossible is a fiction in the sense the maxims forbid.

The first bound draws the line between the article's two Parts. Part One's history is the history of a lawful fiction of the possible, and it runs as far as that fiction's purposes ran. Part Two begins where the Court supposed the impossible. It measures the Court's corporate "person," the being of Section I held as the holder of a right against its maker, against the same three bounds, and finds it failing each. It is not of a possible matter, since no name is born or naturalized, has a conscience or casts a vote. It is not necessary, since the grant already held the land and sued in one name without it. And it works the injury the maxim forbids: on the members whose consent it usurps, on the taxpayers who bear the burden it shifts, and on the persons it reached through the name. A fiction that works an injury has, by the common law's own rule, ceased to be a lawful fiction. The Court did not extend the fiction. It broke the law of fictions.

The third bound cannot be certified from the bench for a right of the name against the people at all. To every right the law assigns a correlative duty, owed by all others, not to infringe

it; whether a right in the name works no injury to any man is therefore a weighing of every right the people retained against it, and the Ninth Amendment forbids the enumeration that weighing would require. The common law's test could be run where it was made, by a court weighing one subject's injury under a sovereign who could answer; against the people's instrument it cannot be run, and a fiction whose test cannot be run is not settled law but accepted usage.

The strongest modern statement against the distinction this section draws is Holmes's, in a letter of 1923: he regarded corporate personality as a fiction, "but as I said when young, on the Massachusetts bench, the very meaning of the fiction is that you are to act as if it was true."[28] If that were the whole of the law of fictions, the Fourteenth Amendment's "person" would follow from the first "as if." It is not the whole, and the Court's own uses of the fiction say so, beginning with Holmes's for the Court seven years later, in a tax case in which the fiction served the State. Kentucky had taxed a corporation and taxed its shareholders on the full value of their shares; the shareholder called the corporation "a mischievous fiction" and claimed an interest in its property. "But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."[29] Holmes did not retreat from the letter; "The corporation is a person" is its doctrine on the bench. The bound is in the sentence beside it, "created by law with intent," and the "as if" ran for the sovereign's purpose and in the sovereign's favor: the State taxed both the name and the members, and the nonconductor kept the members' interest out of the name's property so that

[28] Letter of Oliver Wendell Holmes to I. Maurice Wormser, Dec. 19, 1923, quoted in Wormser, *supra* note 4, at 6.

[29] *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 24 (1930) (Holmes, J.).

both could be reached.[30] Stone, C.J., quoting the sentence in 1945, drew the consequence the article draws. "Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided."[31] The name acts only through natural persons, and to use the fiction's word as if it decided a constitutional question is to beg the question. In the Reports the fiction's "as if" ran for taxation and for service of process, the sovereign's own purposes, and never once as a right of the name against its maker.

Against the *persona ficta* stood Gierke's own theory, which the chapter records because it is the other figure the article will strike. The German fellowship, Maitland reports Gierke as holding, "is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own."[32] The "organism" is Spencer's metaphor of 1860 and the historical school's, and nobody observed a corporation's will. Maitland, translating it, declined to say whether it was true, and left the question as one "who can only guess": "if the reality of this will be granted by the philosopher, can he pause until even the so-called one-man-company has a real will really distinct from the several wills of the one man and his six humble associates?"[33] The article does not pause there either. It observes that the real-entity theory's object is a metaphor, and that a

[30] *Id.* at 23 ("There is no doubt that a State may tax a corporation and also tax the holders of its stock. … The owners are different and, although the appellant calls it a mischievous fiction, the property is different.").

[31] *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (Stone, C.J.).

[32] Maitland, *supra*, at xxvi.

[33] *Id.* at xi.

theory whose object is a metaphor cannot supply the pre-legal existence the theory needs; in the common law's terms, it is a supposition of the impossible, which the law imitates nature in refusing to make. Remove the organism and what is left is either the members and their agreements, which is the aggregate theory, or nothing distinct from them, which is the lawful fiction of the canonists. Real-entity collapses into one of its rivals as soon as the metaphor is asked to be literal.

E. The Sovereign of One Will: The King Who Could Answer, the People Who Consent Only by Article V, and the Fiction of No Redress

Every fiction has a maker, and the common law's lawful fiction of the corporation had one maker only. Blackstone states it in the chapter on corporations: the founder "in the strictest and original sense is the king alone, for he only can incorporate a society."[34] The forms of consent Section II.F recounts were four, and each was a form of his. The grant ran from a single will; it could be conditioned, answered and resumed by that will; and the bond between the corporation and its sovereign ran to a person who could hear a petition in his own name, reply in it, and be bound by the reply. Every incident of the English corporation presupposes that person. So does every doctrine the American Reports built on the English vocabulary after 1819: a grantee that holds rights "against" its grantor presupposes a grantor who can be sued, who can answer, and who can be bound in his own person by what his courts decide.

The Constitution has no such grantor. The sovereign of the United States is the Constitution the people ratified: the people are sovereign through that instrument and in no other way, and they act through the courts and legislatures it ordains. The instrument has no ears, eyes

[34] 1 Blackstone, *Commentaries* 468 (1765) (the first edition in facsimile, pdf 486); and see Section II.F (England) for the chapter's account of the franchise held of its grantor.

or mouth of its own, and what hears for it cannot consent for it: no organ the Constitution ordained can grant a corporation a right against the instrument that ordained it, because the only act that binds the people against the Constitution is the Constitution's amendment. The people grant corporate existence through their constitutions and general laws and keep its terms in the hands they reserved; a right in the name against the people they can grant in one way only, by Article V. A corporation chartered by a State is therefore bound by its grant to the people of that State on their standing terms, and the right it claims against the people's instrument runs to a sovereign that cannot be petitioned in person and cannot be bound except by its own amendment. The presupposition that the corporation answers to a sovereign of one will is the presupposition under every entry of the census in Section III, and the article names it here, once, so that Part Two can measure it entry by entry. It is the same presupposition the companion study finds under the immunity of the sovereign's officers, where the maxim that the king can do no wrong was carried into a republic whose sovereign cannot be wronged in person and cannot answer in person, and the two doctrines fail for one reason.[35]

The Constitution's own history states the incompatibility before the article does. American independence was the repudiation of a political will formed by one or by some. The colonists claimed, and Blackstone had written, that "no subject of England can be constrained to pay any aids or taxes, even for the defence of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament," and that in dealing with a subject's property the public "is now considered as an individual, treating with an individual for an exchange."[36] The Declaration charged the king with "imposing taxes on us

[35] The companion study, *supra* note 3. The maxim and its reason are at 1 Blackstone, *Commentaries* 237, quoted below at note 39.

[36] 1 Blackstone, *Commentaries* 135 (1765) (pdf 153).

without our consent."[37] The remedy was the whole instrument, speech, the Ninth and Tenth Amendments, the Fourteenth, Article V, and the Supremacy Clause binding them together; and Marshall named the structure that made the remedy work: "The only security against the abuse of this power, is found in the structure of the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation," because the means of the Union "are given by all, for the benefit of all, and upon theory, should be subjected to that government only which belongs to all."[38] A sovereign of many wills has its redress in its structure. A sovereign of one will has none against the sovereign in person, and must suppose that it needs none.

That supposition is the second fiction of the impossible, a sovereign who cannot be wronged, and it is the one that protects the first. Blackstone gives the reason for the maxim that "the king himself can do no wrong": "since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress."[39] Then he says what kind of statement that is. Oppressions that would subvert the constitution "are cases which the law will not, out of decency, suppose; being incapable of distrusting those, whom it has invested with any part of the supreme power; since such distrust would render the exercise of that power precarious and impracticable"; and "wherever the law expresses it's distrust of abuse

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[37] The Declaration of Independence para. 19 (U.S. 1776), in 1 Stat. 1, 2 (Richard Peters ed., 1845) (pdf 48).

[38] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 428–29 (1819) (in a star-paged reprint, the sentences following the star marks for 428 and 429; the clause "for the benefit of all" straddles the two pages).

[39] 1 Blackstone, *Commentaries* 237 (1765) (pdf 255). The sentence before it names the redress the maxim presupposes: because "a king cannot misuse his power, without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished," by "indictments, and parliamentary impeachments." The first fiction's form in the same books: *Case of the Duchy of Lancaster*, 1 Plowd. 212, 213, 75 Eng. Rep. 325, 326 (Serjeants' Inn, Mich. 4 Eliz. [1562]) (English Reports vol. 75, leaf 335): the king's "two bodies"; *Sir Thomas Wroth's Case*, 2 Plowd. 452, 457, 75 Eng. Rep. 678, 685 (Exch. Trin. 15 Eliz. [1573]) (leaf 694): the body politic "never dies," and the abbot and convent on the same leaf; 1 Blackstone, *Commentaries* 242 (1765) (pdf 260): "The king never dies."

of power, it always vests a superior coercive authority in some other hand to correct it."[40] That is a disposition of the law against the truth, from a cause named "decency," which is Godefroy's definition of a fiction, and on the next page Blackstone admits the redress the fiction hid: "the prudence of the times must provide new remedies upon new emergencies," and "whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it."[41] The redress was always the people. The judge's immunity is the same fiction of the impossible, with the redress named in the sentence that denies the proof,[42] carried into the American Reports in 1872 in the same form,[43] and the companion study measures it. Against a fiction no proof is admitted, and no redress is possible, are one disposition stated as a rule and as a reason. A fiction cannot survive proof, so it must forbid proof, and the forbidding is itself a fiction of the impossible, a wrong that no one can redress. The article will find the same self-protection at the birth of the corporate "person" in 1886, when the Court declined to hear argument on the question it then decided, and it is why the remedy of Part Two is measurement and not proof: proof against a fiction is excluded by the fiction's own law, and the only act that reaches it is to set it aside and read the text without it.[44] The redress against the corporate fiction of the impossible, like the redress against the king's, was always in the instrument: the people of the States reserved it in their constitutions, Congress holds it in the

[40] *Id.* at 237.

[41] *Id.* at 238 (pdf 256).

[42] 3 Blackstone, *Commentaries* 361 (1768) (pdf 373).

[43] *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 350 (1872); the fiction at 347, the redress at 350. The American carrying-over of the judge's fiction, from *Floyd v. Barker* through *Bradley* to the modern immunities, is the companion study's subject, *supra* note 3.

[44] Section III.E on *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886); Section VII.B and C on the test and the transplant; Section IX.C on the remedy.

power to condition the grant and the exception, the sovereign's oldest writ asks by what warrant the members exercise their power, and a court may decline to carry a word where no clause carries it.

The first fiction has the same birthplace as the second. Plowden's report of the Duchy of Lancaster case, in 1562, gives the king "two bodies, viz. a body natural, and a body politic," and the second "is a body that cannot be seen or handled, consisting of policy and government, and constituted for the direction of the people," "utterly void of infancy, and old age, and other natural defects and imbecilities"; in *Wroth's Case* eleven years later that body "is perpetual, and has perpetual continuance, and never dies," and an abbot and his convent, "all the corporation, which has perpetual continuance," are reasoned from it on the same leaf. Marshall's definition of 1819 is Plowden's body politic described: "cannot be seen or handled" is "invisible, intangible," "never dies" is "immortality," and "consisting of policy and government" answers to "existing only in contemplation of law." The corporation of the Reports is the king's body politic, carried into a republic that had abolished the king; what came over with it, and what stayed behind, Section III.A measures.

F. England: The King's Consent, the Franchise Held of Its Grantor, and Blackstone's Gloss on the Civil Law Corrected

In England the rule took the form the American colonies inherited, and Blackstone stated it at the opening of his chapter on corporations. The law has "found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality." These "are called bodies politic, bodies corporate (*corpora corporata*), or corporations," and they exist "in order to preserve entire and for ever those rights and

immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct."[45]

Three things again. The purpose is continuity, the incident the Roman law called the body's identity through change of members. The rights are "granted," to the individuals or to the body, by someone. And the body is, in the same sentence, a "body politic": the republic-as-model of the Digest, carried into the English books as a matter of ordinary nomenclature. Then the rule of creation: "with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given." The forms of consent were four, by prescription, by common law, by act of Parliament, by royal charter, and all four were forms of the sovereign's grant; prescription was a presumed charter, and the common-law corporations, the king and the parson, were the sovereign's own. The act itself, Blackstone says on the next page, "is usually performed by the king alone, in virtue of his royal prerogative," and its words are "*creamus, erigimus, fundamus, incorporamus*."[46] And when the chapter turns to ask who may visit a corporation, it names the grantor once more, in the sentence Section II.E has quoted for the one will: "The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society."[47] Consent, act and incorporation are one person's. The page then names a second founder for one class, the private endower of a college or hospital, whom the law calls the founder of the dotation, the gift of revenues, and not of the

[45] 1 William Blackstone, *Commentaries on the Laws of England* 455 (Oxford 1765), from the shelf's first-edition facsimile; long s normalized.

[46] *Id.* at 460–461.

[47] 1 William Blackstone, *Commentaries on the Laws of England* 468 (Oxford 1765), from the shelf's first-edition facsimile (pdf 486); long s normalized: "The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society: and in civil incorporations, such as mayor and commonalty, &c, where there are no possessions or endowments given to the body, there is no other founder but the king." The page then distinguishes, for eleemosynary foundations, the *fundatio incipiens*, the incorporation, "in which sense the king is the general founder of all colleges and hospitals," from the *fundatio perficiens*, the dotation, and closes with "the king being the sole founder of all civil corporations." Section IV.E carries 472 and 473, the condition the law annexes to every such grant and the four modes of dissolution; Section IX.C the writ of *quo warranto*.

body: the king is "the general founder of all colleges and hospitals" in the sense of the incorporation, and "the sole founder of all civil corporations." The chapter's account of the body runs from him; the endower's part is property, which Part Two finds in the persons' hands (Section IV.E).

Blackstone also records a contrast that the chapter must correct. "Corporations, by the civil law," he writes, "seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law."[48] The Digest's first fragment, which Blackstone's own note at the same page cites for the *illicitum collegium*, says the opposite: such bodies are not "conceded to everyone at large" and are "conceded in very few cases." Blackstone was reading the later Roman law of the *collegia tenuiorum*, the burial societies of the poor that a senatorial decree had licensed by class, and generalizing it. The chapter reads the Digest against the gloss, and notes the gloss as one source of the "voluntary association" vocabulary that would reappear in the Massachusetts Constitution of 1780 and in the Supreme Court's reasoning in 1888.

The Digest also has a text for free association, and it belongs on the same page, because the two fragments together are the two sets in one book. Gaius, on the Twelve Tables: "*Sodales sunt, qui eiusdem collegii sunt … his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant*," members of a college may make among themselves whatever pact they will, so long as nothing in public law is broken, a rule Gaius traced to a law of Solon.[49] That is the first set, what the members can make among themselves. To have a body,

[48] 1 Blackstone, *Commentaries* 460–461.

[49] Dig. 47.22.4 (Gaius, 4 *ad legem duodecim tabularum*), in 1 *Corpus Iuris Civilis* 789 (P. Krueger & T. Mommsen eds., Berlin, Weidmann; the stereotype edition on the shelf, pdf 905): "Sodales sunt, qui eiusdem collegii sunt: quam Graeci ἑταιρείαν vocant. his autem potestatem facit lex pactionem quam velint sibi ferre, dum ne quid ex publica lege corrumpant. sed haec lex videtur ex lege Solonis tralata esse." The translation in the body is the article's; the shelf's Latin text file agrees with the page.

corpus habere, to act under a name with common property and an agent, is what Gaius's fragment says is "conceded in very few cases," and that is the second, what binds strangers. On the same page of the Digest Marcian records the imperial mandates against the *collegia sodalicia*, the leave given to the poor to pay a monthly subscription so long as they meet once a month and no illicit college forms under the pretext, and the rule that an illicit college is dissolved and its common fund divided among its members: the sovereign governing the form, and the members' own money returning to them when the form is withdrawn.[50] Blackstone's gloss read the first fragment as if it were the second.

What the English rule did not do is as important as what it did. The chartered body was a franchise, a portion of the Crown's prerogative granted out to subjects, and a franchise is held of the grantor. It was held for a purpose as well. The "general duties of all bodies politic, considered in their corporate capacity," Blackstone writes, "may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder," and the King's Bench said the same of the end in 1789, when Ashhurst, J., described a town's corporation as "originally created for the public good, and not merely with a view to the private interest of individuals," and held that when it "can no longer perform those functions which is a condition incident to its incorporation," the Crown may grant it anew.[51] The

[50] Dig. 47.22.1 (Marcian, 3 *inst.*) (pdf 2759) ("Mandatis principalibus praecipitur praesidibus provinciarum, ne patiantur esse collegia sodalicia neve milites collegia in castris habeant. sed permittitur tenuioribus stipem menstruam conferre, dum tamen semel in mense coeant, ne sub praetextu huiusmodi illicitum collegium coeat"); Dig. 47.22.3 (Marcian, 2 *iud. publ.*) ("Collegia si qua fuerint illicita, mandatis et constitutionibus et senatus consultis dissolvuntur: sed permittitur eis, cum dissolvuntur, pecunias communes si quas habent dividere pecuniamque inter se partiri"), both on the same page, 1 *Corpus Iuris Civilis* 789. Section II.B's *conceditur* fragment is Dig. 3.4.1 pr.

[51] 1 Bl. Comm. 467 (pdf 485): "THE general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder." *Rex v. Pasmore*, 3 T.R. 199, 242–243 (K.B. 1789), 100 Eng. Rep. 531, 554 (Ashhurst, J.), from the shelf's English Reports cut (pdf 24; a star-paged reprint, each sentence pinned at the last star mark before it, the first on 242, the second after the [243] mark): "The principal end is for preserving good order and government within the limits of the towns in which they are established: they are not merely temporary institutions, but are intended to have perpetual succession"; and, after the [243] mark, "as it

grant was bounded by the design that made it, which is the bound Section II.D states of every lawful fiction, here stated of the English franchise in the books the American courts inherited. Nothing in Blackstone's chapter attributes to a corporation any right against the king who consented to it. The body politic within the realm was, as Hobbes had put it a century earlier, a "system subordinate," lawful only by the sovereign's authority and for that reason not a rival to it.[52] The whole point of requiring the king's consent was to keep "lesser commonwealths" subordinate to the greater one. The American law would inherit the consent and, for one class of corporation, forget the subordination.

G. America: The Colony as Corporation, the Convention's Refusal, and the States' Grant in the People's Words

1. The Colonies Were Corporations Before They Were States

The American States were corporations before they were States. The Virginia Company and the Massachusetts Bay Company were chartered trading corporations whose charters became the colony's frame of government; Connecticut and Rhode Island governed under their royal charters of 1662 and 1663 until 1818 and 1842 respectively, long after they had become States of the Union. The body politic and the body corporate were, in the colonial charters, literally one

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was originally created for the public good, and not merely with a view to the private interest of individuals, whenever it can no longer perform those functions which is a condition incident to its incorporation, the Crown ought not, for the sake of a few individuals, to be restrained from exercising its prerogative in granting a new constitution for the benefit of the inhabitants of the place, whose interest the Crown had in view in the original incorporation." Lord Kenyon's opinion in the same case (241; 553) is quoted in Section IV.E. "A condition incident to its incorporation" is the King's Bench's phrase for what Blackstone's 473 calls "the condition upon which it was incorporated," the common law's own name for what the removal test detects (Section VII).

[52] Thomas Hobbes, *Leviathan* (London 1651), ch. 22, "Of Systemes Subject, Politicall, and Private," at 115–116 (1651 pagination): "Of Systemes subordinate, some are Politicall and some Private. Politicall (otherwise Called Bodies Politique, and Persons in Law,) are those, which are made by authority from the Soveraign Power of the Common-wealth"; ch. 29, at 174: corporations "are as it were many lesser Common-wealths in the bowels of a greater, like wormes in the entrayles of a naturall man." From the shelf's mirror of the Clarendon reprint of the 1651 edition (Oxford 1909), pp. 155–156, 257.

document. When the Massachusetts Constitution of 1780 defined the State, it did so in the vocabulary of the corporation: "The body politic is formed by a voluntary association of individuals: it is a social compact."[53] The identity between corporation and body politic that the Digest had drawn by analogy and Blackstone by nomenclature was, in America, the founding fact.

Two consequences follow for everything after. The first is that when the colonies became States, the Crown's power to consent to corporations passed to them as successors to the Crown's prerogative, and the people of each State then gave themselves a constitution, in convention or by ratification, or kept a charter as one, vesting legislative power in a legislature. The state corporation therefore rests, from the beginning, on a grant by the people of the State. The second is that the American law inherited, with the power, the fear. The chartered body was a "lesser commonwealth," and the Jacksonian objection to special charters, to banks, and to monopolies was Hobbes's objection in a republican idiom: an *imperium in imperio*, a body politic within the body politic, holding privileges the people had not granted to everyone.

2. The Convention Asked for the Power and Refused It, 18 August and 14 September 1787

The federal Constitution grants no power to create corporations, and the omission was not an oversight. The Convention considered the power twice and declined it both times.

On 18 August 1787 Madison submitted a list of additional powers to be referred to the Committee of Detail, among them a power "To grant charters of incorporation in cases where the public good may require them, and the authority of a single State may be incompetent";

[53] Mass. Const. of 1780, pmbl., in 3 Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 1889 (Washington: GPO, 1909) (vol. III, pdf 635): "The body politic is formed by a voluntary association of individuals: it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good."

Pinckney's list of the same day included "To grant charters of incorporation."[54] The Committee's report did not return either. On 14 September, three days before the signing, Franklin moved to add to the enumerated powers "a power to provide for cutting canals where deemed necessary," and Madison, Farrand's notes record, "suggested an enlargement of the motion into a power 'to grant charters of incorporation where the interest of the U. S. might require & the legislative provisions of individual States may be incompetent.'" Randolph seconded. "Mr King thought the power unnecessary."[55]

The next page gives the debate. King: "The States will be prejudiced and divided into parties by it— In Philada. & New York, It will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies." Wilson answered that mercantile monopolies "are already included in the power to regulate trade." Mason "was for limiting the power to the single case of Canals. He was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson." The motion was narrowed to canals alone and lost, three States to eight. "The other part fell of course, as including the power rejected."[56] McHenry's notes of the same day are shorter: "moved by Virginia To empower Congress to grant charters of incorporation in cases where the U. S. may require them and where the objects of them cannot be obtained by a State. Negatived."[57]

The record settles three things. The power was asked for, in terms, by the Convention's most careful member, and declined: the motion was narrowed to canals and lost, three States to

[54] 2 Max Farrand, ed., *The Records of the Federal Convention of 1787*, at 321–325 (New Haven 1911) (Journal and Madison, Saturday 18 August), from the boarded copy.

[55] *Id.* at 615 (Madison, Friday 14 September).

[56] *Id.* at 616.

[57] *Id.* at 620 (McHenry).

eight, and the rest of it fell with the vote. The reasons given were the Bank and "monopolies of every sort," that is, the fear of the lesser commonwealth. And Mason's remark that the power was not "already implied by the Constitution" is Mason's answer, recorded three days before the signing, to the argument the Court would accept thirty-two years later. The sequel is the article's to tell before an adversary tells it: the First Congress chartered the Bank in 1791 over the same objection, and *McCulloch* records both that the bill "did not steal upon an unsuspecting legislature, and pass unobserved" and, on the leaf before, that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this."[58]

3. The Federal Power by Implication: McCulloch Stated and Not Relied On, and the Premise It Supplies

In *McCulloch v. Maryland* the Court held that Congress could incorporate a bank, and it did so by denying that incorporation was a power at all. "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."[59] The corporation was a means, and the Necessary and Proper Clause supplied the means to the ends enumerated. The chapter states this honestly and does not rest on the contrary. If *McCulloch*'s implication is rejected, every federal corporation from the Bank to the present rests on nothing the people granted; if it is accepted, the federal corporation rests on an implication the

[58] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, *401–*402 (1819), from the Banks reprint (the leaf headed 400, cut pdf 39, carries the *401 and *402 marks; "The power now contested was exercised by the first congress elected under the present constitution" and the usurpation sentence follow the *401 mark, the bill sentence follows *402). The chartering act is the First Congress's of February 1791.

[59] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 410–411 (1819).

Convention's own members said was not there. The article's thesis does not turn on which. It turns on what any corporation, however created, holds.

But *McCulloch* is cited here for a second reason, because in the same opinion Marshall stated the premise on which the whole of this article rests. The Constitution's authority, he wrote, derives from the conventions of the people: "The government proceeds directly from the people; is 'ordained and established,' in the name of the people; and is declared to be ordained, 'in order to form a more perfect union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity.'"[60] The people are sovereign through the Constitution they ratified, the instrument is theirs, and the instrument's purpose is the list in the Preamble, ending in the blessings of liberty secured to the people and their posterity. Justice Wilson had said it in 1793: "To the Constitution of the United States the term SOVEREIGN, is totally unknown," because the people who ordained it, "serenely conscious of the fact," had no need to announce themselves as what they were.[61] Chief Justice Jay in the same case: "Here we see the people acting as sovereigns of the whole country; and in the language of sovereignty, establishing a Constitution by which it was their will, that the State Governments should be bound."[62] And the Court said it of a corporate charter, in 1880, in words this article could not improve: "the power of governing is a trust committed by the people to the government, no part of which can be granted away." The people, "in their sovereign capacity, have established their agencies," which govern within their authority while in power, "but they cannot give away nor

[60] *Id.* at 403–404.

[61] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.) (the cut's leaf 36, headed "454 CASES ruled and adjudged in the"; the 1793 print's text layer does not carry the sentence).

[62] *Id.* at 471 (Jay, C.J.).

sell the discretion of those that are to come after them."[63] The premise on which Part Two measures the Court's grants to the name was stated by the Court itself, in a case about what a legislature may promise a name, and Section IV.E returns to the page. A grant, in this order, is an act of the people, through the federal Constitution, a state constitution, or a legislature acting within the powers a constitution gave it. An act of a court is not an act of the people. That is the premise, and it is the Court's.

4. The States' Grant in the People's Words: Existence Under General Laws, the Condition in the Same Section, the Definition by What Individuals Lack

The state corporation's grant is not a matter of inference. The people of the States wrote it down, and from the 1840s onward they wrote it into their constitutions in nearly uniform words, together with the condition.

Michigan, 1850, article XV, section 1: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All laws passed pursuant to this section may be amended, altered or repealed."[64] Alabama, 1867, article XIII, section 1, in

[63] *Stone v. Mississippi*, 101 U.S. 814, 820 (1880) (Waite, C.J., for the Court), from the shelf's cut (pdf 7), 819 (pdf 6) beside it: "But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must 'vary with varying circumstances.'" The page continues with the sentence Section IV.E quotes, that the people's agencies "may create corporations, and give them, so to speak, a limited citizenship," subject to the rules "from time to time … ordained and established for the preservation of health and morality"; and 819 holds that "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." The case was a lottery company's charter measured against the people's constitution of 1868, and the premise is stated there of the grantor and the grant. The page states the trust sentence inside the limitation Marshall put on *Dartmouth* (4 Wheat. 629, quoted at 820: the framers "did not intend to restrain States in the regulation of their civil institutions, adopted for internal government"), concedes that the clause has "protected a corporation in its charter exemptions from taxation," and closes with the line between the two sets: "The contracts which the Constitution protects are those that relate to property rights, not governmental." What is property is the holders' and what is governmental the people's (Section IV.E); the article takes the sentence with its limit.

[64] Mich. Const. of 1850, art. XV, § 1, in 4 Francis Newton Thorpe, ed., *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 1964 (Washington: GPO, 1909) (vol. IV, pdf 48).

nearly the same words, with "all general laws, and special acts passed pursuant to this section" for Michigan's "all laws."[65] Illinois, 1848: "Corporations, not possessing banking powers or privileges, may be formed under general laws, but shall not be created by special acts, except for municipal purposes, and in cases where, in the judgment of the general assembly, the objects of the corporation cannot be attained under general laws"; Wisconsin, the same year, in the same frame, with the legislature as the judge of the exception.[66] Illinois, 1870: "No corporation shall be created by special laws, or its charter extended, changed or amended, except those for charitable, educational, penal or reformatory purposes, which are to be and remain under the patronage and control of the State, but the general assembly shall provide, by general laws, for the organization of all corporations hereafter to be created."[67] West Virginia, 1872: "The Legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate, but no corporation shall be created by special law."[68] And Virginia, 1902, defining the thing granted: "the term 'corporation' or 'company' shall include all trusts, associations and joint stock companies having any powers or

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Thorpe prints the section as amended in 1862 (his note *b*); in the amended text a third sentence, on a single bank with branches, follows the two quoted.

[65] Ala. Const. of 1867, art. XIII, § 1, in 1 Thorpe, *supra*, at 150 (vol. I, pdf 192): "Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws, and special acts passed pursuant to this section, may be altered, amended, or repealed."

[66] Ill. Const. of 1848, art. X, § 1, in 2 Thorpe, *supra*, at 1005 (vol. II, pdf 365; Thorpe's running head over the 1848 constitution's pages misprints "Illinois—1818"); Wis. Const. of 1848, art. XI, § 1, in 7 Thorpe, *supra*, at 4093 (vol. VII, pdf 317): "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes, and in cases where in the judgment of the Legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts, enacted under the provisions of this section, may be altered or repealed by the Legislature at any time after their passage."

[67] Ill. Const. of 1870, art. XI, § 1, in 2 Thorpe, *supra*, at 1041 (vol. II, pdf 401).

[68] W. Va. Const. of 1872, art. XI, § 1, in 7 Thorpe, *supra*, at 4058 (vol. VII, pdf 282). The section ends with a proviso reserving special laws for a canal from the Chesapeake to the Ohio.

privileges not possessed by individuals or unlimited partnerships, and exclude all municipal corporations and public institutions owned or controlled by the State."[69]

The six are specimens. The census of Thorpe's seven volumes, which the article carries as Appendix A, counts seventy-three constitutions and amendments of forty-two States, from Delaware's of 1831 to Oklahoma's of 1907, that speak to how a corporation comes to exist.[70] They fall into three forms, in sequence. The first kept the special charter and fenced it with a two-thirds vote: Delaware in 1831, Michigan in 1835, Florida in 1838, Texas in 1845. Delaware's people wrote the condition into the same sentence, "with a reserved power of revocation by the legislature," and gave every charter twenty years. The second is the form the six specimens show, and Louisiana wrote it first, in 1845, a year before New York: corporations "shall not be created in this State by special laws, except for political or municipal purposes, but the legislature shall provide, by general laws, for the organization of all other corporations, except corporations with banking or discounting privileges, the creation of which is prohibited." Thirty-three constitutions took that form between 1845 and 1894. The third, from Iowa's of 1857 and Illinois's of 1870 onward and in twenty-eight constitutions, forbids the special charter outright and commands the legislature to provide by general laws for "the organization of all corporations hereafter to be created"; Tennessee's people gave the section its title, "corporations only to be provided for by general laws." Sixty-one of the seventy-three are in the second or third

[69] Va. Const. of 1902, art. XII, § 153, in 7 Thorpe, *supra*, at 3936 (vol. VII, pdf 160). Section 154 of the same article: "The creation of corporations, and the extension and amendment of charters (whether heretofore or hereafter granted), shall be provided for by general laws, and no charter shall be granted, amended or extended by special act."

[70] The census, each clause at its Thorpe page, is Appendix A (seventy-three entries, built from Thorpe, vols. I–VII, seventeen of them verified against Thorpe's page). The clauses quoted in this paragraph: Del. Const. of 1831, art. II, § 17, in 1 Thorpe, *supra*, at 586; La. Const. of 1845, art. 123, in 3 Thorpe, *supra*, at 1405; Tenn. Const. of 1870, art. XI, § 8, in 6 Thorpe, *supra*, at 3468; Iowa Const. of 1857, art. VIII, § 1, in 2 Thorpe, *supra*, at 1149; N.Y. Const. of 1846, art. VIII, § 3, in 5 Thorpe, *supra*, at 2669; Miss. Const. of 1890, § 199, in 4 Thorpe, *supra*, at 2114; Okla. Const. of 1907, art. IX, § 1, in 7 Thorpe, *supra*, at 4300.

form. Fifty-two reserve, in terms, a power over the laws or the charters themselves, counted by the rule Appendix A's head note states. And twenty, beginning with New York's of 1846 and ending with Oklahoma's of 1907, define the thing granted, in words that vary by a syllable: "all associations and joint-stock companies having any of the powers or privileges of corporations not possessed by individuals or partnerships." Mississippi's people in 1890 put it in fewer words: companies "for pecuniary gain, having privileges not possessed by individuals or partnerships." Not one of the seventy-three grants the name anything against the State.

The people's grant has a shape, and the shape is the rule this chapter has traced from the Digest. The inference should be stated exactly, because an adversary will say that a state legislature's power is plenary and needs no clause, and that clauses of this kind regulate the mode and condition of a power already held. Both are true, and neither reaches the point. The plenary power is itself the people's grant, made once: when the colonies became States the Crown's power passed to them, and the people of each State then gave themselves a constitution, in convention or by ratification, or kept a charter as one, as this section began by saying, vesting legislative power in a legislature. The vesting is the grant, and the seventy-three clauses are the people's statement of the mode and the condition of a power they had vested, not its sole source; what they add to the vesting is the people's own description of the thing their legislature may permit. The grant is of *existence under general laws*: the people permit the legislature to permit, and withdraw the special charter that had been the lesser commonwealth's instrument. The grant carries its *condition in the same section*: the laws "may be altered, amended, or repealed," and fifty-two of the seventy-three reserve the power in terms. The grant is defined by *what individuals lack*: Virginia's people called a corporation whatever has "powers or privileges not possessed by individuals or unlimited partnerships," which is to say the incidents, and nothing

else; the definition is the people of a State conceding the whole of this Part, that everything the name has beyond a natural person is the grant's.[71] And the grant confers *no right against the grantor*: not one constitution in the census grants the name anything as against the State, several forbid the legislature to extend a charter once given, and every clause that speaks runs in one direction, the people over the name. The Court had read the grant the same way in 1869, before it stopped reading, in the sentence Section IV.C quotes whole: a grant of corporate existence runs "to the corporators," confers "special privileges," and gives the single name and the exemption from individual liability.[72] That is the rule, in the Court's words and the people's, and it is the whole of what the sovereign gave.

5. The Two Sentences of 1809 and 1819: Marshall States the Rule, Then Clothes It and Hedges the Clothing

Part One has traced one rule through its settings, and it is the same rule in each. The Digest permitted a body to act under a name and attached two incidents to the permission, the separation of the body's obligations from the members' and the body's identity through every change of them, and it stated both as rules of the permission and not as properties of a being. The canonists' *persona ficta* was a rule of treatment, and the common law bounded every fiction of law by three

[71] Virginia's definition is the article's friend, and Section VI.I uses it so: everything the name has beyond a natural person is the grant's, the second set and nothing else. A functional parallel is recorded here and is not asserted as a holding. Article I, § 10, cl. 1, the sentence that excludes the States from the national instrument ("No State shall … coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any … Law impairing the Obligation of Contracts"), ends "or grant any Title of Nobility," and § 9, cl. 8 forbids the United States the same (the Literal Print, p. 9, pdf 6). A title of nobility is a rank conferred by the sovereign on one or some, carrying privileges unavailable to the natural person who holds no title. The designation "a corporation" is a rank of that kind in function: conferred by grant, it carries "powers or privileges not possessed by individuals," among them, as Section VI.I shows, a use of the people's national instrument for the name's own ends where a natural person has none. The article cites no decision reading the Nobility Clauses toward corporate privilege, and does not say that they reach it. It records that the Founders' explicit prohibition on privilege by grant to one or some, laid on the United States in § 9 and on the States in § 10, sits in the States' case in the sentence that excludes them from the national instrument and withdraws from them the power to impair the obligation of contracts (Section IV.E), and that the argument of Section VI.I stands on *McCulloch* and Article I, §§ 8 and 10, independently of the parallel.

[72] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869).

conditions, that it be of a possible matter, for a necessity, and work no injury to any man. The English books made the king's consent absolutely necessary and the franchise a thing held of its grantor, and the king who granted could answer for the grant and be bound in his own person. The colonies came to independence as corporations; the Convention refused a federal power to incorporate on 18 August and again on 14 September 1787; and the people of the States granted corporate existence under general laws, reserved in the same section the power to alter, amend or repeal, and defined the thing granted by what individuals lack. At every step the corporation is a sovereign's permission to act under a name, and the permission is a rule the sovereign made. Nothing in the history gives the name a right against its grantor, and the sovereign of the United States, the Constitution the people ratified, can be bound against the people only by its own amendment.

The chapter closes where Part Two begins. Marshall stated the rule in 1809, in *Deveaux*, and clothed it in 1819, in *Dartmouth College*, hedging the clothing with "if the expression may be allowed"; Sections III.B and III.C read the two sentences, and the hedge is Part Two's first case.

PART TWO. THE RIGHTS: WHAT THE RULE CAN CONFER, AND THE TEST FOR A HOLDING THAT GRANTED MORE

Part Two asks what the rule of Part One can confer, and measures what the Court conferred. It opens with the census, the record of every term on which a corporate constitutional right rests, read in the order of its entry (Section III); sorts everything a corporation might claim into two sets and finds no third (Section IV); takes the derivative theory to the edge where no member's consent can be found (Section V); runs *Citizens United* through the two sets (Section VI); derives the test, that a holding resting on a coined term alone supersedes Article V, and refines it (Section VII); runs the test on a judgment the author would keep (Section VIII); and states the scope of the test and the remedy, which is measurement (Section IX). Its first case is the hedge of 1819, "if the expression may be allowed," and the citations that dropped it.

III. The Coinage Census: Every Term on Which a Corporate Constitutional Right Rests Entered the Reports as a Figure of Speech or a Transplant

This section is the evidence. It reads every term on which a corporate constitutional right has been made to rest, in the order the term entered the Reports, and asks of each how it entered, whether it was argued, and what was afterwards hung on it. The answers fill the table in Section III.J, and the table is what the rest of Part Two measures.

A. Coinage and Transplant: The Two Things a Term Can Be, and the Five Questions Put to Each

A term of art is a word the law has agreed to use in a fixed sense. A coinage is a word someone made up. The difference between them is not in the word but in what stands behind it: a term of

art has a holding, a statute, or a settled usage that fixes its meaning, and a coinage has an author. The claim of this Section is that every term on which a corporate constitutional right rests entered the constitutional Reports as one of two things, neither of which is a term of art: a coinage, a figure of speech offered by a judge or a reporter to describe a result, or a transplant, a word settled in another field and carried into this one with nothing to fix it here; and that each was afterwards cited as though it were a term of art fixed by a holding. The claim is documentary. It is proved or disproved by reading the pages in order.

The second of the two, the transplant, is the one the objection to this census will press, and the entry of the table that carries the modern law belongs to it. A transplant is a term settled in one field of the law and carried into another without a holding, a statute, or an argument to carry it.[73] The word "person," applied to a corporation, was not a coinage in 1886. It was settled usage older than the Republic.[74] The English books divide persons into natural and artificial, and the artificial person is the corporation;[75] the Reports' own vocabulary from 1809 is "artificial

[73] The word is Alan Watson's, *Legal Transplants: An Approach to Comparative Law* (1974) (cite-only; not on the shelf), where it names a rule carried from one jurisdiction's law into another's. It is used here for a word carried between fields of one system, from the law of corporations into the construction of the people's instrument. The attributes and their English pages: 1 Blackstone, *Commentaries* 242 (1765) (pdf 260) ("king to all intents and purposes"), 243 (pdf 261) ("expressly, or by evident consequence"), 469 (pdf 487) ("the visitor of all civil corporations"), 388–389 (pdf 406–407) (a dignity by patent enures "only to the grantee for life" without "words to direct the inheritance"); *Letson*, 2 How. at 558; *Dartmouth*, 4 Wheat. at 636.

[74] The period's own dictionary shows the same division. Webster's first sense of "free" is "Being at liberty; not being under necessity or restraint, physical or moral; a word of general application to the body, the will or mind, and to corporations," and an adversary will read the last three words as a term of art. The same leaves answer. The corporation of 1828 is "A body politic or corporate, formed and authorized by law to act as a single person … preserved by a succession of members, either forever, or till the corporation is dissolved by the power that formed it, by the death of all its members, by surrender of its charter or franchises, or by forfeiture"; what such a body is free *of* is the franchise, sense 16, "Invested with franchises; enjoying certain immunities; with of; as a man free of the city of London," and "freedom" in its second sense, "Particular privileges; franchise; immunity; as the freedom of a city"; and the freedom that is "not subject to the arbitrary will of a sovereign or lord" is a people's, "as a free state, nation or people" (senses 2–3). Noah Webster, *An American Dictionary of the English Language* (New York: S. Converse, 1828), vol. I, s.v. "Free" and "Freedom" (leaf 800) and s.v. "Corporation" (leaf 486, citing Blackstone); the leaf convention is Section VIII.E's.

[75] 1 William Blackstone, *Commentaries on the Laws of England* 119 (Oxford, Clarendon Press, 1765) (Book I, ch. 1, "Of the Absolute Rights of Individuals"; the first edition in facsimile, pdf 137; long s normalized): "Persons also are divided by the law into either natural persons, or artificial. Natural persons are such as the God of

being," and *Paul v. Virginia* in 1869 wrote "artificial persons created by the legislature" to say what a citizen is not. But what the usage had settled was a treatment and not a holder. Part One is the record of it: a body of natural persons may hold, sue, and succeed under one name, for the purposes the grant allows, and the name holds nothing against its grantor. What the transplant carried was the king's body politic of Section II.E, and what it left behind was every check the English law kept on it. Blackstone's heir is, at the instant of the demise, "king to all intents and purposes," and the prerogative runs "unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary"; *Letson* deemed the corporation a person "to all intents and purposes," and *Dartmouth* gave it its properties "either expressly, or as incidental to its very existence." The same king was "the visitor of all civil corporations," his grants were construed by their words, and he could be petitioned and could answer; none of the three came over with the formula. *Deveaux*'s sentence in Section III.B states the treatment in terms: the name "is considered as an inhabitant, when the general spirit and purpose of the law requires it."

A term of art carries its meaning with it. When "person" was carried from the law of corporations, where it fixed how a name is treated, into the Fourteenth Amendment, where it fixes who holds rights against the States, nothing came with it but the word. No holding carried it; Section III.E shows there is none. No statute carried it. The one statute the objection can cite, Congress's Dictionary Act, governs Acts of Congress and not the people's instrument, its first form is three years younger than the Amendment, and it is the people's own rule of treatment for the name, which Section V.A reads from the Act of 1871 as the Court quotes it.[76] The Court that

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nature formed us: artificial are such as created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic."

[76] 1 U.S.C. § 1, as the Court quotes it in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–708 (2014): the Dictionary Act is consulted "[i]n determining the meaning of any Act of Congress, unless the context

relies on it says the word has two senses, not one: "The term 'person' sometimes encompasses artificial persons (as the Dictionary Act instructs), and it sometimes is limited to natural persons."[77] Which sense the Amendment carries is the question a transplant leaves unasked. No argument carried it: the Court "does not wish to hear argument on the question." A coinage is a word made up. A transplant is a meaning made up for a word that already existed, and it is the harder of the two to see, because the word arrives looking settled. The census treats the two alike, and the test of Section VII runs on both.

The method is the one the author's book, *The Subject's Unanswered Plea: A Restorative and Comparative History of Immunity* (book manuscript, 2026), applied to citations and applies here to vocabulary.[78] For each term, five questions. Where did it enter the Reports, and from what source outside them? Who introduced it, and was the introduction argued, assumed, or hedged? Did the hedge survive the next citation? What was afterwards hung on the term? And, the question the rest of Part Two answers, does the holding survive the term's removal? The first four are answered below, term by term, in the order of their appearance. The result is a table, and the table is the argument.

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indicates otherwise," and under it "the wor[d] 'person' . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals" (the quotation straddles 707–708). The Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, is quoted in Section V.A as the Court quotes it in *Monell v. Department of Social Services*, 436 U.S. 658, 688 (1978). The present words are the Act of July 30, 1947, ch. 388, 61 Stat. 633, as the section's credit line reads at the Office of the Law Revision Counsel's Title 1 (release point 119-111, leaf 3).

[77] *Hobby Lobby*, 573 U.S. at 708; the page also quotes *FCC v. AT&T Inc.*, 562 U.S. 397, 404–405 (2011): "We have no doubt that 'person,' in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear."

[78] *The Subject's Unanswered Plea*, book manuscript, Method § C (the source-text audit; the verb test; the strategic paraphrase).

B. 1809: "Artificial Being," "Mere Legal Entity," and the Road Not Taken in Deveaux

The vocabulary enters the Reports in a single sentence of Chief Justice Marshall's, in *Bank of the United States v. Deveaux*, ten years before *Dartmouth College*. One of its words is older, and its two earlier appearances are both limits. Justice Iredell, dissenting in *Chisholm v. Georgia* in 1793, listed the differences between a State and a corporation and began: "A corporation is a mere creature of the king, or of parliament; very rarely, of the latter; most usually, of the former only." It owes "its existence, its name, and its laws … to the authority which create it," where a State "derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people."[79] Marshall used the word first for the Court in 1804, in *Head & Amory v. Providence Insurance Co.*, of an insurance company "which, in its corporate capacity, is the mere creature of the act to which it owes its existence," and drew from the figure a limit and not a nature: the company "may correctly be said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes."[80] Two pages on he said the same thing without the figure: "with these bodies which have only a legal existence, it is otherwise: the act of incorporation is to them 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, or the instrument no more creates a contract than if the body had never been incorporated."[81] A

[79] *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 448 (1793) (Iredell, J., dissenting), from the 1882 Banks reprint (the leaves headed 446 and 448; the first sentence falls after the *448 mark). At 447–448 Iredell takes "corporations" in "its largest sense": "Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense, 'a corporation.' The king, accordingly, in England, is called a corporation. 10 Co. 29 *b*." In the Dallas print on the shelf (cut pdf 29–30, the leaves headed 447 and 448, displayed 2026-10-14) the words are "to the authority which create it," as quoted; "create" is the print's.

[80] *Head & Amory v. Providence Insurance Co.*, 6 U.S. (2 Cranch) 127, 167 (1804) (Marshall, C.J.), from the 1882 Banks reprint (the leaf headed 166; the sentence falls after the *167 mark). The reporter's headnote at 127 restates it: "It is the mere creature of law, and derives all its powers from the act of incorporation."

[81] *Id.* at 169 (the leaf headed 167, after the *169 mark).

body that is what its act made it, and no more, is the rule of this article's Part One. The vocabulary that would afterwards be used to give the body more begins in 1809. The question was whether a corporation could sue in the federal courts under the Diversity Clause, which speaks of "citizens." Marshall answered:

> 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.[82]

Three terms arrive together: "artificial being," "legal entity," and the adjective that governs them both, "mere." The sentence does not argue for the being; it describes one. And the sentence's second half states, in its first form, the theory that will later be called derivative: the corporation is not a citizen, and the suit proceeds if at all because "the rights of the members … can be exercised in their corporate name." The right is the members'. The name is the means.

The next sentence is the road the law did not take. "If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union."[83] Here Marshall offers the alternative to the being: the corporation "considered as a mere faculty," a capacity, or as "a company of individuals" who "may use a legal name." On the next leaf he says where the being came from. "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."[84] The "creature" is an import, and Marshall names the shipment. The bill of lading survives. In *The Case of Sutton's Hospital*

[82] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809), from the 1882 Banks reprint (leaf carrying *86).

[83] *Id.* at 87.

[84] *Id.* at 88.

in 1612, Coke wrote that "a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law," and in the next breath that such bodies "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney": invisibility and immortality were stated as a rule of how the law treats a body of men, with the disabilities the rule carries, and not as a being with properties.[85] What 1809 took from the English books was Coke's rule of treatment; what 1819 and 1889 hung on it was their own. Then, applying Coke's gloss on a statute of Henry VIII that taxed "inhabitants," he states the mechanism by which the law treats a name as a person: the tax "is imposed on the corporation itself, and consequently, this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it."[86]

Count the coinages on two leaves: artificial being, legal entity, creature of the law, faculty, legal name, ideal existence. Six words for one thing, and the Chief Justice using them as a writer tries phrases, not as a court fixes a term. The one that would carry everything afterward, "entity," is used here to deny the corporation a status, not to confer one. And the one sentence that states a rule rather than a picture is the last: the name is "considered as" a person "when the general spirit and purpose of the law requires it." That is not a being. It is a rule of treatment, and it is the position this article takes.

The next citations fixed the figures in the order the sentence had offered them. In 1823, in *Society for the Propagation of the Gospel v. New Haven*, Justice Washington cited *Deveaux* for

[85] *The Case of Sutton's Hospital*, 10 Co. Rep. 1a, 32b (K.B. 1612), 77 Eng. Rep. 937, 973, from the English Reports cut (pdf 37, the leaf headed "10 CO. REP. 32 b." and "973"; the "[32 b]" mark stands above the passage). The two quotations are consecutive sentences: "… for a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law; and therefore … a dean and chapter cannot have predecessor nor successor … They cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney." *Deveaux*'s "invisible, intangible and incorporeal" and *Dartmouth*'s "existing only in contemplation of law" and "immortality" are Coke's words carried across.

[86] *Deveaux*, 9 U.S. at 89.

what "was stated by the Court, that a corporation, considered as a mere legal entity, is not a citizen," and applied the statement to alienage.[87] "Entity" entered its second opinion as something the Court had stated, its denial of status intact. The year after, Marshall reused the figure himself, in *Osborn v. Bank of the United States*, to hold that every suit by the Bank arose under federal law: "This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependant on the same law."[88] The figure now did work, and did it without a citation; counsel in the same case had already quoted *Dartmouth*'s definition back to the Court as the Court's own.[89] The road not taken was cited once, in 1844, and cited to close it. In *Louisville Railroad v. Letson* Justice Wayne took *Deveaux*'s sentence that "this ideal existence is considered as an inhabitant, when the general spirit and purposes of the law requires it," asked "If it be so for the purposes of taxation, why is it not so for the purposes of a suit in the Circuit Court of the United States, when the plaintiff has the proper residence?" and confessed the Court's "inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought."[90] No opinion between 1809 and 1844

[87] *Society for the Propagation of the Gospel in Foreign Parts v. Town of New Haven*, 21 U.S. (8 Wheat.) 464, 491 (1823) (Washington, J.).

[88] *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 823 (1824) ("dependant" is the page's). The same page: "The charter of incorporation not only creates it, but gives it every faculty which it possesses."

[89] *Id.* at 767 (argument for the appellants), on the volume's text layer.

[90] *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 559 (1844) (Wayne, J.): on the reprint leaf headed 558 the passage falls after the *559 mark. Page 558 carries the Court's quotations of *Dartmouth*'s "like one immortal being" and *Providence Bank*'s sentence on "individuality." Counsel had quoted the "mere faculty … legal name" passage at 498.

had cited the faculty, the legal name, or the ideal existence at all;[91] the one that did made the rule of treatment a quality of the thing treated, and made the corporation a citizen. The confession is the proof. In the system of positive law Blackstone described, in which, as Section II.E quoted, not even a wrong may be defined without its redress, every incident of the body is the sovereign's positive grant, and a corporation's citizenship could come only from a rule that reconciled its qualities with the clause's word; the reconciliation was the grant's work, not the Court's. The Court said it could not perform it, and held the citizenship anyway: a holding by default, supplying what only positive law could supply. The default has a constitutional name. It is law made by its negative, a space filled because no rule forbade the filling, and the space is the one the Ninth Amendment keeps for the people, whose unenumerated rights the enumeration "shall not be construed to deny or disparage." A court that fills it for a name has made the construction the clause forbids, and the violation is concrete, measured by what the name received and the people lost. Section VIII.F returns to the clause with the test in hand.

The English books Marshall named say what he said they say. Blackstone's eighteenth chapter opens with the sentences Section II.F quoted, the law constituting "artificial persons" for a perpetual succession, and gives the reason: because "all personal rights die with the person," and "the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable."[92] The rights are "granted"; the purpose is continuity; the body is a body politic; and the king's consent is, as Section II.F quoted, "absolutely necessary."[93] The "artificial person" of the English books is a rule for succession

[91] Volumes 10 through 42 of the Reports (1810–1843) searched on the shelf's text layers for "ideal existence," "legal name," and "mere faculty": the only occurrence is in argument of counsel, *Osborn*, 9 Wheat. at 790.

[92] 1 William Blackstone, *Commentaries on the Laws of England* 455 (Oxford 1765) (ch. 18, "Of Corporations"), from the shelf's mirror of the first edition, long-s normalized.

[93] *Id.* at 460.

under a grant, and nothing in Blackstone's chapter attributes to it any right against the grantor; it is a rule made for a king's grant, and incompatible with the instrumental governance of American constitutional democracy.

C. 1819: Dartmouth College's Hedge, "If the Expression May Be Allowed," and the Citations That Dropped It

Trustees of Dartmouth College v. Woodward gave the vocabulary its canonical form, and the canonical form carries a hedge that its citations dropped. At page 636:

> A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties, by which a perpetual succession of many persons are considered as the same, and may act as a single individual.[94]

The first sentence is the concession theory. The second sentence contains the clause that lets the being back in: the corporation possesses what the charter confers "either expressly, or as incidental to its very existence." Properties that are "incidental to its very existence" are properties the charter did not name and that follow from the nature of the thing created. That is a thing with a nature, which is what the real-entity theory asserts and the concession theory denies. The sentence does its work by its scope. "Only" promises a limit, and the two branches that follow remove it: what the charter confers "expressly" is everything named, and what is "incidental to its very existence" is everything unnamed that attends the thing's being, so that the two together are the whole field, the positive grant and its negative, and nothing is left outside

[94] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819) (the leaf carrying *635 and *636).

the word "only." A grant of that scope is the sovereign's own scope, a king's, who held every right in his person and could part with any of them; it is the scope the second presupposition requires (Section II.E), and it is why "only" limits nothing. "Supposed best calculated" then concedes that the properties so conferred are presumed, not shown. The unnamed half of the field is the unenumerated space of Section III.B's default: a definition named it, no grant filled it, and the Court filled it, until in 1978 Justice Rehnquist, dissenting, made the clause itself the measure of constitutional rights. In the same breath Marshall names the two incidents, "immortality" and "individuality," and hedges the second: "if the expression may be allowed." The pair spans the same field a second time. Immortality is the sovereign's attribute before it is anyone's: Blackstone's third attribute of the king's majesty is "his perpetuity," by which "the law ascribes to him, in his political capacity, an absolute immortality. The king never dies." Individuality is the attribute of the natural subject, whose "personal rights die with the person," the condition Section III.B quoted as Blackstone's reason for incorporating at all. The charter confers both on a body of men, the sovereign's attribute and the subject's, and the two together reach from one end of the field to the other, as "expressly" and "incidental" do. The hedge marks which end needs leave. Marshall states the sovereign's attribute without it, because perpetuity is what the grant is for, and asks leave for the subject's, because many are one person only by the law's allowance. In the system of positive law his definition describes, leave of that kind is the grantor's to give, and the hedge asks of the reader the one thing the being holds of its sovereign: allowance. Two sentences later he writes that "a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being," and immediately qualifies: "But this being does not share in the civil government of the country, unless that be the purpose for which it was created."[95]

[95] *Id.* at 636. The king's perpetuity: 1 Blackstone, *Commentaries* 242 (1765) (the first edition in facsimile,

The hedge is the finding. Marshall knew "individuality" was a figure and said so. He knew "immortal being" was a simile and wrote "like." The next hundred and fifty years of citation kept the being and lost the "if the expression may be allowed."[96] When Justice Rehnquist quoted the passage in 1978 as the description of "the status of a corporation in the eyes of federal law," he quoted it one sentence past "incidental to its very existence" and stopped before the hedge, and then made that clause the test: "our inquiry must seek to determine which constitutional protections are 'incidental to its very existence.'"[97] The clause Marshall wrote to describe charter powers became, in the hands of the Justice most sympathetic to the concession theory, the measure of constitutional rights. The hedge did not survive even its friends. Nor did it survive the lexicon. Webster's of 1828, nine years after *Dartmouth*, made the corporation its example under *immortal*, "A corporation is called an immortal being," and under *immortality* cited "J. Marshall" for "existence not limited": the simile became the definition, and what the

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pdf 260; long s normalized): "III. A THIRD attribute of the king's majesty is his perpetuity. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all." The paragraph that follows calls him "thus all-perfect and immortal in his kingly capacity"; the perfection is the maxim quoted at note 39.

[96] The phrase was quoted afterwards without the hedge, by the Court and by dissenters: *Miller & Lux v. East Side Canal & Irrigation Co.*, 211 U.S. 293, 302 (1908) (the Court) (the bound volume, pdf 334), quoting it of a corporation whose stockholders had "assumed, as a body, the mask of a Pennsylvania corporation, for the purpose, and the purpose only, of invoking the jurisdiction of the Circuit Court of the United States," the Court looking through the name to the persons and refusing the jurisdiction; *State Tax Commission v. Aldrich*, 316 U.S. 174, 187 n. 2 (1942) (Jackson, J., dissenting) (pdf 291), the phrase beside *People v. Knapp*, 206 N.Y. 373, 381, "a mere conception of the legislative mind," and Frankfurter, J., in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 169: "It took half a century of litigation in this Court finally to confer on a corporation, through the use of a fiction, citizenship in the chartering state for jurisdictional purposes. . . . Throughout, the mode of thought was metaphorical"; *Sierra Club v. Morton*, 405 U.S. 727, 743 n. 4 (1972) (Douglas, J., dissenting) (pdf 895), the phrase beside Coke's *Sutton's Hospital*, 77 Eng. Rep. at 973, "rests only in intendment and consideration of the law," and then: "Today, suits in the names of corporations are taken for granted." Before any of them, the lexicon: Noah Webster, *An American Dictionary of the English Language* (New York: S. Converse, 1828), vol. I, s.v. "Immortal" (leaf 943, left column: sense 3, "Perpetual; having unlimited existence. A corporation is called an immortal being") and s.v. "Immortality" (same leaf and column: sense 3, "Perpetuity; existence not limited; as the immortality of a corporation. J. Marshall").

[97] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 823–824 (1978) (Rehnquist, J., dissenting). His quotation of *Dartmouth* at 823 runs through "These are such as are supposed best calculated to effect the object for which it was created" and stops before "Among the most important are immortality, and, if the expression may be allowed, individuality."

citations carried forward was a being held in view, Johnson's "something appearing only to imagination," with the one incident Marshall asked leave for attached to it as a property.

It did not survive its author either. In 1830, in *Providence Bank v. Billings*, Marshall restated the hedged word as a plain property, with no citation and no qualification: "The great object of an incorporation is, to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body."[98] The sentence that follows is the concession theory flat: "Any privileges which may exempt it from the burdens common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."[99] The Court would later quote the first sentence beside its "person" holding and leave the sentence that follows where it was.[100] The first opinion of the Court to cite page 636 for the definition came in 1839. Chief Justice Taney, in *Bank of Augusta v. Earle*: "In the case of *Dartmouth College v. Woodward*, 4 Wheat. 636, the same principle was again decided by the court," followed by the definition through "incidental to its very existence," and nothing after it.[101] Decided. The passage Marshall wrote as a description, with a hedge two sentences on, is a decision twenty years later, quoted to the clause that lets the being in and stopped before the clause that lets it out. Rehnquist in 1978 ran one sentence further; neither reached the hedge.

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[98] *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830) (Marshall, C.J.) (the reprint leaf headed 561; the sentences fall after the *562 mark).

[99] *Id.* at 562.

[100] *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888), quoting the first sentence as "said by Chief Justice Marshall"; see note 111. *Letson*, 2 How. at 558, quotes all three sentences beside *Dartmouth*'s "one immortal being."

[101] *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 587 (1839) (Taney, C.J.). The quotation of 4 Wheat. 636 ends at "incidental to its very existence." The same page quotes *Head & Amory*, 2 Cranch at 167, and *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64 (1827), and opens: a corporation's contract "is the contract of the legal entity—of the artificial being created by the charter—and not the contract of the individual members."

D. 1869: Paul v. Virginia, the Court Reading Its Own Text, as the Census's Control

One case in the sequence is not a coinage but its opposite, and it belongs in the census as the control. In *Paul v. Virginia* the question was whether a corporation was a "citizen" within the Privileges and Immunities Clause of Article IV. Justice Field for the Court:

> 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.[102]

This is the text read as written. "Citizens" means natural persons. Artificial persons have "only the attributes which the legislature has prescribed." No figure of speech is doing any work; the word "artificial" appears only to mark what the clause excludes. *Paul* is cited here because it shows the Court was able to read "citizen" without a coinage, in 1869, and because *Pembina* restated it in 1888 in the numbered paragraph before the one in which it reasoned the corporation into "person."[103] The Court knew how to do this. It did it for one word and not for the other.

Paul's words travelled as the others did, by restatement. The first opinion to carry them is Justice Field's own dissent in the *Slaughter-House Cases*, four years later, reciting what "the court answered" in *Paul*, "that the term citizens as there used applied 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 had prescribed," and running on through the rest of the holding.[104] The first opinion of the Court with the words is *Pembina*:

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[102] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869).

[103] *Pembina*, 125 U.S. at 187–188, 189 (the *Paul* restatement is the Court's numbered paragraph 2, straddling 187–188; the "person" reasoning opens paragraph 3 at 188–189).

[104] *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 99 (1873) (Field, J., dissenting).

"This was expressly held in *Paul v. Virginia*."[105] The two opinions that cited *Paul* in between took its result without its sentence.[106]

E. 1886 to 1889: "Person," from a Remark Before Argument to a Holding by Citation in Three Years

The term that carries the modern law is "person," as used in the Fourteenth Amendment, and its entry into the Amendment's construction is the cleanest instance of the transplant Section III.A named: a word older than the Republic as a rule of treatment, carried into a grant of rights against the States by a remark.

Santa Clara County v. Southern Pacific Railroad was a tax case. The railroad's brief argued, among other points, that "Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States." The reporter's statement of the case records what happened before argument:

> Before argument MR. CHIEF JUSTICE WAITE said: 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.[107]

The syllabus repeated the proposition as the first headnote.[108] The opinion of the Court, by Justice Harlan, did not. Of the constitutional questions it said: "These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of

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[105] *Pembina*, 125 U.S. at 187; the restatement of *Paul*'s sentence follows at 187–188.

[106] *Ducat v. Chicago*, 77 U.S. (10 Wall.) 410, 415 (1870); *Liverpool Insurance Co. v. Massachusetts*, 77 U.S. (10 Wall.) 566, 573 (1871), both on the volume's text layer; neither carries *Paul*'s sentence.

[107] *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886) (statement of the case).

[108] *Id.* at 394 (syllabus).

the case in which they arise."[109] It then decided the case on a ground of California law, that the state board had assessed fences it had no jurisdiction to assess, and concluded: "As the judgment can be sustained upon this ground it is not necessary to consider any other questions raised by the pleadings and the facts found by the court."[110] Nothing was held. A remark was made from the bench, a reporter recorded it, and a headnote stated it. What the remark did is measured by what it carried and by how. The Equal Protection Clause is a positive grant in the people's instrument, written for persons against the States, and the remark carried the name into it. It did so outside the process by which Article III's judicial power acts, which is the decision of a case upon argument: the Court declined the argument, decided the case on another ground, and left the proposition standing in a reporter's note. From that note the citations that follow extended the clause's protection to the name, and the later sections of this Part follow the rest of what natural persons hold (Section IV.A) as it was extended in turn, until the name had the scope Section III.C read in the king's grant, the enumerated protection and the unenumerated remainder behind it. The people's own words refute both halves. The Ninth Amendment reserves the remainder to "the people," who are natural persons (Section VIII.F); and the principle Justice Iredell stated in 1793 (Section III.B), that a State draws its authority from "the voluntary and deliberate choice of the people" while a corporation is "a mere creature" of the power that made it, is the spirit of Independence in the Reports' own words, and it leaves no room for what a grant made to hold against its makers what they reserved to themselves. The extension was made outside the Article III process and against the Ninth Amendment, and it has never had more behind it than the remark.

[109] *Id.* at 410.

[110] *Id.* at 416.

Two years later, in *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, the Court gave the proposition a reason for the first and only time:

> Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, "The great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men."[111]

The reason is the aggregate theory: the corporation is "merely associations of individuals." But the same sentence names the sovereign's permission, "permitted to do business under a particular name," and the incident the rule confers, "a succession of members without dissolution." The only argument ever made for the corporate "person" reaches, by its own terms, the members' rights carried through a permitted name, and nothing of the name's own. Sections IV and V take up what follows from that.

Two steps between the remark and the holding complete the record. The remark's first citation anywhere in the Reports is a dissent, in the term after it was made. In *Philadelphia Fire Association v. New York*, in the October Term of 1886, Justice Harlan quoted what "the Chief Justice observed" before argument in *Santa Clara* and extended it: a corporation of one State doing business in another "is to be deemed, at least in respect to that business, a 'person' within the jurisdiction of the latter State, in the meaning of the Fourteenth Amendment."[112] *Pembina*'s own page does not cite *Santa Clara*; it says "there is no doubt" and cites Marshall's sentence of 1830.[113] In the same term, in *Missouri Pacific Railway v. Mackey*, the proposition had become

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[111] *Pembina*, 125 U.S. at 189, quoting *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830).

[112] *Philadelphia Fire Association v. New York*, 119 U.S. 110, 120 (1886) (Harlan, J., dissenting). *Santa Clara* was decided May 10, 1886, in the October Term of 1885.

[113] *Pembina*, 125 U.S. at 189: the paragraph cites *Providence Bank*, 4 Pet. 514, 562, and nothing else.

something the parties agreed on: "It is conceded that corporations are persons within the meaning of the amendment," with *Santa Clara* and *Pembina* cited and nothing said.[114]

The year after, in *Minneapolis & St. Louis Railway v. Beckwith*, the proposition became a holding by citation:

> It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question. It was so held in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396, and the doctrine was reasserted in *Pembina Mining Company v. Pennsylvania*, 125 U.S. 181, 189.[115]

"It was so held," citing page 396. Page 396 is the reporter's note of what the Chief Justice said before argument, in a case whose opinion declined the question. From 1889 the proposition has been "so held," and every later case cites the chain.[116] Justice Rehnquist described the

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[114] *Missouri Pacific Railway Co. v. Mackey*, 127 U.S. 205, 209–210 (1888) (Field, J.); the sentence straddles the two pages and cites *Santa Clara*, 118 U.S. 394, and *Pembina*, 125 U.S. 187.

[115] *Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

[116] *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896) (Harlan, J., for the Court) (the Library of Congress print, pdf 15): "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," citing *Santa Clara*, 118 U.S. 394, *Pembina*, 125 U.S. 181, 189, *Beckwith*, 129 U.S. 26, and *Charlotte, Columbia & Augusta Railroad v. Gibbes*, 142 U.S. 386, 391; *Smyth v. Ames*, 169 U.S. 466, 522 (1898) (Harlan, J., for the Court) (pdf 57): "That corporations are persons within the meaning of this Amendment is now settled," citing *Santa Clara* at 396, *Gibbes* at 391 and *Gulf, Colorado & Santa Fé Railway v. Ellis*, 165 U.S. 150, 154, and at 526 (pdf 61) the first of the principles "regarded as settled," "A railroad corporation is a person within the meaning of the Fourteenth Amendment"; *Blake v. McClung*, 172 U.S. 239, 259 (1898) (Harlan, J., for the Court) (pdf 21–22): "Since, however, a corporation is a 'person' within the meaning of the Fourteenth Amendment, (*Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396; *Smyth v. Ames*, 169 U.S. 466, 522,)" the Virginia corporation might invoke the due process and equal protection clauses, and at 259–261 could not on the facts, the equal protection clause reaching only persons "within its jurisdiction"; *Southern Railway Co. v. Greene*, 216 U.S. 400, 412–413 (1910) (Day, J., for the Court) (pdf 13–14): "That a corporation is a person, within the meaning of the Fourteenth Amendment, is no longer open to discussion. This point was decided in *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 188"; *Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933) (Roberts, J., for the Court) (pdf 20): "Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons," citing *Greene* and four cases after it; *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (Sutherland, J., for the Court) (pdf 12): "Appellant contends that the Fourteenth Amendment does not apply to corporations; but this is only partly true. A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause. *Paul v. Virginia*, 8 Wall. 168. But a corporation is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here. *Covington & Lexington Turnpike Co. v. Sandford*, 164 U.S. 578, 592; *Smyth v. Ames*, 169 U.S. 466, 522." Every link before *Grosjean* is a tax or rate case about property; three of them (*Smyth* 522, *Blake* 259, and *Grosjean* through *Smyth*) rest on *Santa Clara*'s page 396, the reporter's note; the words are "settled," "now settled," "no longer open

sequence accurately ninety years later: "This Court decided at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment."[117] Neither argument nor discussion. A remark, a headnote, a dissent that quotes the remark, a reason that proves less than it is cited for, a concession, and a citation that calls the remark a holding. Not one page in the chain argues the proposition.

The census was run from the bench twice before this article ran it, by the two Justices who would have overruled the line, and both ran it on the text. Justice Black, dissenting alone in *Connecticut General Life Insurance Co. v. Johnson* in 1938, began with the word: "I do not believe the word 'person' in the Fourteenth Amendment includes corporations," and "Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."[118] He read § 1 clause by clause. Its first sentence makes "all persons born or naturalized" citizens, and "Certainly a corporation cannot be naturalized and 'persons' here is not broad enough to include 'corporations.'"[119] Its second sentence names "citizens" in its first clause, and "efforts have been made to persuade this Court to allow

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to discussion"; none argues. *Grosjean*'s two sentences are the cleanest statement in the Reports of the split this section explains: the same paragraph denies the name citizenship by *Paul* and grants it personhood by two rate cases, and then decides a claim under the "liberty" the clause protects, which *Riggs* and *Western Turf* had held the liberty of natural persons (note 121), without a word on the step. The Court afterwards read *Grosjean* as a corporate press-freedom holding (*Bellotti*, 435 U.S. at 780 n. 16; *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359 n. 3 (1973), "the taxes that discriminated against newspapers, struck down under the First Amendment" (the cut, pdf 4); *303 Creative*, 600 U.S. at 594, "Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech"); Section IV.B tells the sequence and Section IX.E states what *Grosjean* held and what survives removal.

[117] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting).

[118] *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85–86 (1938) (Black, J., dissenting) (the cut's pp. 9–10); the second sentence straddles the leaves at "are in-" / "cluded within its protection." The same page states the premise for overruling: "A constitutional interpretation that is wrong should not stand. I believe this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations."

[119] *Id.* at 88; the Amendment's first sentence is set out at 87–88.

corporations to claim the protection of this clause," without success.[120] Of the next clause: "It has not been decided that this clause prohibits a state from depriving a corporation of 'life,'" the Court "has expressly held"[121] that the liberty it guarantees "is the liberty of natural, not artificial persons," and so "the words 'life' and 'liberty' do not apply to corporations, and of course they could not have been so intended to apply"; the clause as the majority's cases construe it reads, in Black's rewriting of it, "Nor shall any State deprive any human being of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law."[122] The Amendment's second section counts "the whole number of persons in each State," its third bars any "person" who "engaged in insurrection" from Congress, and "No citizen could gather the impression here that while the word 'persons' in the second section

[120] *Id.* at 88 & n. 12 (citing *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 126): "While efforts have been made to persuade this Court to allow corporations to claim the protection of this clause, these efforts have not been successful."

[121] The Reports hold both lines, and the article says so. The line Black states: *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906) (Harlan, J., for the Court) (the Library of Congress print, pdf 13): "The liberty referred to in that Amendment is the liberty of natural, not artificial persons" (the print has no comma after "artificial"); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907) (Harlan, J., for the Court) (the bound volume, pdf 395): "the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons," citing *Riggs*, and on the same page "a corporation cannot be deemed a citizen within the meaning of the clause of the Constitution of the United States which protects the privileges and immunities of citizens of the United States"; *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925), citing both (Section IV.B); and, after Black wrote, *Hague v. Committee for Industrial Organization*, 307 U.S. 496, 527 (1939) (Stone, J., joined by Reed, J.; there is no opinion of the Court, the lineup at 500 recording that Roberts, J., "has an opinion in which Mr. Justice Black concurs, and Mr. Justice Stone an opinion in which Mr. Justice Reed concurs," the Chief Justice concurring separately and McReynolds and Butler, JJ., dissenting) (pdf 32): the American Civil Liberties Union, "which is a corporation, … cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons," citing *Riggs* 255 and *Western Turf* 363. The other line: *Grosjean*, 297 U.S. at 244 (1936), two years before Black's dissent, where corporate publishers' claim under the press clause was decided as a deprivation of "liberty" under the due process clause by the citation of two rate cases (note 116). The two lines meet in one opinion. At *Hague* 519 (pdf 24; Stone's opinion opens at 518) Stone cites *Grosjean* in the string for the proposition that "freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment," and eight pages later, at 527, denies that liberty to the corporate respondent, with nothing between the two pages to reconcile them. Black's dissent in *Connecticut General* does not cite *Grosjean v. American Press*; the *Grosjean* in his note 8, at 85 (pdf 9), is *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U.S. 412, 427 (1937), the chain-store tax case. The sentence at the end of this section's reading of Douglas repeats "expressly held" and means the same line.

[122] *Connecticut General*, 303 U.S. at 88 & n. 13 (quoting *Western Turf Ass'n v. Greenberg*, 204 U.S. 359, 363). Note 14 cites *Gulf, Colorado & Santa Fe Ry. v. Ellis*, 165 U.S. 150, 154, for the construction of "person" in the Equal Protection Clause.

applied to human beings, the word 'persons' in the first section in some instances applied to corporations."[123]

The history he found where this section found it: the *Slaughter-House* Court, five years after ratification, "had apparently discovered no such purpose," and "The records of the time can be searched in vain for evidence that this Amendment was adopted for the benefit of corporations."[124] The one record ever offered was offered in 1882, when "an argument was made in this Court that a journal of the joint Congressional Committee which framed the Amendment, secret and undisclosed up to that date, indicated the Committee's desire to protect corporations by the use of the word 'person,'" and Black's answer makes notice the measure: "A secret purpose on the part of the members of the Committee, even if such be the fact, however, would not be sufficient to justify any such construction," because "No section of the Amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, (and all administrative actions under them) to censorship of the United States courts."[125] Even he called the remark a decision, *Santa Clara* having "decided for the first time that the word 'person' in the Amendment did in some instances include corporations"; the dissenter who would undo the chain took its first link as the chain described it.[126] His remedy is Section VII's: "If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their

[123] *Id.* at 89. The same page: "The judicial inclusion of the word 'corporation' in the Fourteenth Amendment has had a revolutionary effect on our form of government."

[124] *Id.* at 86; the page sets out *Slaughter-House Cases*, 16 Wall. at 70, on the Amendment's purpose.

[125] *Id.* at 87 & n. 11, 89. Note 11 cites *San Mateo County v. Southern Pacific Railroad*, 116 U.S. 138; Kendrick, *Journal of the Joint Committee on Reconstruction* (1914); Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 Yale L.J. 371; and Chidsey, *The Gentleman from New York* (1935). The 1882 argument was Roscoe Conkling's; its refutation is Graham's, cited here through the Court's page.

[126] *Id.* at 87.

own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter."[127]

Eleven years later Justice Douglas, joined by Justice Black, ran the census again in *Wheeling Steel Corp. v. Glander*, and began where this section began: "It has been implicit in all of our decisions since 1886 that a corporation is a 'person' within the meaning of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 396, so held. The Court was cryptic in its decision. It was so sure of its ground that it wrote no opinion on the point," and then the Chief Justice's words from the bench, set out entire, and the verdict on them: "There was no history, logic, or reason given to support that view. Nor was the result so obvious that exposition was unnecessary."[128] He added a reader this section had not reached, the one judge to construe the word before the remark was made. In 1871, three years after ratification, Justice Woods on circuit "held that 'person' as there used did not include a corporation," with "the history of the submission by congress, and the adoption by the states of the 14th amendment, so fresh in all minds as to need no rehearsal."[129]

Then he set out § 1 with its four nouns in italics and read them in order. "'Persons' in the first sentence plainly includes only human beings, for corporations are not 'born or naturalized.'" Corporations "are not 'citizens'" under the second sentence's first clause. "It has never been held that they are persons whom a State may not deprive of 'life.'" "'Liberty' in that clause is 'the liberty of natural, not artificial, persons.'" "But 'property' as used in that clause has been held to include that of a corporation since 1889 when *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S.

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[127] *Id.* at 90. The sentence that follows: "An Amendment having that purpose could be submitted by Congress as provided by the Constitution."

[128] *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576–577 (1949) (Douglas, J., dissenting, Black, J., joining) (the cut's pp. 15–16); the sentence straddles the pages at "wrote no" / "opinion on the point."

[129] *Id.* at 577 (quoting *Insurance Co. v. New Orleans*, 1 Woods 85, 88 (C.C.D. La. 1871) (Woods, Circuit Judge)). The same page sets *Slaughter-House*, 16 Wall. at 71 and 81, beside it.

26, was decided."[130] 1889 and *Beckwith*: the year and the case at which this section's chain arrived at "It was so held." What followed is the sentence this census's third category restates: "It requires distortion to read 'person' as meaning one thing, then another within the same clause and from clause to clause. It means, in my opinion, a substantial revision of the Fourteenth Amendment."[131] The construction he preferred was Woods's, and Woods's sentence meets the objection that the Amendment's framers chose "person" beside "citizens" for its breadth, because it says what the wider word reaches: "the persons to whom the equal protection of the law is secured are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons."[132] The breadth is real, and it runs in one direction. "Person" reaches past "citizens" to the natural person who was not born or naturalized here, who is endowed with life and liberty and can be deprived of both; it does not reach a name, which is neither born nor naturalized, has no life to lose and no liberty, as the Court had "expressly held" in the line that the note to Black's dissent sets beside its contrary, the Reports holding both lines and once, in *Hague*, both in one opinion, and holds property only as the rule of Part One lets a name hold it. "History has gone the other way," Douglas conceded, and "now that the question is squarely presented I can only conclude that the *Santa Clara* case was wrong and should be overruled."[133] His last paragraph is Section VII's premise in seven sentences: "We are dealing with a question of vital concern to the people of the nation. It may be most desirable to give

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[130] *Id.* at 578–579. Section 1 is set out at 578–579 with "persons," "citizens," "citizens," and "person" in italics, "(Italics added.)"; the second note cites McGovney, *A Supreme Court Fiction*, 56 Harv. L. Rev. 853, 1090, 1225. At 578 Douglas cites Black's dissent at 87 and at 88–89 and quotes Arthur Twining Hadley's sentence of 1908 that the Amendment "was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature," the first note sending the undisclosed-purpose question to Graham, 47 Yale L.J. 371.

[131] *Id.* at 579.

[132] *Id.* at 579 (quoting *Insurance Co. v. New Orleans*, 1 Woods at 88).

[133] *Id.* at 579–580; the third note, at 580, lists the decisions since 1886 striking state legislation under the clause as applied to corporations, and the fourth the Court's overrulings of old decisions.

corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation."[134]

The Court's answer came in the same case, and it was not a reading of the word. Justice Jackson, who wrote for the Court in *Wheeling Steel*, added a separate opinion "to complete the record by pointing out why, in writing by assignment for the Court, he assumed without discussion that the protections of the Fourteenth Amendment are available to a corporation."[135] The reasons were three. The State had not questioned it. "It has consistently been held by this Court that the Fourteenth Amendment assures corporations equal protection of the laws, at least since 1886, *Santa Clara County v. Southern Pacific R. Co.*, 118 U. S. 394, 396, and that it entitles them to due process of law, at least since 1889, *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 28." The two pages he cited are the two this section began and ended with: 396, the reporter's note of what the Chief Justice said before argument, and 28, "It was so held." And the dissenters had themselves written for the Court in cases where corporations claimed the Amendment's protection, and "it was not intimated therein that there was even doubt whether the corporations had standing to raise the questions or were entitled to protection of the Amendment."[136] Assumed without discussion in 1949, by the Court's own author, because it had

[134] *Id.* at 581 (the cut's p. 20); the paragraph is the dissent's last. Its fifth note sets the Commerce Clause's restrictions on the States aside as rising "from a different source."

[135] *Wheeling Steel*, 337 U.S. at 574 (Jackson, J.) (the cut's p. 13). The opinion of the Court, by the same Justice, ends on the same page.

[136] *Id.* at 574–575. At 575 Jackson names the cases: *Railway Express Agency v. New York*, 336 U.S. 106, and *Ott v. Mississippi Barge Line*, 336 U.S. 169, of the same term, and *Illinois Central R. Co. v. Minnesota*, 309 U.S. 157, *Lincoln Life Insurance Co. v. Read*, 325 U.S. 673, and *Queenside Hills Co. v. Saxl*, 328 U.S. 80, all written by the dissent's author; and at 576 *Times-Mirror Co. v. Superior Court*, companion to *Bridges v. California*,

been so held since 1886 and 1889: the chain this section traced, cited as its own justification, and the two Justices who asked for the argument answered with the term's age and their own votes. The transplant has never been argued for by the Court. It was assumed in 1886 and assumed again in 1949, and on both occasions the absence of discussion is the Court's own description. What the removal test does with a sense that was never argued for, and why the question whether the Amendment's own structure bears that sense is the ordinary question of interpretation and not the test's, is Section VII.C's business; this section's work was to show that the Court asked neither question.

F. 1907 and 1923: "Creature of the State," Kept for the Municipal Class Alone

The concession vocabulary did not disappear after *Santa Clara*. It was confined to a class. For municipal corporations the Court continued to say what Marshall and Blackstone had said of all corporations. In *Hunter v. Pittsburgh*: "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them," and their inhabitants "have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State."[137] In *Trenton v. New Jersey*: "A municipality is merely a department of the State, and the State may withhold, grant or withdraw powers and privileges as it sees fit. However great or small its sphere of action, it remains the creature of the State exercising and holding powers and

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314 U.S. 252, and *Pennekamp v. Florida*, 328 U.S. 331, where "a newspaper corporation" won relief under the Amendment with both dissenters joining. Of Black's 1938 dissent he wrote that "the challenge did not commend itself, even to such consistent liberals as Mr. Justice Brandeis and Mr. Justice Stone."

[137] *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–179 (1907).

privileges subject to the sovereign will," and the city "cannot invoke these provisions of the Federal Constitution against" the State.[138]

The census records these not because the article adopts "creature," which it does not, but because the Court applied one vocabulary to the body politic below the State and another to the private corporation, and the only stated reason for the difference is *Pembina*'s: the private corporation has members with property. That reason is the derivative theory, and it reaches the members' property and nothing else.

The word itself travelled slowly.[139] Justice Cardozo restated the rule in 1933 with the correlative noun: a municipal corporation "has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator," and cited six cases for it.[140] Chief Justice Hughes in 1939 put the word and the citation together for the first time in an opinion of the Court, and used them for standing: "Being but creatures of the State, municipal corporations have no standing to invoke the contract clause or the provisions of the Fourteenth Amendment of the Constitution in opposition to the will of their creator."[141] Sixteen years from the word to its first citation with the word, and the use was to close the courthouse to the body politic below the State while the private corporation stood inside it; the word's later life outside the municipal class is a figure for any created body and for nothing in particular.[142]

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[138] *City of Trenton v. New Jersey*, 262 U.S. 182, 187, 192 (1923).

[139] Volumes 263 through 288 (1923–1933) searched on the shelf's text layers for "creature" within reach of a citation of *Trenton* or *Hunter*: none in an opinion. *Pawhuska v. Pawhuska Oil Co.*, 250 U.S. 394 (1919), and *Risty v. Chicago, R.I. & P. Ry.*, 270 U.S. 378 (1926), cited by both of the opinions that follow, carry neither "creature" nor "creator" on their pages.

[140] *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933) (Cardozo, J.). The six: *Trenton*, *Newark v. New Jersey*, 262 U.S. 192; *Worcester v. Worcester Consolidated Street Ry.*, 196 U.S. 539; *Pawhuska*, 250 U.S. 394; *Risty*, 270 U.S. 378; *Railroad Commission v. Los Angeles Ry.*, 280 U.S. 145, 156.

[141] *Coleman v. Miller*, 307 U.S. 433, 441 & n. 6 (1939) (Hughes, C.J.); note 6 cites *Pawhuska*, *Trenton*, *Risty*, and *Williams*.

[142] The pdf pages are the bound volume's. *Phelps v. Board of Education*, 300 U.S. 319, 323 (1937) (the Court) (pdf 387): "the board, a creature of the state"; *Steward Machine Co. v. Davis*, 301 U.S. 548, 603 (1937)

G. 1958: "Medium," the One Word That Supports No Corporate Right

One word in the sequence supports no corporate right at all, and it was the word the Court chose when it was looking carefully at what an association is. In *NAACP v. Alabama* the State argued that the Association lacked standing to assert its members' rights. The Court rejected the argument:

> Petitioner is the appropriate party to assert these rights, because it and its members are in every practical sense identical. The Association, which provides in its constitution that "[a]ny person who is in accordance with [its] principles and policies …" may become a member, is but the medium through which its individual members seek to make more effective the expression of their own views.[143]

The Association was itself a nonprofit membership corporation,[144] and the Court located the right in the members' own liberty under the Fourteenth Amendment[145] and let the name assert it only because requiring the members to come forward would nullify the right at the moment of its assertion;[146] Section IV.B tells the case. A medium is a conduit. It holds nothing.

(McReynolds, J., dissenting, quoting President Pierce's veto message to the Senate of May 3, 1854, which the dissent sets out at 600–603) (pdf 663): "Are we not too prone to forget that the Federal Union is the creature of the States, not they of the Federal Union?"; *Grovey v. Townsend*, 295 U.S. 45, 53 (1935) (the Court) (pdf 117), restating the petitioner's contention that the state Democratic convention "was a mere creature of the state and could not lawfully do what the Federal Constitution prohibits to its creator"; *Monell v. Department of Social Services*, 436 U.S. 658, 675 (1978) (the Court) (pdf 735), quoting the debate of 1871 on "a municipality, which is equally the creature of the State" (Globe 795); *Shapiro v. United States*, 335 U.S. 1, 66 (1948) (Frankfurter, J., dissenting) (pdf 150), quoting *Hale v. Henkel*, 201 U.S. 43, 74–75, as *Wilson*, 221 U.S. at 383, had quoted it, "the corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public" (Section VI.A); *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting) (pdf 264): "If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects," and, on the same page, "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects." The last is the settled bond of Section VI.H in a Justice's sentence, and "creature of the State" is his word for what a person is not. *United States v. Classic*, 313 U.S. 299, 304 (1941), where the phrase also appears, is argument of counsel and is not counted.

[143] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

[144] *Id.* at 451.

[145] *Id.* at 460.

[146] *Id.* at 459.

The one time the Court described a corporation with care, it described a rule of treatment and not a being.

The sentence was next cited five years later, in *NAACP v. Button*, as what the Court had said: "compare *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459, where we said," and then the sentence entire, to deny any conflict between the Association's interests and its members'.[147] Justice Douglas, concurring, quoted it the same way.[148] The word was assumed in its next citation as every other word in this census was. The difference is in what was assumed. A conduit was assumed, and a conduit can be given no right of its own.

H. 1978: "Corporate Democracy," a Presumption in Modal Verbs, Applied in 2010 as a Fact

The last term before *Citizens United* is the one that answers the dissenting shareholder, and it entered in a sentence whose every verb is modal. Justice Powell for the Court in *Bellotti*: "Ultimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues."[149] The next page presumed the shareholders competent and gave them access to a derivative suit, in the same mood;[150] the term describes a presumption, and the opinion calls it one. Its next appearance, thirty-two years later, is its elevation: the majority in *Citizens United* rejected the shareholder-protection interest because abuses "can be corrected by shareholders 'through the procedures of corporate democracy,'" with the quotation marks and the citation to *Bellotti* and nothing further,[151] and no

[147] *NAACP v. Button*, 371 U.S. 415, 443 (1963) (Brennan, J.).

[148] *Id.* at 446 (Douglas, J., concurring), on the volume's text layer.

[149] *Bellotti*, 435 U.S. at 794.

[150] *Id.* at 795.

[151] *Citizens United v. FEC*, 558 U.S. 310, 362 (2010); see *id.* at 370.

opinion between the two uses the phrase.[152] The only opinion ever to ask what the words mean is the dissent in the case that elevated them, which answered from the literature that the shareholders' rights "are so limited as to be almost nonexistent."[153] A term whose meaning is first asked after thirty-two years, by a dissenter, and answered from a law review, is a coinage and not a term of art. Section VI.D measures what the presumption presumes.

I. 2010: "Associations of Citizens," Invoked for the Treasury and Denied for the PAC in One Opinion

The newest coinage is the oldest theory under a new name. The majority in *Citizens United* wrote that § 441b "permits the Government to ban the political speech of millions of associations of citizens," and that "certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech."[154] This is *Pembina*'s "merely associations of individuals," the aggregate theory, invoked to make the corporation's speech the citizens' speech. Seventeen pages earlier the same opinion had held that the citizens' own association, the PAC, could not carry the corporation's speech, because "[a] PAC is a separate association from the corporation."[155] The corporation is an association of citizens when the question is whether it may speak, and a separate thing from the association of its citizens when the question is whether their speaking suffices. The two sentences cannot both describe one object. They describe a word used two ways in one opinion. Section V.D supplies the measure the word lacks: speech through a sanctioned body is its members' own act only where

[152] Volumes 436 through 557 (1978–2009) searched on the shelf's text layers, hyphenation across lines tolerated: no occurrence of "corporate democracy" in any opinion.

[153] *Citizens United*, 558 U.S. at 477 (Stevens, J., concurring in part and dissenting in part); the inner quotation is Blair & Stout's, cited at 320.

[154] *Id.* at 354, 356.

[155] *Id.* at 337.

the charter or the terms of membership contain that speech, and the business treasury's charter contains none.

The phrase first appears five pages earlier than the two the article has quoted, in the sentence that frames the holding: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech."[156] The next sentence names the thing the phrase stands for, "an association that has taken on the corporate form."[157] That is the term's whole life in the opinions of the Court. No opinion of the Court through the last volume on the shelf uses the phrase again. Its one citation is Justice Breyer's, dissenting in *Holder v. Humanitarian Law Project* five months later, in a string of parentheticals for the protection of political speech.[158] The newest term in the census has been cited once, in dissent, as settled.

J. The Table: The Census in One View, and the Five Things It Shows

Term	**Entered at**	**Introduced**	**Argued, assumed, or hedged**
"artificial being," "mere legal entity," "mere creature of the law"	*Deveaux*, 9 U.S. at 86–88 (1809); "creature" earlier as a limit, Iredell dissenting, *Chisholm*, 2 U.S. at 448 (1793), and Marshall, *Head & Amory*, 6 U.S. at 167, 169 (1804)	Marshall, C.J., from "the English books": received from the English Reports as a rule of treatment (Coke, *Sutton's Hospital*, 10 Co. Rep. at 32b (1612)); the coinage is what 1819–1889 hung on it	Assumed; "entity" used to deny a status; "faculty," "legal name," "ideal existence … when the … purpose of the law requires it" offered as the alternative

[156] *Id.* at 349 (the sentence sits whole on the page).

[157] *Id.* at 349.

[158] *Holder v. Humanitarian Law Project*, 561 U.S. 1, 43 (2010) (Breyer, J., dissenting); decided June 21, 2010. Volumes 559 through 592 searched on the shelf's text layers for "associations of citizens" in an opinion of the Court: none; the shelf ends at volume 592.

Term	**Entered at**	**Introduced**	**Argued, assumed, or hedged**
"artificial being … incidental to its very existence … if the expression may be allowed, individuality … like one immortal being"	*Dartmouth*, 17 U.S. at 636 (1819)	Marshall, C.J.	Hedged twice ("if the expression may be allowed"; "like")
"natural persons … not artificial persons created by the legislature"	*Paul v. Virginia*, 75 U.S. at 177 (1869)	Field, J.	Argued from the text; the control
"citizen" (Article III; Article IV, § 2; the Fourteenth Amendment, § 1): the clause the Court kept closed	*Deveaux*, 9 U.S. at 86 (1809), "certainly not a citizen"; *Hope Insurance Co. v. Boardman*, 9 U.S. at 61 (1809), the reporter's note of the decision	Marshall, C.J.; the reporter	Argued from the text and from the persons behind the name; the second control
"person" (Fourteenth Amendment)	*Santa Clara*, 118 U.S. at 396 (1886)	transplanted from the law of corporations by a remark before argument (Waite, C.J.; the reporter)	Assumed, "neither argument nor discussion"; the opinion declined the question at 410, 416
"creature of the State" (municipal)	*Hunter*, 207 U.S. at 178–179 (1907); *Trenton*, 262 U.S. at 187, 192 (1923)	Moody, J.; Butler, J.	Argued, for one class
"the same protection of equal laws that natural persons … have a right to demand" (taxation of the privilege)	*Quaker City Cab*, 277 U.S. at 400–402 (1928)	Butler, J.	Assumed, by citation of the "person" entry; argued against in dissent, Holmes, J., and Brandeis, J., at 403
"medium"	*NAACP v. Alabama*, 357 U.S. at 459 (1958)	Harlan, J.	Argued; the right located in the members at 460
"corporate democracy"	*Bellotti*, 435 U.S. at 794–795 (1978)	Powell, J.	Presumed, and called a presumption
"associations of citizens"	*Citizens United*, 558 U.S. at 349, 354, 356 (2010)	Kennedy, J.	Assumed; denied at 337 for the PAC

The two columns a grid cannot hold, the next citation of each term and what was afterwards hung on it, follow entry by entry in the order of the table.

"artificial being," "mere legal entity," "mere creature of the law." *Next citation: Society v. New Haven*, 8 Wheat. at 491 (1823), "it was stated by the Court," assumed; Marshall's own reuse, *Osborn*, 9 Wheat. at 823 (1824), argued, no cite; the "ideal existence" turned, *Letson*,

2 How. at 559 (1844), argued against; *Dartmouth* (1819) within the lineage. *What was hung on it:* The whole vocabulary; the road not taken is this article's position.

"artificial being … incidental to its very existence … if the expression may be allowed, individuality … like one immortal being." *Next citation:* The author's restatement without the hedge, *Providence Bank*, 4 Pet. at 562 (1830), assumed; first cited as "decided," *Bank of Augusta*, 13 Pet. at 587 (1839), stopped before the hedge; Rehnquist, *Bellotti*, 435 U.S. at 823–824 (1978), makes "incidental to its very existence" the test for constitutional rights. *What was hung on it:* the incidents; the Contract Clause holding rests on the charter as the trustees' contract (*Fletcher* *137), not on the being.

"natural persons … not artificial persons created by the legislature." *Next citation:* Field dissenting, *Slaughter-House Cases*, 16 Wall. at 99 (1873), assumed; first opinion of the Court, *Pembina*, 125 U.S. at 187–188 (1888), "expressly held." *What was hung on it:* "Citizen" confined to natural persons.

"citizen" (Article III; Article IV, § 2; the Fourteenth Amendment, § 1): the clause the Court kept closed. *Next citation: Sullivan*, 19 U.S. at 451–452 (1821); *Breithaupt*, 26 U.S. at 240 (1828); *Slocomb*, 39 U.S. at 64 (1840), "the artificial being, a corporation aggregate, was not a citizen, as such"; the one exception, *Letson*, 43 U.S. at 558 (1844), "capable of being treated as a citizen of that state, as much as a natural person"; the presumption put in its place, *Marshall v. Baltimore & Ohio*, 57 U.S. at 327–328 (1854); *Wheeler*, 66 U.S. at 295–296 (1861); *Paul*, 75 U.S. at 177 (1869); *Blake v. McClung*, 172 U.S. at 259 (1898), "we now hold"; *Western Turf*, 204 U.S. at 363 (1907); *Hague*, 307 U.S. at 514 (1939) (Roberts, J., joined by Black, J.); *Asbury Hospital*, 326 U.S. at 210–211 (1945); 28 U.S.C. § 1332(c)(1) (1958), the statutory word

supplied by Congress; *Carden*, 494 U.S. at 197 (1990), the rest left to Congress.[159] *What was hung on it:* Nothing that lasted. The name was spoken of as "capable of being treated as a citizen" once, in *Letson*, and from 1854 the result rested on a presumption about the persons, the word where still spoken naming the presumption's effect "for such purposes" (*Blake* 259); for the rest of one hundred and eighty years the name was kept out of the one word that is the settled bond's own (Section VI.H), by reading the word and by looking through the name to the persons, and when the word was wanted in terms Congress wrote it.

"person" (Fourteenth Amendment). *Next citation:* Harlan dissenting, *Philadelphia Fire Ass'n*, 119 U.S. at 120 (Nov. 1886), the remark quoted and extended; *Pembina*, 125 U.S. at 189

[159] The entry's pins, each from the shelf's cut unless marked: *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809) (Section III.B); *Hope Insurance Co. v. Boardman*, 9 U.S. (5 Cranch) 57, 61 (1809) (the Library of Congress print, pdf 5): "THE COURT having, in the case of *The Bank of the United States v. Deveaux et al.* decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate as such cannot be a citizen, within the meaning of the constitution, reversed the judgment, for want of jurisdiction in the court below," the reporter's note of a decision made without a separate opinion, the two cases having been argued together as the reporter's footnote records; the note is on 61, the leaf headed 60 being argument of counsel; *Sullivan v. Fulton Steamboat Co.*, 19 U.S. (6 Wheat.) 450, 451–452 (1821) (the shelf's star-paged reprint, pdf 1–2): the defendants "described as a corporate body incorporated by the legislature of the state of New York," no citizenship averred, and the decree affirmed "it not appearing from the record, that the said circuit court had jurisdiction in said cause"; *Breithaupt v. Bank of Georgia*, 26 U.S. (1 Pet.) 238, 240 (1828) (pdf 3), by the Court, no jurisdiction because the bill "does not aver that the corporators of the Bank of the State of Georgia, which bank is defendant in the suit, are citizens of the state of Georgia"; *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. (14 Pet.) 60, 64 (1840) (Barbour, J., for the Court) (pdf 5): *Deveaux* "in effect decided, that although the artificial being, a corporation aggregate, was not a citizen, as such, and therefore could not sue in the Courts of the United States, as such, yet the Court would look beyond the mere corporate character, to the individuals of whom it was composed" (the sentence is on 64; the leaf headed 63 carries the plea); *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1854) (note 163); *Ohio & Mississippi Railroad Co. v. Wheeler*, 66 U.S. (1 Black) 286, 295–296 (1861) (note 164); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869) (Section III.D); *Blake v. McClung*, 172 U.S. 239, 259 (1898) (Harlan, J., for the Court) (pdf 21): the presumption in its settled form, "for purposes of suit by or against it in the courts of the United States, the members of a corporation are to be conclusively presumed to be citizens of the State creating such corporation," citing *Letson*, *Covington Drawbridge*, *Wheeler* 296, *Tugman* and *Barrow Steamship*, "and therefore it has been said that a corporation is to be deemed, for such purposes, a citizen of the State under whose laws it was organized"; then: "But it is equally well settled, and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,'" citing *Paul*, *Ducat* and *Liverpool Insurance*; *Western Turf*, 204 U.S. at 363 (1907) (note 121); *Hague*, 307 U.S. at 514 (1939) (note 165); *Asbury Hospital v. Cass County*, 326 U.S. 207, 210–211 (1945) (Stone, C.J., for the Court) (pdf 4–5): the appellant "is neither a citizen of a state nor of the United States within the protection of the privileges and immunities clauses of Article IV, § 2 of the Constitution and the Fourteenth Amendment," citing *Paul* 177, *Pembina* 187 and *Selover, Bates & Co. v. Walsh*, 226 U.S. 112, 126; *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) (note 167). *Letson*, 43 U.S. (2 How.) 497 (1844), is the presumption's source and is treated in Section III.B. Section VI.H quotes *Wheeler* 295 and *Marshall* 327 for the unsettled bond; the entry is their place in the census.

(1888), "there is no doubt," the aggregate reason, *Santa Clara* not cited; *Mackey*, 127 U.S. at 209–210 (1888), "It is conceded"; *Beckwith*, 129 U.S. at 28 (1889), "It was so held"; argued against, in dissent only, Black, J., *Connecticut General*, 303 U.S. at 85–90 (1938), and Douglas, J., *Wheeling Steel*, 337 U.S. at 576–581 (1949), answered by Jackson, J., at 574–575 with the term's age. *What was hung on it:* The Fourteenth Amendment line entire, and within it the liberty line, told once in Section IV.B and printed here whole: liberty withheld from the name, *Riggs*, 203 U.S. at 255 (1906), and *Western Turf*, 204 U.S. at 363 (1907); the rule applied against persons through the name, *Berea College*, 211 U.S. at 54 (1908), where it was used to segregate a college because the Court held only half of it; the two sets stated, *Pierce*, 268 U.S. at 535 (1925); the transplant's step into the First Amendment, *Grosjean*, 297 U.S. at 244 (1936), by citation of two rate cases; the line restated, *Hague*, 307 U.S. at 527 (1939) (Stone, J., joined by Reed, J.); the persons' rights through the medium, *NAACP v. Alabama*, 357 U.S. at 459 (1958); the description, *Button*, 371 U.S. at 428 (1963); the description cited against the line, *Bellotti*, 435 U.S. at 780 n. 16 (1978); and for the treasury, *Citizens United*, 558 U.S. at 342 (2010).[160]

"creature of the State" (municipal). *Next citation:* None with the word for ten years; *Williams v. Mayor*, 289 U.S. at 40 (1933), "the will of its creator," assumed; *Coleman v. Miller*, 307 U.S. at 441 & n. 6 (1939), "Being but creatures of the State," for standing. *What was hung on it:* No federal right against the creator.

"the same protection of equal laws that natural persons … have a right to demand" (taxation of the privilege). *Next citation: Lehnhausen*, 410 U.S. at 359–360, 365 (1973)

[160] The entry's pins: *Riggs*, 203 U.S. at 255, and *Western Turf*, 204 U.S. at 363 (note 121); *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908) (Brewer, J., for the Court; Harlan, J., dissenting at 58–69), Sections IV.B, VI.B and VII.D, where the use is named in each place; *Pierce*, 268 U.S. at 535 (Section IV.B); *Grosjean*, 297 U.S. at 244 (note 116); *Hague*, 307 U.S. at 527 and 514 (notes 121 and 165); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (Section III.G); *NAACP v. Button*, 371 U.S. 415, 428 (1963) (Section IV.B); *Bellotti*, 435 U.S. at 780 n. 16 (Section IV.B; the footnote prints "natural" in capitals); *Citizens United*, 558 U.S. at 342 (Section IV.B). The sequence is told once, in Section IV.B, at length; this entry is its place in the census.

(Douglas, J., for a unanimous Court), the clause applied with "great leeway" between corporations and individuals and *Quaker City Cab*'s equality "only a relic of a bygone era"; *Metropolitan Life*, 470 U.S. at 882 (1985), the clause applied between two names with no person on either side.[161] *What was hung on it:* The name's equality with natural persons against a heavier charge on the privilege, asserted in 1928 by citation of the "person" entry; abandoned in 1973 for "great leeway," the clause applied and the claim failing; the clause applied between names in 1985: the measure of a name's protection moving with the Court as no person's does (Section VI.I).

"medium." *Next citation: NAACP v. Button*, 371 U.S. at 443 (1963), "where we said," assumed; Douglas, J., concurring, at 446. *What was hung on it:* No corporate right; the members' rights carried through.

"corporate democracy." *Next citation:* None, 1978–2009; *Citizens United*, 558 U.S. at 362, 370 (2010), as *Bellotti*'s holding; Stevens, J., dissenting, at 477, the only opinion to ask what it means. *What was hung on it:* The rejection of the shareholder-protection interest.

"associations of citizens." *Next citation:* None by the Court through 592 U.S.; Breyer dissenting, *Holder*, 561 U.S. at 43 (2010), quoting 349. *What was hung on it:* Treasury speech as the citizens' speech.

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[161] The entry's pins are given in Section VI.I's notes: *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400–402 (1928) (Butler, J., for the Court), quoting *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493 (1927), and 403 (Holmes, J., dissenting; Brandeis, J., dissenting, Stone, J., also dissenting as *Lehnhausen* records); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 359–361, 365 (1973) (Douglas, J., for a unanimous Court): at 359 (the cut, pdf 4) the Court quotes *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 526–527 (1959), that "the States, in the exercise of their taxing power, are subject to the requirements of the Equal Protection Clause of the Fourteenth Amendment. But that clause imposes no iron rule of equality"; at 360 (pdf 5), "When it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned"; at 365 the sentence on *Quaker City Cab*. The clause was applied to the corporations and their claim failed; what the Court abandoned was the equality with natural persons that *Quaker City Cab* had asserted, and the entry's verbs say that and no more. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 875, 882 (1985). The entry is printed as the census's second doctrine; Section VI.I carries the argument and this entry carries the sequence.

Five things the table shows that the prose has stated piecemeal. First, the hedges are all at the beginning. Marshall assumed in 1809 and hedged in 1819; nobody hedged afterward, because the next citation always dropped the qualification and kept the noun. Second, the next citation is the step. In every entry the term's second appearance is a restatement, "it was stated by the Court," "the same principle was again decided," "This was expressly held," "there is no doubt," "It is conceded," "where we said," and a restatement carries the noun and not the qualification. The only citations that argue a term are the two that turned it to a new use, *Letson* in 1844 and Justice Stevens in 2010; the two that argued against one, Black in 1938 and Douglas in 1949, were dissents, and were answered with the term's age; and two of the terms were first carried forward by dissents, "person" by Harlan in 1886 and "associations of citizens" by Breyer in 2010, the last with no later citation by the Court at all. Third, the only entries that were argued from the text, *Paul*, *NAACP* and the citizenship entry that *Paul* belongs to, are the ones that confer nothing on the name. Where the Court read its words it found natural persons and a medium. Where it found a holder, it found one by a figure of speech, or by a word carried in from the law of corporations with its meaning left behind, and the figure, or the word, was afterwards cited as the holding. Fourth, the two entries added to the census here test the rest from the other side: the clause the Court kept closed, it kept closed by reading the word and looking through the name to the persons, as Section III.K records, and on the tax side the name's protection moved with the Court as no person's does, as the entry records and Section VI.I measures. What was carried into one clause and kept out of the next, and asserted for a third and abandoned, was carried each time by a citation and not by the Amendment's words, and the test of Section VII asks, clause by clause, what stands under the citation. Fifth, the limiting word is the grant's cover. In the sentence that confers the right on the name, the entries find in the same

breath a word that denies the name, "mere," "only," "although," "artificial," "for such purposes," and Hale's sentence in Section VII.C adds "but an association" and "assumed"; the denial is what let the grant pass: it reads as a limit, and the grant is the whole. Where the limiting word was held to its meaning, as in *Deveaux*, *Paul* and *Blake*, the holding reached the persons or the grant's incidents; where it covered the grant, as in *Letson* and *Hale*, the holding is the name's own. What is left when the figure is removed is the question of Section VII.

K. The Control the Table Found: "Citizen," the Clause the Court Kept Closed to the Name for One Hundred and Eighty Years by Reading the Word and Looking Through to the Persons

The table has one entry the census did not set out to find, and it is the control the other entries wanted. The Court was asked from the beginning whether a corporation is a citizen, under Article III's "controversies between citizens of different States," under Article IV's "citizens of each State," and under the Fourteenth Amendment's "citizens of the United States," and for one hundred and eighty years it answered no, of every clause but one, and of that one for ten years. The first answer is *Deveaux*'s, "certainly not a citizen," and the reporter's note of *Hope Insurance Co. v. Boardman*, the companion case argued with it (the pin in note 159), records the Court as holding "that a body corporate as such cannot be a citizen, within the meaning of the constitution." The exception is *Letson* in 1844, which Section III.B has read: the Court there held a corporation "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," and "substantially, within the meaning of the law, a citizen of the state which created it," for the purposes of suing and being sued.[162] Ten

[162] *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 How.) 497, 558 (1844) (Wayne, J., for the Court), from the Library of Congress print (pdf 62): "It is, that a corporation created by and doing business

years later the Court rested the same jurisdiction on the persons instead. In 1854, when it settled the diversity question by presumption, Grier, J., for the Court, allowed the premise and its conclusion, and refused to let the conclusion decide the case: the corporation "is an artificial person, a mere legal entity, invisible and intangible," and "This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises which cannot be denied"; but the citizen who sued it "did not deal with a mere metaphysical abstraction, but with natural persons," and "State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution."[163] From 1854 the jurisdiction rested on a presumption about the persons, that the members of a corporation are citizens of the chartering State, which *Blake* in 1898 would state in its settled form, the members "are to be conclusively presumed to be citizens of the State creating such corporation," adding that "therefore it has been said that a corporation is to be deemed, for such purposes, a citizen": where the word was still spoken, it named the presumption's effect, for those purposes, and nothing more. Seven years later Taney, C.J., for the Court, restated both halves: a corporation "exists only in contemplation of law, and by force of law; and where that

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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, and where its business is done, for all the purposes of suing and being sued." The reporter's headnote at 497 (the print's text layer): "capable of being treated as a citizen, for all purposes of suing and being sued." The same page quotes *Dartmouth College* at 636 and *Providence Bank* at 514, and 559 turns *Deveaux*'s "ideal existence," as Section III.B reads it. The Court quoted the sentence at *Monell*, 436 U.S. at 688. *Letson* is the one opinion in the entry that speaks the word of the name, and it speaks it in the "treated as" form; *Marshall* ten years later rested the same jurisdiction on the persons instead (note 163).

[163] *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1854) (Grier, J., for the Court), from the official report, the Library of Congress bound volume, and quoted in Section VII.C (whose note gives the pin's correction from the shelf's star-paged reprint: the sentences follow the reprint's *327 mark and sit on 327 of the official report); the "cannot be a citizen" that Grier quotes is the inference drawn in argument from the artificial-person premise, which he accepts as "a logical conclusion from the premises which cannot be denied" and then declines to let decide the case. The presumption on which the jurisdiction rests is at 328: the persons who use the corporate name "may be justly presumed to be resident in the State which is the necessary habitat of the corporation." The dissents of Catron, Daniel and Campbell, JJ., are not cited here.

law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation," and, restating *Deveaux*, "a corporation is not a citizen, within the meaning of the Constitution of the United States."[164] *Paul* in 1869 is the entry's Article IV statement, quoted in Section III.D; *Blake v. McClung* in 1898 made it a holding in terms, "we now hold, that a corporation is not a citizen within the meaning of the constitutional provision," in the same paragraph that called the corporation a "person" under the Fourteenth Amendment on the authority of *Santa Clara*'s page 396; *Western Turf* in 1907 and *Hague* in 1939 said it of the Fourteenth Amendment's own clause, the privileges and immunities of "citizens of the United States," Roberts, J., in *Hague* writing, with Black, J., that "Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States'"; *Asbury Hospital* in 1945 restated it for both clauses together.[165]

The entry closes with the statutory word, and it was the legislature that spoke it. In 1958 Congress wrote that a corporation "shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business," the diversity statute's own rule of treatment, enacted by the people's legislature for the people's courts as Section V.A

[164] *Ohio & Mississippi Railroad Co. v. Wheeler*, 66 U.S. (1 Black) 286, 295–296 (1861) (Taney, C.J., for the Court), from the shelf's cut (pdf 10–11) and quoted in Section VI.H: the "contemplation of law" passage, restating *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519 (1839), is on 295; the "not a citizen" clause, restating *Deveaux*, opens on 295 and closes on 296; and 296 states *Letson*'s presumption, "where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence," so that the suit in the corporate name "must be presumed to be" the members' suit.

[165] *Hague*, 307 U.S. at 514 (Roberts, J., joined by Black, J.) (the Library of Congress print, pdf 19): "Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States.' Only the individual respondents may, therefore, maintain this suit," his note 22 citing *Orient Insurance Co. v. Daggs*, 172 U.S. 557, *Holt v. Indiana Manufacturing Co.*, 176 U.S. 68, *Western Turf*, 204 U.S. 359, and *Selover, Bates & Co. v. Walsh*, 226 U.S. 112. Stone, J., reached the same result for the corporate respondent under the due process clause at 527, having cited *Grosjean* at 519 for the liberty of "all persons" (note 121). The two opinions are attributed by their authors because the case has no opinion of the Court (the lineup at 500, pdf 5).

says the Dictionary Act was enacted for the people's statutes.[166] In 1990, asked whether a limited partnership takes its citizenship from all its partners, Scalia, J., for the Court, answered that the question was "more readily resolved by legislative prescription than by legal reasoning," that such accommodation "is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word 'citizen'," and that "having established special treatment for corporations, we will leave the rest to Congress."[167]

Two things about the entry bear on the rest of the table. The first is how the Court kept the clause closed. It read the word, as *Paul* and *Blake* did, and found natural persons; and where a result for the persons was wanted, as in the diversity cases, it looked through the name to the persons and presumed their citizenship, as *Deveaux*, *Marshall* and *Wheeler* did, which is the rule of Part One and of Section IV.B and not a coinage; *Letson*'s decade is the exception, and the Court itself ended it. The second is what the word is. Citizenship is the settled bond's own word, as Section VI.H shows: the Fourteenth Amendment's first sentence makes citizens of "all persons born or naturalized," and the four voting amendments each say "citizens." A name is born of a grant and naturalized by nothing, and for one hundred and eighty years, *Letson*'s

[166] 28 U.S.C. § 1332(c)(1), from the Office of the Law Revision Counsel's Title 28 (release point 119-111, leaf 627), in its present words: "a corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business." The subsection was added by Pub. L. 85-554, § 2, July 25, 1958, 72 Stat. 415 (the section's credit line at leaf 629; the amendment notes at leaf 634: "Subsecs. (b) to (d). Pub. L. 85-554 added subsecs. (b) and (c)"), and the words of 1958 are the ones the text quotes, as the 1988 amendment note recites the subsection's prior form: "a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business" (the 1964 proviso on insurers and the 2011 words "every State and foreign state" are the later amendments the notes record). The statute is the rule of treatment for the people's courts that the Court in *Carden* said was Congress's to write (note 167).

[167] *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990) (Scalia, J., for the Court) (the Library of Congress print, pdf 13). The question was the citizenship of a limited partnership for the diversity statute, 28 U.S.C. § 1332 (leaf 626); the Court held that the citizenship of every partner counts and declined to extend to other artificial entities the "special treatment" the corporation had received since *Letson*. The sentence quoted is about the statutory word, and the article cites it for that: the one extension of "citizen" to a name the Court ever made it made by presumption about the persons, and when asked to go further it named the legislature as the body to do it.

decade excepted, the Court said so whenever the word was put to it, in the same years in which it moved the name into "person" by a remark and into "liberty" by a citation. The census shows the transplant stopping at one word, and the word it stopped at is the one that names the people.

L. The Transplant in One View: The Reports' Phrase Beside the King's, and the Checks That Stayed Behind

The census table reads the terms in the order of their entry. The table below reads the same terms against their source. Each phrase on which the Reports built the being has an English original, and the original was said of the king's body politic, the second of his two bodies (Section II.E), or of the corporation as the king's grant (Section II.F). The left column is the American phrase as the Court wrote it, with its page; the right is the English phrase as Plowden, Coke and Blackstone wrote it, with its leaf; every quotation stands in the section named, where its page is read.

The Reports' phrase, with its page	**The English books' phrase, said of the king's body politic or the king's grant, with its leaf**	**Read at Section**
"invisible, intangible" (*Deveaux*, 9 U.S. at 86, 88 (1809); *Dartmouth*, 17 U.S. at 636 (1819))	"a body that cannot be seen or handled" (*Duchy of Lancaster*, 1 Plowd. 213, 75 Eng. Rep. 326 (1562)); "invisible" (*Sutton's Hospital*, 10 Co. Rep. 32b, 77 Eng. Rep. 973 (1612))	II.E, III.B
"immortality"; "like one immortal being" (*Dartmouth*, 17 U.S. at 636)	"never dies" (*Wroth's Case*, 2 Plowd. 457, 75 Eng. Rep. 685 (1573)); "immortal" (10 Co. Rep. 32b); "an absolute immortality. The king never dies" (1 Bl. Comm. 242 (1765))	II.E, III.C
"existing only in contemplation of law" (*Dartmouth*, 17 U.S. at 636)	"consisting of policy and government" (1 Plowd. 213); "rests only in intendment and consideration of the law" (10 Co. Rep. 32b)	II.E, III.B

The Reports' phrase, with its page	**The English books' phrase, said of the king's body politic or the king's grant, with its leaf**	**Read at Section**
"artificial being"; "artificial persons created by the legislature" (*Deveaux*, 9 U.S. at 86; *Dartmouth*, 17 U.S. at 636; *Paul v. Virginia*, 75 U.S. at 177 (1869))	"artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality" (1 Bl. Comm. 455); "natural persons, or artificial" (1 Bl. Comm. 119)	II.F, III.A, III.D
"mere creature of the law" (*Deveaux*, 9 U.S. at 88, "derived entirely from the English books")	artificial persons "created and devised by human laws" (1 Bl. Comm. 119); the king's act, "*creamus, erigimus, fundamus, incorporamus*" (1 Bl. Comm. 460–461)	II.F, III.B
"either expressly, or as incidental to its very existence" (*Dartmouth*, 17 U.S. at 636)	the prerogative runs "unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary" (1 Bl. Comm. 243)	III.A, III.C
"to be deemed to all intents and purposes as a person" (*Letson*, 2 How. at 558 (1844))	the heir, at the demise, "king to all intents and purposes" (1 Bl. Comm. 242)	III.A

Read across, the rows are a recitation. The Court described the corporation in the words the English books had used for the king's political body and for the king's grant, and the description came without argument, as Sections III.B and III.C record, because the words arrived looking settled. Read down the right column, the rows are also an inventory of what did not come over. The same books that gave the body politic its perpetuity and its scope kept four checks on the king's corporation, and none of them has a row on the left: the king was "the visitor of all civil corporations" (1 Bl. Comm. 469); his grant was construed by its words, a dignity by patent enuring "only to the grantee for life" without "words to direct the inheritance" (388–389); he could be petitioned and could answer (Section II.E); and the body he made was a "system subordinate," bound to "acting up to the end or design, whatever it be, for which they

were created by their founder," and regranted by the Crown when it could no longer perform its functions (467; *Rex v. Pasmore*, 3 T.R. 199, 242–243 (K.B. 1789); Section II.F). The transplant carried the sovereign's attributes and left the sovereign's remedies behind, which is what Section III.A named and the test of Section VII measures.

IV. The Two Sets: What Natural Persons Already Hold, What Incorporation Alone Confers, and Why There Is No Third

The census has shown what the terms are. This section supplies the measure the rest of Part Two applies: two sets, the rights the members already hold and carry through the name, and the incidents the grant alone confers; and it shows why there is no third. Whatever a court has called a corporation's own right must be found in one set or the other, or in nothing.

A. The Division: The Members' Own Rights Carried Through the Name, and the Incidents of the Grant

Everything a corporation might claim as a constitutional right falls into one of two sets, and the sets do not overlap.

The first set is what natural persons hold in full before any charter exists. Assembly, which the First Amendment secures to "the people," and association, which the Court derived from it. Speech. Property. The "liberty" the Fourteenth Amendment protects against the States. The unenumerated rights the Ninth Amendment reserves. Every member of every corporation holds all of these as a natural person, and held them the day before the charter issued. Incorporation cannot add to this set. There is nothing to add. What incorporation can do with these rights is carry them: the members may assert them together, under one name, and the name

is what the Court called the NAACP, "but the medium through which its individual members seek to make more effective the expression of their own views."[168] A medium is a conduit. It holds nothing of its own, and it carries nothing that was not put into it.

The second set is what incorporation alone confers. Limited liability. Perpetual succession. The capacity to hold, to contract, to sue and be sued under a common name. These are the incidents of the rule, and none of them is a constitutional right. Each is a sovereign's grant, each binds strangers to the agreement that sought it, and each remains the grantor's to condition or withdraw.

There is no third set. A right that is neither a member's own right carried through the name nor an incident of the rule has no source. "Corporate constitutional rights," as a phrase, therefore names one of two things: a natural person's retained right, which incorporation did not give, or an incident of the rule, which the Constitution does not protect as a right of the name. Neither is a right the corporation holds as itself.

B. The First Set, from the Court's Own Case: NAACP v. Alabama and the Incorporated Body Called "But the Medium"

The division is not a construction imposed on the cases from outside. It is what the Court found when it looked, in the one case in which it looked carefully.

The NAACP in *NAACP v. Alabama* was "a nonprofit membership corporation organized under the laws of New York."[169] Alabama had ordered it to produce its membership lists, and it refused on the ground that disclosure would expose its members to reprisal. The State argued that the Association had no standing to assert rights that belonged to the members, who were not

[168] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958).

[169] *Id.* at 451.

parties. The Court agreed that the rights were the members' and allowed the Association to assert them anyway, because "it and its members are in every practical sense identical," because the Association "is but the medium" for the members' expression, and because requiring the members to come forward themselves "would result in nullification of the right at the very moment of its assertion."[170] The right itself was located in the members' own liberty: "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."[171]

Three things follow. The right was a natural person's liberty, held in full without any charter. The charter added nothing to it and could add nothing. And the Court called an *incorporated* body a medium, so the incorporation did not turn the body into a holder. That is the first set, described by the Court in the case most often cited for corporate rights of association, and the description supports no right of the name's own.

The division has a ground, and the ground should be stated before more cases are, because it is what the cases track. Constitutional rights divide by their object and by the direction in which their interest runs. Rights of security have an object that can be held: a house, papers and effects, property, a claim, a defense. The Fourth Amendment secures the people "in their persons, houses, papers, and effects"; the Fifth forbids a taking without just compensation and a deprivation without due process; the Seventh preserves the jury over a claim at law; the Sixth guarantees the accused. Their interest lies in the person whose holding is at stake, and they run from that person outward, against the sovereign, as limits on what it may do to what is theirs. Because the invasion is of the object, whoever lawfully holds the object may invoke the limit.

[170] *Id.* at 459.

[171] *Id.* at 460.

The head of a household invokes the Fourth Amendment against a search of the home because the home is theirs, as their own interest and not as anyone's representative; the Court's rule that Fourth Amendment rights "are personal rights which, like some other constitutional rights, may not be vicariously asserted," so that a person aggrieved only through a search of "a third person's premises or property has not had any of his Fourth Amendment rights infringed," is a rule about the household's members, each of whom has the same interest in the home.[172] The right is in the holder because the object is the holder's.

When the people grant a name that may hold property, these limits travel with the holding, not as rights of the name's own but as the incident of holding: the members' plant, papers and effects are no less theirs for being held under the name. The Court's standing rule, applied to a name, resolves the question of whose security a search of the plant invades by naming the name, and denies the shareholder a right in premises that are "a third person's." That is a description the article measures and a result it keeps. Strike the name as the holder and the plant is still the members' property, invaded; and the question who may complain of it is the one this section's *NAACP* paragraph has already answered, the name asserting the holding for the persons behind it because requiring them to come forward severally "would result in nullification of the right at the very moment of its assertion," which is the medium, the one vicarious assertion the Court allows and has named. That is what the Court saw in *Hale v. Henkel* as well, an association of individuals under an assumed name whose property cannot be taken without compensation (Section VII.C), and it is why the Court was right in result to find the Fourth Amendment at a corporation's premises and right to say "some" of the rights it finds there; the holder named as the name is the description the article measures. *Dow Chemical* is the case the

[172] *Alderman v. United States*, 394 U.S. 165, 174 (1969) (the Library of Congress bound volume, cut pdf 10); *Rakas v. Illinois*, 439 U.S. 128, 133–134 (1978) (the cut, pdf 6–7; the quoted sentence is on 134, following *Rakas*'s quotation of *Alderman* at 133–134).

adversary names, and the article names it back as a security case rightly decided. The question was whether aerial photography of a two-thousand-acre plant was a search, and the Court held it was not, because the open areas of an industrial complex are not the curtilage of a home: "The intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings of a manufacturing plant."[173] The plant is the members' holding, and the Court measured the holding by what a plant is, not by what a person is; *Morton Salt*'s sentence that corporations "can claim no equality with individuals in the enjoyment of a right to privacy" and *Oklahoma Press*'s "the Fourth, if applicable" (Section VII.C) are the Court's own statements that the security travels as far as the object and no further.

Rights of participation have no object but the person's own act: to speak, to publish, to assemble, to petition, to worship, to vote. They exist because the people govern themselves, and each member's voice is the sovereign's own deliberation distributed to each as a member. Their interest runs the other way, from the sovereign to each person as a member. And because their object is the act of the self, they cannot be held or exercised by one person for another without that person's consent to the act. An agent speaks the principal's words by the principal's consent, and the act remains the principal's; without that consent no one may speak another's speech, cast another's vote or hold another's belief, and a head of household who tried to exercise the household's speech, or to prevent it, would find no constitutional provision behind them. Where consent to the act is recorded, and where it is not, is Section V.D's question. These rights

[173] *Dow Chemical Co. v. United States*, 476 U.S. 227, 236 (1986) (the cut, pdf 10). The hedges: *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950), and *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946), both quoted in Section VII.C; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 353 (1977) (the Library of Congress bound volume, cut pdf 16): "Nor can it be claimed that corporations are without some Fourth Amendment rights," and "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context"; the syllabus says more than the Court, and the article quotes the Court. *Hale v. Henkel*, 201 U.S. 43, 76 (1906), is quoted in Section VII.C.

therefore cannot pass to a name. What comes out of a name is two things at once: the words, which are identified persons' acts, the writer's article, the officer's statement, protected as theirs; and the money, which is the pool's, the people's grant and the people's to condition. The statute reached the second and left the first whole (Section VI.A). There is no third thing for the name to hold. The Fifth Amendment privilege proves the line, because it is a shield that the Court denies to the name while granting the Fourth. The privilege protects a person's own testimony, an act of the self that no custodian can hold, which is why the Court calls it "purely personal" and says that a custodian's production of the corporation's records "is not deemed a personal act, but rather an act of the corporation."[174] From *Hale* in 1906 to *Braswell* in 1988 the Court's practice tracks the object of the right exactly: holdable, through the name; an act of the self, never. The Court has drawn the article's line, and in 1989 Justice O'Connor named it, in the criterion Section VII.C quotes: what a corporation "can do as an entity."

The adversary's objection to the two sets has a standard form, and it was given in writing to the Senate's committee in the weeks after *Citizens United*. Without constitutional rights for corporations, the witness answered, "the government could seize corporate property without due process or just compensation; corporations would not have rights against warrantless, unreasonable searches of their properties," and the same would follow for partnerships and unions, which "have rights because they are made up of people."[175] Every item in the parade is a

[174] *Bellis v. United States*, 417 U.S. 85, 90 (1974) (the privilege "is a purely personal one"); *Braswell v. United States*, 487 U.S. 99, 110 (1988) ("the custodian's act of production is not deemed a personal act, but rather an act of the corporation"); both belong to Section VII.C, where the collective-entity line is run from *Hale* through *Wilson*, *Bellis* and *Braswell*.

[175] Bradley A. Smith, responses to questions for the record, in *We the People? Corporate Spending in American Elections After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 64 (2010) (GPO) (the shelf's HathiTrust copy, pdf 67, the printed page 64; the responses begin at 60): "And imagine if corporations—associations of people—did not enjoy [sic] have constitutional rights: the government could seize corporate property without due process or just compensation; corporations would not have rights against warrantless, unreasonable searches of their properties. And there would be no particular reason to extend such protections to partnerships or unions or informal associations, either—after all, unions are not persons either, but

right of security, and every one travels through the name as the incident of the members' holding; the article grants them all, and grants them for the witness's own reason, that the body is made up of people. The witness's next sentence concedes the rest of the article's premise: "The law allows for the legal fiction of a corporation because it benefits the citizenry and the members of the corporation."[176] The parade names one claim of participation, and the article meets it in the witness's terms. "The true judicial radicals," he wrote, "are those who would deprive Americans of their rights on the grounds that they have joined in the corporate form."[177] Granted: the persons who join the form keep every right of participation they had, and Section VI.A shows that the statute left all of them open, the officer's own speech, the members' pooled speech through the committee, every member's vote. What they cannot do is hold the pool's speech as their own act without their consent to it (Section V.D), and that is not a right they had before joining, so it cannot be one they were deprived of by joining. There is no household head for speech.

Procedural due process and the civil jury are not rights of security at all. They are rules of the proceeding, which the people's permission to sue and be sued carries with it, binding the court whoever the party is, and the Court's own Seventh Amendment case says so. In *Ross v. Bernhard* the Court held that a derivative suit presenting a legal claim carries the jury right, and it reasoned from the suit and not from the plaintiff: "a corporation, although an artificial being,

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artificial entities. Like corporations, they have rights because they are made up of people." The same page describes a Justice's question at the second argument as proposing "a radical remake of American Constitutional and common law."

[176] *Id.* at 64: "Corporations are not people, of course, and there is nothing remarkable in that observation. But they are associations of people, bound together in a complex web of imperfect contracts. The law allows for the legal fiction of a corporation because it benefits the citizenry and the members of the corporation."

[177] Smith, responses, *supra* note 175, at 64: "The true judicial radicals are those who would deprive Americans of their rights on the grounds that they have joined in the corporate form." The sentence is the first set claimed for persons through the form, which the article grants; the sentences before it list the security rights the parade names.

was commonly entitled to sue and be sued in the usual forms of action," and "whether the corporation was viewed as an entity separate from its stockholders or as a device permitting its stockholders to carry on their business and to sue and be sued, a corporation's suit to enforce a legal right was an action at common law carrying the right to jury trial at the time the Seventh Amendment was adopted."[178] The jury came because the suit was at law, not because the plaintiff was a person; the Court declined the theory question, as this article does; and when it said that the claim "is not his own but the corporation's," that the corporation is "the real party in interest, the stockholder being at best the nominal plaintiff," and that "the heart of the action is the corporate claim," it was speaking the entity vocabulary the article measures.[179] The article's sorting puts the claim where *Ross*'s result puts it. A corporate cause of action is an asset of the pool, the second set's capacity to sue under a common name (Section IV.A), sued on under the name by the sovereign's own procedure, and the members' interest in it is the residual claim that lets a stockholder bring the suit. One phrase slips, "one entitling the corporation to a jury trial under the Seventh Amendment," where the entitlement is the suit's, tried at law by the sovereign's procedure whoever the party is. Right in result, right in its reasoning from the suit, and no third set.

The Court had faced the question of looking through the name fifty years before *NAACP v. Alabama* and had declined to, and the case belongs here because the article's rule is the one it misapplied. Kentucky's Day Law of 1904 made it unlawful for "any person, corporation or association of persons" to maintain a school where white and Black pupils were both received;

[178] *Ross v. Bernhard*, 396 U.S. 531, 533–534 (1970) (the Library of Congress bound volume, cut pdf 3–4; the second sentence straddles the leaves). The Court cited *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), for the capacity to sue and be sued, the same page Section IV.C quotes for the grant.

[179] *Id.* at 538, 539 (pdf 8–9); at 538 the Court quotes *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 522 (1947), for the proposition that the claim "is not his own but the corporation's." Section VII.C places *Ross* beside O'Connor's inventory as the Court's "nature" test agreeing with the article's "source" test.

its title, as Harlan gives it, was "An act to prohibit white and colored persons from attending the same school"; Berea College's charter, in his recital, was for an institution of learning "in order to promote the cause of Christ."[180] The Kentucky court had added, "as if merely incidental to or a make-weight," in Harlan's words, that the corporation "has no natural right to teach at all. Its right to teach is such as the State sees fit to give to it."[181] The Court affirmed on that ground alone. "In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike"; it was "unnecessary for us to consider anything more than the question of its validity as applied to corporations"; and the Court would "concern ourselves only with the inquiry whether the first section can be upheld as coming within the power of a State over its own corporate creatures."[182] The sentence about the name is true, and the holding is the error. A name has no natural right to any act; that is this article's first premise. The error is the next step, that because the name has none the State may forbid the teaching. Teaching is a person's act, a right of participation in its plainest form, and the corporation taught only as its teachers taught. The grant gave the name the power to maintain a school, to hold the buildings and the endowment and to contract in one name, and the State might condition or withhold that power; what the grant never gave or withheld was the act of teaching and learning together, which was the teachers' and the students', and which the same persons might do without the form. The Court let the condition on the power reach the act, and that is the error.

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[180] *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908) (the statute's words, in the opinion of the Court; the cut, pdf 10); *id.* at 59 (Harlan, J., dissenting) (the title, Ky. Acts 1904, p. 181) (the cut, pdf 15, displayed) and 60 (the charter's words) (the Library of Congress bound volume, cut pdf 16).

[181] *Id.* at 61 (Harlan, J., dissenting) (pdf 17), quoting the Court of Appeals of Kentucky.

[182] *Id.* at 54 (Brewer, J., for the Court) (pdf 10); *id.* at 58 (pdf 14; the leaf's running head reads "HARLAN, J., dissenting" because the dissent opens on the same page, but the sentence is the Court's close). Holmes and Moody concurred in the judgment only; Harlan dissented, Day with him. The article takes the rule and names the use here, in Sections VI.B and VII.D, and in the census entry.

Harlan, dissenting, saw it. In so ruling, he wrote, "it must necessarily have been assumed by this court that the legislature may have regarded the teaching of white and colored pupils at the same time and in the same school or institution, when maintained by private individuals and associations, as wholly different in its results from such teaching when conducted by the same individuals acting under the authority of or representing a corporation"; the statute was "an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile state action"; and the right to impart instruction is "beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States."[183] If the State could do this, he added, it could "forbid the assembling of white and colored children in the same Sabbath-school," though the teaching be "under the authority of the church to which the school is attached as well as with the consent of the parents of the children."[184] Every case in Section III's census runs one way, the persons' rights moved into the name. *Berea* runs the other way, the State reaching the persons' acts through the name by addressing the name. Both rest on one false premise, that the name holds the act. The article takes *Berea*'s rule and names its use in each place it cites it: the rule was used to segregate a college because the Court held only half of it.

The Court supplied the missing half seventeen years later, in two sentences that this section's division could have written. "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true," the Court said in *Pierce v. Society of Sisters*, citing *Riggs* and *Western Turf*, the two cases that had kept liberty from the name in 1906 and 1907 and whose rule *Berea* applied without citing them; the sentences that follow, on the business and property the

[183] *Id.* at 61, 67 (Harlan, J., dissenting) (pdf 17, 23).

[184] *Id.* at 68 (Harlan, J., dissenting) (pdf 24).

schools held and the child who "is not the mere creature of the State," Section V.A quotes.[185] The Court even described *Berea* for what it was, a statute read "as though merely intended to amend the charters of certain private corporations." *Pierce* is *Berea* with both sets held: the name's property in the second, the persons' liberty in the first, and nothing of the name's own between them. Harlan's dissent of 1908 is the first half of *Pierce*'s reasoning of 1925.

Then came *NAACP v. Alabama*, where the State's device was Kentucky's. Alabama sued under its foreign-corporation statute "to enjoin the Association from conducting further activities within, and to oust it from, the State," and demanded the members' names;[186] the Court looked through the name to the persons, as the paragraphs above record. Five years later, in *NAACP v. Button*, the Court added a description. The Association "may assert this right on its own behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the statute would curtail. Cf. *Grosjean v. American Press Co.*"; and in the next sentence, "We also think petitioner has standing to assert the corresponding rights of its members."[187] The second sentence is the first set. The first is right in result and wrong in description, a name "directly engaged" in acts that only its lawyers and members performed, with *Grosjean* as the authority, which Section IX.E measures. The business treasury inherited the description. *Bellotti*, rejecting the reasoning of the Massachusetts court, quoted the argument that the Fourteenth Amendment's liberty "is the liberty of NATURAL not of artificial persons" and answered it in a footnote with "But see *NAACP v. Alabama ex rel. Patterson* … ; *NAACP v. Button*," the two civil-rights cases cited as if they had held the name's own liberty, against the

[185] *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (the Library of Congress bound volume, cut pdf 26), citing *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906), and *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907). "Creature" is the Court's word.

[186] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 452 (1958) (the cut, pdf 4; the ouster sentence is on 452, the opinion opening at 451).

[187] *NAACP v. Button*, 371 U.S. 415, 428 (1963) (the cut, pdf 14).

very line *Berea* had applied;[188] and *Citizens United*, at page 342, cited *Button* and *Grosjean* for the proposition that political speech does not lose protection "simply because its source is a corporation" (Section III.J, the census's "person" entry). The Court withheld liberty from the name when the persons behind it were Black students and their teachers; looked through the name to the persons when they were the Association's members; described the name as acting on its own behalf in the Association's next case; and cited that description for the business treasury. The persons' victories were real and were theirs, by the Court's own words of 1958. What the business corporation inherited in 1978 and 2010 was the description, not the persons.

C. The Second Set, from the Sovereigns Who Granted It: Ulpian, Blackstone, Paul, the State Constitutions, Flint, and Rehnquist

The second set is older than the first set's case law by two millennia, and every sovereign who granted it said what it was.

Ulpian, in the Digest's title on suits in the name of a body, in the fragment Section II.B translated: "*Si quid universitati debetur, singulis non debetur: nec quod debet universitas singuli debent.*"[189] And in the next fragment: whether all, some, or none of the body's members remain, the body is the same.[190] The separation of the body's debts from the members' and the body's survival through every change of them: the two incidents, stated as rules of the sovereign's law

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[188] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 & n. 16 (1978) (the cut, pdf 16). The footnote quotes the appellant's brief in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), as the reasoning the Massachusetts court adopted, and prints "NATURAL" in capitals; before the "But see" it cites *Hague v. CIO*, 307 U.S. 496, at 518 (1939) (opinion of Stone, J.), the opening of Stone's opinion; the article's own pin for Stone's "natural, not artificial, persons" sentence is 527 (Sections III.J and IX.E). *Citizens United v. FEC*, 558 U.S. 310, 342 (2010) (the bound volume, pdf 503): "This protection has been extended by explicit holdings to the context of political speech. See, e.g., *Button*, 371 U.S., at 428–429; *Grosjean* …."

[189] Dig. 3.4.7.1 (Ulpian, 10 *ad ed.*), from the shelf's Latin text (pdf 148).

[190] Dig. 3.4.7.2 (pdf 148): "In decurionibus vel aliis universitatibus nihil refert, utrum omnes idem maneant an pars maneat vel omnes immutati sint."

in the second century, in a title whose first fragment says that such a body is not conceded to everyone but "in very few cases."[191]

Blackstone, opening his chapter on corporations, in the sentences Section II.F quoted: the law constitutes artificial persons for a perpetual succession, to preserve rights which, granted only to the individuals composing the body, "would upon their death be utterly lost and extinct."[192] The incident is succession; the rights are "granted"; and the king's consent is "absolutely necessary."[193]

And closing the chapter, at the dissolution: "The debts of a corporation, either to or from it, are totally extinguished by it's dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities," a rule Blackstone grounds in the same maxim of Ulpian's that opens this section.[194] Limited liability, in the chapter's own words, is the grant's incident, and it lasts as long as the grant.

The Supreme Court, in *Paul v. Virginia*: "Now a grant of corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability."[195] Note to whom the grant runs. Not to a corporation; to "the corporators," the natural persons, who receive two privileges, the single name and the exemption from liability. The

[191] Dig. 3.4.1 pr. (Gaius, 3 *ad ed. provinc.*) (pdf 146): "Neque societas neque collegium neque huiusmodi corpus passim omnibus habere conceditur … paucis admodum in causis concessa sunt huiusmodi corpora."

[192] 1 William Blackstone, *Commentaries on the Laws of England* 455 (Oxford 1765).

[193] *Id.* at 460.

[194] 1 Blackstone, *Commentaries* 472 (1765) (the first edition in facsimile, pdf 490), citing "Ff. 3. 4. 7." in the margin, which is Dig. 3.4.7.1, quoted at the head of this section.

[195] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 181 (1869).

corporation itself, the same opinion says, is "the mere creation of local law" and "can have no legal existence beyond the limits of the sovereignty where created."[196]

The people of the States, in their constitutions. Virginia's, in 1902, defined the thing: "the term 'corporation' or 'company' shall include all trusts, associations and joint stock companies having any powers or privileges not possessed by individuals or unlimited partnerships," excluding municipal corporations and the public institutions of the State.[197] A corporation is, by the people's own definition, whatever has powers individuals and partnerships lack. That is the second set written into a constitution. And Alabama's people in 1867, in the words Michigan's had used in 1850[198] and Section II.G.4 quotes, reserved the condition in the section that granted the power.[199] The grantor conditions the grant in the act of making it.

And Justice Rehnquist, dissenting in *Bellotti*, named the incidents as the grant in the modern Reports: "A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity," and "the mere creation of a corporation does not invest it with all the liberties enjoyed by natural persons."[200]

The Court said the same of the privilege when it taxed it and when it regulated it. The federal corporation tax, *Flint v. Stone Tracy Co.* held in 1911, is "an excise upon the particular privilege of doing business in a corporate capacity," laid "upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed, and which are not enjoyed by private firms or individuals"; the advantages the Court listed are

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[196] *Id.*

[197] Va. Const. of 1902, art. XII, § 153, in 7 Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* 3936 (Washington: GPO, 1909) (vol. VII, pdf 160).

[198] Mich. Const. of 1850, art. XV, § 1, in 4 Thorpe, *supra*, at 1964 (vol. IV, pdf 48).

[199] See note 65.

[200] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 824–825 (1978) (Rehnquist, J., dissenting), at 824 citing *United States v. White*, 322 U.S. 694, 698–701 (1944), for the proposition that corporations do not enjoy the privilege against self-incrimination.

this section's second set, "the continuity of the business, without interruption by death or dissolution, the transfer of property interests by the disposition of shares of stock, the advantages of business controlled and managed by corporate directors, the general absence of individual liability"; and "it is this distinctive privilege which is the subject of taxation."[201] In 1987 the Court called corporations "entities whose very existence and attributes are a product of state law," and said that "no principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations, including the authority to define the voting rights of shareholders."[202] Brandeis, dissenting in *Liggett*, recorded the grant's history as a grant: incorporation for business "was commonly denied long after it had been freely granted for religious, educational and charitable purposes," and only "after 1875 extension of the privilege to every lawful business became" common.[203] Section VI.I measures what the Court later did with the privilege's charge. Here it is enough that the Court, taxing the privilege and regulating it, described it as this section does.

The second set, then, is not a theory. It is what the Digest, Blackstone, the Court, the people of the States, and the one Justice who tried to limit corporate rights all said the corporation was: a grant of succession and exemption to natural persons, conditionable by the grantor.

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[201] *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151, 162 (1911) (the cut, pdf 45, 56). Section VI.I measures the exceptions from the charge.

[202] *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) (Powell, J., for the Court) (the Library of Congress bound volume, cut pdf 21), quoting at the same page Marshall's *Dartmouth* sentence and citing Rehnquist's *Bellotti* dissent at 822–824, the passage this section quotes.

[203] *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 & n. 2 (1933) (Brandeis, J., dissenting) (the cut, pdf 32).

D. Why the Two Sets Exhaust the Field: The Line Is Drawn by What Private Agreement Cannot Create

The division is exhaustive because the second set is exactly the part of a corporation that private agreement cannot produce, and the first set is exactly the part it can.

Natural persons may agree among themselves to act together, to pool property, to speak with one voice, to appoint agents, to share profits and losses. That is a partnership, and every right a partnership can assert is a right its partners hold already. What natural persons cannot do by agreement among themselves is bind people who were not party to it. Limited liability tells a creditor or a tort victim, who agreed to nothing, that the members' assets are beyond reach. Perpetual succession tells the law of inheritance that this property does not pass at death, and tells the members' successors that the body continues without them. Each alters the rights of strangers to the contract. Binding strangers is what a sovereign's rule does and what private agreement cannot do. So the line between the sets is not drawn by a theory; it is drawn by who can create what. Everything the members could create for themselves is theirs already and needs no grant. Everything that needs a grant binds strangers and is not a right.

Carter saw this in 1919, listing the "distinguishing characteristics of a corporation" as "limited liability of individual members for the debts of the corporation, continuing existence irrespective of change of membership or stock-ownership, and centralized control of property and interests," and adding "the necessary condition of corporate existence: origin and definition of legal powers in an enabling act of the State." He noted that the right to sue and hold property in a group name "is not exclusively a quality of the incorporated group," since a statute may give it to unincorporated associations.[204] Strip away what a legislature may give to anyone and what

[204] William Henry Carter, *The Nature of the Corporation as a Legal Entity* 6–7 (Baltimore 1919), from the shelf's HathiTrust copy (pdf 36–37).

remains of the corporation is the two incidents and the enabling act: the second set, and the rule that confers it.

The hinge should be stated at its narrowest, because an adversary will narrow it. Much of what the two incidents do can be had by agreement: a lender may agree to look only to the firm's assets, a continuing body was had before any general act by the deed of settlement and the trust, and management is agency. The part no agreement reaches is the part that binds persons who did not agree. The tort victim contracted for nothing. The member's own creditor is told by the sovereign's rule that the pool is beyond reach, and that shielding of the body's assets from its owners' creditors is the one thing organizational law provides and contract cannot.[205] The law of succession is told that this property does not pass. Those three are the whole of the criterion, and they are enough, because each binds a stranger, and binding strangers is what the article means by the second set. The private forms themselves lived on the sovereign's sufferance: the unchartered joint stock was suppressed by statute in 1720, and registration and limited liability were granted back by statute in 1844 and 1855, the "system subordinate" permitted and withdrawn by the power that permits it.[206]

E. The Consequence: A Right of the Name's Own Is a Right of Something That Does Not Exist

If there is no third set, then every holding that attributes a constitutional right to a corporation as such is a holding about something that does not exist. Where the right in question is one a member could assert in their own name, the holding is correct in result and wrong in description:

[205] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387 (2000) (the shielding of a firm's assets from its owners' creditors as the one thing organizational law provides that contract cannot).

[206] The Bubble Act, 6 Geo. 1, c. 18 (1720); the Joint Stock Companies Act, 7 & 8 Vict., c. 110 (1844); the Limited Liability Act, 18 & 19 Vict., c. 133 (1855), cited for their existence and dates. "System subordinate" is Hobbes's phrase, Section II above.

the right is the member's, the name is the medium, and the holding should say so. Where the right in question is one no member could assert, the holding has conferred on a rule the protection the text reserves to persons, and Section V shows where that line falls.

Dartmouth College is the oldest case of the first kind, and the one its own figure of speech has most obscured. The plaintiffs' title, Marshall wrote, "originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of 'The Trustees of Dartmouth College,' granting to them and their successors the usual corporate privileges and powers"; the act of 1816 "increases the number of trustees to twenty-one, gives the appointment of the additional members to the executive of the state, and creates a board of overseers, with power to inspect and control the most important acts of the trustees"; and "The majority of the trustees of the college have refused to accept this amended charter."[207] The Court held the acts void under the Contract Clause, and the holding needs no "artificial being."

Nine years earlier, in *Fletcher v. Peck*, the Court had held that a grant is a contract: "A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to re-assert that right. A party is, therefore, always estopped by his own grant. Since, then, in fact, a grant is a contract executed, the obligation of which still continues …"[208] Marshall put *Dartmouth* on that rule in sentences that name persons and acts and not a being: "It can require no argument to prove, that the circumstances of this case constitute a contract. An

[207] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, *626 (1819) (Marshall, C.J.), from the Banks reprint: the leaf headed 625 carries the *626 and *627 marks, the charter sentence follows the *626 mark, and the act and the trustees' refusal follow on the same leaf, the refusal straddling the *627 mark. The special verdict names the acts as "passed on the 27th of June, and on the 18th of December 1816," *id.* at *624–*625 (the leaf headed 623).

[208] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, *137 (1810) (Marshall, C.J.), from the Banks reprint (the leaf headed 135 carries the *136 and *137 marks; the passage follows the *137 mark). It opens: "Is a grant a contract? A contract is a compact between two or more parties, and is either executory or executed."

application is made to the crown for a charter to incorporate a religious and literary institution. In the application, it is stated, that large contributions have been made for the object, which will be conferred on the corporation, as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction every ingredient of a complete and legitimate contract is to be found."[209] The applicants, the contributors, and the twelve were natural persons; the charter was their contract; the acts impaired it. The right was theirs, a first-set right carried through the name, and the holding was right in result. It was wrong in description, and only there: nine pages on, the opinion located what the clause protected in a being whose properties were "incidental to its very existence," and described the being with a hedge. Strike the being and the holding stands where *Fletcher* and the charter put it. The people of the States answered *Dartmouth* in the sections of their constitutions that make the grant, in the sentence that follows the grant in Michigan's and Alabama's: "All general laws, and special acts passed pursuant to this section, may be altered, amended, or repealed."[210] The reservation takes no right from any person. It states the grantor's rule in advance, so that no later charter can be read as a promise not to alter it, and it is the remedy of Section IX.C in action: a sovereign conditioning the grant the name holds, by the people's own instrument.

The Court itself practiced the measurement in 1880, in the case the adversary offers to show that the test is unnecessary. Mississippi had chartered a lottery company for twenty-five years and then, in its constitution of 1868, forbade lotteries; the company pleaded its charter as a contract. "No legislature can bargain away the public health or the public morals," the Court

[209] *Dartmouth College*, 17 U.S. at *627 (the sentences follow the *627 mark on the leaf headed 625). The two questions the opinion then puts: "1. Is this contract protected by the constitution of the United States? 2. Is it impaired by the acts under which the defendant holds?"

[210] Ala. Const. of 1867, art. XIII, § 1, in 1 Thorpe, *supra*, at 150 (vol. I, pdf 192).

answered. "The people themselves cannot do it, much less their servants."[211] Then the second set, in the Court's own words, after the trust sentence Section II.G quoted: the people's agencies "may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality."[212] Two years earlier the Court had said of a chartered fertilizer works ordered out of a growing village that "the charter was a sufficient license until revoked; but we cannot regard it as a contract guaranteeing, in the locality originally selected, exemption for fifty years from the exercise of the police power of the State."[213] And in *Charles River Bridge* Taney had put the grantor's standing terms in one sentence: "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation."[214] *Stone* is the grantor conditioning the grant, which is what the people's reservation clauses do in advance; the two are one proposition, and "limited citizenship" is this section's second set named by the Court. "Creatures" is the Court's word, quoted here and never the article's own.

What the reserved-power doctrine never asked is the question this article puts. The doctrine limited what a charter may promise. It never asked whether the name holds a right against the grantor, because in 1880 that question had not been invented; it was invented when the question moved from the grant to the right, and the police power could not follow it there.

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[211] *Stone v. Mississippi*, 101 U.S. 814, 819 (1880) (the Library of Congress bound volume, cut pdf 6).

[212] *Id.* at 820 (pdf 7).

[213] *Fertilizing Co. v. Hyde Park*, 97 U.S. 659, 670 (1878) (the Library of Congress bound volume, cut pdf 12).

[214] *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837) (Taney, C.J.) (the Library of Congress bound volume, cut pdf 129; the sentence is on 548, not 547). Story's dissent begins at 583; Baldwin's concurrence, printed only in the shelf's reprint, is met in Section VI.H.

Citizens United at page 351 is the gap: a condition on the grant treated as a penalty on a speaker, in the sentence Section VI.H reads whole, that the State cannot exact the forfeiture of First Amendment rights as the price of the form's special advantages. *Stone* answers a charter's promise. It has no answer to a right the name is said to hold, and the test does. The test detects what the doctrine lacks, not what it duplicates.

Blackstone supplies the baseline the doctrine stood on and the adversary leaves out. The founder of a corporation is the king alone, as Section II.E quoted; "the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation"; and a corporation may be dissolved "by act of parliament, which is boundless in it's operations," by the death of all its members, by surrender of its franchises, or "by forfeiture of it's charter, through negligence or abuse of it's franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void."[215] Lord Kenyon stated the same law from the bench in 1789: "Corporations are the creatures of the Crown: and on their dissolution their franchises revert to the Crown. But if the King choose that all their rights shall be revived, it is competent to him to do so, either with the old or new corporators; and thereby no person is injured, nor is any rule of law infringed."[216] In England the sovereign of one will could end any corporation, and when the Crown seized the charter of the City of London the proceeding "gave great and just offence" and was answered by a statute that the charter "shall never more be forfeited for any cause

[215] 1 Blackstone, *Commentaries* 468, 472, 473 (1765) (pdf 486, 490, 491). Section VII.B quotes 473's "the condition upon which it was incorporated" at the test, and names the writ of *quo warranto* the same page prescribes.

[216] *Rex v. Pasmore* (K.B. 1789), 3 T.R. 199, 241, 100 Eng. Rep. 531, 553 (Lord Kenyon, C.J.) (ER 100 leaf 564; the sentences follow the [241] mark). "Creatures" is Kenyon's word. Ashhurst, J., at 242–243 is quoted in Section II.F for the purpose-bound grant.

whatsoever."[217] The American innovation was the Contract Clause as *Fletcher* and *Dartmouth* read it, which withdrew that boundless power from the legislatures of the States for every charter on the faith of which property had been conveyed. The sentence this section needs is that the withdrawal was a rule the people wrote about their own servants, not a right the corporation holds of its own. The people of the United States bound the States not to impair the obligation of contracts; a charter on the faith of which property was conveyed was, as this section has shown, the corporators' contract; and the people of the States then wrote Blackstone's condition into their constitutions so that no later charter could be read as a promise not to alter it. *Dartmouth* stays where *Fletcher* and the charter put it, the trustees' contract, right in result. The reservation clauses are the condition the common law annexed to every grant, written down by the grantor. And page 351 is the one place in the Reports where that condition was read as a price exacted from a holder of rights.

V. The Derivative Theory: True for Every Claim a Member Could Bring, and Ended Where No Member's Consent Can Be Found

The adversary's strongest answer to the two sets is the derivative theory: that a corporation's right is only its members' rights asserted together, so that nothing need have been conferred. This section grants the theory everything it can claim, which is the whole of the first set, and then follows it to its edge: the first claim no member could bring, where consent runs out and only the name is left.

[217] 1 Blackstone, *Commentaries* 473 (1765) (pdf 491): the forfeiture "by seising the charter of the city of London, gave great and just offence," and by 2 W. & M. c. 8 the charter "shall never more be forfeited for any cause whatsoever."

A. The Theory: The Corporation's Rights as Its Members' Rights Asserted Collectively, from Deveaux to Citizens United

The derivative theory holds that a corporation has no rights of its own, and that when a court protects "the corporation's" property or speech it is protecting the natural persons behind the name, whose rights are asserted collectively because that is the convenient way to assert them. The theory is the oldest account of corporate rights in the Reports and the one most compatible with the two sets, because it needs no grant at all. On its own terms it is simply the first set, stated as a theory.[218]

Its founding instance is Marshall's sentence in *Deveaux*, read in Section III.B: the corporation "is certainly not a citizen," and the suit proceeds only where "the rights of the

[218] The derivative account has a modern literature, which the article engages here once and by name; none of the in-copyright works is on the shelf, and the article quotes nothing it has not displayed. Margaret M. Blair & Elizabeth Pollman, "The Derivative Nature of Corporate Constitutional Rights," 56 Wm. & Mary L. Rev. 1673 (2015), read the Court's corporate-rights cases from *Deveaux* forward as derivative in method, and the article agrees with the reading as far as it goes. What their account lacks, and what this Part supplies, is the END of the derivation, the point at which the right asserted derives from no member because no member consented to the act (Section V.C), and the criterion by which that point is found in the body's own instrument (Section V.D); their derivative method is a theory of what corporations may claim, this article's is the only reading the people's instrument allows, and the reading has an edge the theory does not. Their antecedents are Ernst Freund, *The Legal Nature of Corporations* (1897), whose account of representation made the body's acts its members' through their representatives, and Victor Morawetz, *A Treatise on the Law of Private Corporations* (1882), who treated the corporation as its members under a collective name; both are on the shelf and both state the aggregate reading before the Court's "person" had hardened. John Dewey, "The Historic Background of Corporate Legal Personality," 35 Yale L.J. 655 (1926), argued that the theories of corporate personality decide nothing, since each has been used for every result; the article meets the objection by offering no theory of what a corporation IS. It offers a reading of what the people's instrument SAYS (Sections III and VII) and of the law of fictions' own bounds (Section II.D), and neither needs a theory of being. Brandon L. Garrett, "The Constitutional Standing of Corporations," 163 U. Pa. L. Rev. 95 (2014), inventories the Court's clause-by-clause results and finds no theory in them; the article takes the inventory as what the removal test measures, and answers that a holding's existence is what the test measures, not what it presumes (Section VII.B). Gregory A. Mark, "The Personification of the Business Corporation in American Law," 54 U. Chi. L. Rev. 1441 (1987), and Morton J. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory," 88 W. Va. L. Rev. 173 (1985), argue that the natural-entity theory, and not a word, did the work of the late nineteenth century; the article's answer is one sentence: the test asks not what did the work but whether the holding survives the word's removal, and a theory that supplied the result is itself what the removal strikes. Elizabeth Pollman, "Reconceiving Corporate Personhood," 2011 Utah L. Rev. 1629, is cited for the finding that the Court never adopted a theory and that personhood has been a conclusion rather than a premise, which Section III's census confirms at the page; Adam Winkler, *We the Corporations* (2018), for the history of the litigation; James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780–1970* (1970), for the passage from special charter to general incorporation that Appendix A records in the constitutions' own words; John C. Coates IV, "Corporate Speech & the First Amendment: History, Data, and Implications," 30 Const. Comment. 223 (2015), for the data on the rise of corporate First Amendment claims since *Bellotti*. Each is cited for the thesis named and none is quoted.

members, in this respect, can be exercised in their corporate name."[219] The corporation is not the holder; the members are. Its strongest instance is *NAACP v. Alabama*, where the Court protected the members' associational liberty through the medium of the Association because the members could not protect it themselves.[220] Its invocation for the treasury is the majority's in *Citizens United*, which called corporations "associations of citizens" and held that the government may not ban "the political speech of millions of associations of citizens."[221] The theory's fullest statement in the modern Reports is in *Burwell v. Hobby Lobby Stores, Inc.*, and the statement should be read with the word the Court was reading. The question was whether closely held corporations are "persons" under the Religious Freedom Restoration Act, and the Court answered it from the Dictionary Act, which it "must consult" in determining the meaning of any Act of Congress "unless the context indicates otherwise," and which provides that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals."[222] That statute is the people's legislature saying when a name is to be treated as a person for the purposes of the people's statutes, with the bound written into the sentence that says it: unless the context indicates otherwise. It is the rule of treatment of Section II.C enacted, a purpose-bound "as if" made by the sovereign's own organ, and what the legislature made by statute it may unmake by statute.

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[219] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

[220] *NAACP v. Alabama*, 357 U.S. at 459–460.

[221] *Citizens United v. FEC*, 558 U.S. 310, 354, 356 (2010).

[222] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–708 (2014) (the cut, pdf 26); 1 U.S.C. § 1 (the Office of the Law Revision Counsel's release point 119-111, Title 1, leaf 3). The present text of § 1 was enacted on July 30, 1947, ch. 388, 61 Stat. 633, and amended on June 25, 1948, ch. 645, § 6, 62 Stat. 859, which the leaf's amendment note records as including "a broader definition of 'person'"; the extension of "person" to corporations in the people's statutes is thus itself a statute, made and amendable by the people's legislature. The Court was reading "person" in the Religious Freedom Restoration Act, a statute and not the Constitution; the article cites the opinion for its account of what the form is for, which is the derivative theory's, and for the Dictionary Act as the people's rule of treatment for the name.

The rule is older than its present text, and its date is the article's exhibit and not the adversary's. On February 25, 1871, three years after the Fourteenth Amendment's ratification and fifteen before *Santa Clara*, Congress provided, in the words the Court quotes, that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows that such words were intended to be used in a more limited sense."[223] Every word of it is the article's. The rule is for "acts hereafter passed," the people's statutes and not their Constitution; it is permissive, "may extend"; it carries its bound in its own sentence; and it was needed, which is the legislature's own admission that "person" did not reach the name by its own force. The people's legislature wrote the rule for its statutes and wrote none for the Amendment, which only Article V could carry; the adversary who offers the ratifying generation's statute as proof that "person" reached corporations offers the proof that it took a statute to make it do so.

The Court read the present rule as such a rule is read, by its purpose: "Congress provided protection for people like the Hahns and Greens by employing a familiar legal fiction: It included corporations within RFRA's definition of 'persons.' But it is important to keep in mind that the purpose of this fiction is to provide protection for human beings. A corporation is simply a form of organization used by human beings to achieve desired ends."[224] Then, on the next page, the Court stated the derivative sorting in its own voice: "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

[223] Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431, as quoted by the Court in *Monell v. Department of Social Services*, 436 U.S. 658, 688 (1978) (the cut, pdf 31), which read "person" in the Civil Rights Act of 1871 to reach municipal corporations by the legislature's own rule; the Court there calls the 1871 Act one "which had been passed only months before the Civil Rights Act was passed." The Statutes at Large page is on the shelf (the govinfo print of 16 Stat. 431–432, pdf 1), and the words are quoted as the Court quotes them, with the Court's ellipses.

[224] *Hobby Lobby*, 573 U.S. at 706 (the cut, pdf 25).

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, Conestoga, and Mardel protects the religious liberty of the humans who own and control those companies."[225] And it stated the rule of treatment outright. The court below had written that general business corporations do not exercise religion "separate and apart from" their owners and employees, and the Court answered: "All of this is true—but quite beside the point. Corporations, 'separate and apart from' the human beings who own, run, and are employed by them, cannot do anything at all."[226] Every sentence is the derivative theory, and every sentence is this article's. What they are not is a holding that the name holds a constitutional right. The case was decided under the statute; the "person" the Court extended to the companies was the Dictionary Act's, the people's own rule for the name; the rights protected were "the religious liberty of the humans who own and control those companies," which is the first set in the Court's words; and the capacity in which the companies stood in court was the second set in action, the people's grant of a name that may sue and may be a "person" under the people's statutes on the people's terms. Whether the statutory extension reaches a company of one owner or of a thousand is a question about the statute's context, and the Court's answer to it is the Court's; the article's sorting never turns on the count (Section VI.A). Run on the companies' own instruments, the criterion of Section V.D gives the Court's result without the count. Conestoga's board-adopted statements and Hobby Lobby's statement of purpose, to which every member of

[225] *Id.* at 707 (pdf 26).

[226] *Id.* at 707, quoting and answering the Court of Appeals for the Third Circuit, 724 F.3d 377, 385 (3d Cir. 2013), whose sentence the Court set out in full: "General business corporations do not, separate and apart from the actions or belief systems of their individual owners or employees, exercise religion. They do not pray, worship, observe sacraments or take other religiously-motivated actions separate and apart from the intention and direction of their individual actors."

the owning family "has signed a pledge," committed the companies to "operating the company in a manner consistent with Biblical principles," and the Court found that the States' laws "permit for-profit corporations to pursue 'any lawful purpose' or 'act,' including the pursuit of profit in conformity with the owners' religious principles."[227] The instrument contained the commitment, so the owners' exercise through the name was consented matter, which is the first set, and the count never enters.

Hobby Lobby is therefore not the article's difficulty but its cleanest modern exhibit: the sovereign's own organ extending a word to a name, for a stated purpose, by an instrument the sovereign can amend; the Court reading the extension by its purpose; and the opinion nowhere supposing that the Fourteenth Amendment had done the same.

The theory's principal authority, though, is not the case that states it most fully but the one that applies it with both halves held, and that is *Pierce v. Society of Sisters*. Oregon's compulsory education act would have ended the appellees' schools; two corporations that maintained them sued to enjoin it before its effective date; and the State answered that corporations cannot claim the Fourteenth Amendment's liberty. The Court agreed with the State's premise and decided for the corporations anyway, and the two steps are the derivative theory entire. "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true," the Court said, citing *Riggs* and *Western Turf*, which had kept liberty from the name in 1906 and 1907; "But they have business and property for which they claim

[227] *Hobby Lobby*, 573 U.S. at 701, 703, 711 & n. 24, 713 (the cut, pdf 20, 22, 30, 32). At 701 Conestoga's "Vision and Values Statements" and "board-adopted 'Statement on the Sanctity of Human Life'"; at 703 Hobby Lobby's "statement of purpose," which "commits the Greens to '[h]onoring the Lord in all [they] do by operating the company in a manner consistent with Biblical principles,'" and the pledge each family member "has signed"; at 711 the Court's statement, from the treatise it quotes, that every American jurisdiction authorizes corporations "for *any lawful purpose* or business," and at n. 24 that "some for-profit corporations do seek 'to perpetuate the religious values shared,' in these cases, by their owners"; at 713 the Pennsylvania and Oklahoma statutes.

protection."[228] The liberty the Court vindicated was the persons': "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[229] And the corporations' standing to vindicate it rested on what they held by grant and on the persons who dealt with them: "the injunctions here sought are not against the exercise of any proper power. Plaintiffs asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate," within the rule of the cases "where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers."[230] The name held no liberty. The name held business and property, the grant's incidents and the members' holding (Section IV); the parents and the teachers held the liberty; and the suit in the name carried the persons' right because the name's holding was the thing the statute would have destroyed. The Court was unanimous, and it wrote in 1925 what the theory's fullest modern statement wrote in 2014: the name as the form through which persons' rights are protected, with nothing of the name's own between. Section IV.B placed *Pierce* beside *Berea* as the Court supplying the half it had withheld in 1908. Here it is the derivative theory's model case, because it is the one in which the Court said in terms that the name has no liberty of its own and protected the persons through it in the same opinion.

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[228] *Pierce*, 268 U.S. at 535, citing *Riggs*, 203 U.S. at 255, and *Western Turf*, 204 U.S. at 363; Section IV.B takes the first sentence for *Berea*'s correction.

[229] *Id.* at 535. "Creature" is the Court's word.

[230] *Id.* at 536 (the Library of Congress cut ends at 535, and 536 is at the shelf's second cut, pdf 27, the leaf headed "536 OCTOBER TERM, 1924," which carries the close of the opinion above the next case's syllabus), citing *Truax v. Raich*, *Truax v. Corrigan* and *Terrace v. Thompson* "and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers." The decrees were affirmed.

The theory's appeal to a reading grounded in popular sovereignty is plain. The Constitution restrains government. If government takes property without due process, natural persons are injured whether the title was in their own names or in a name they share. Nothing is conferred on the corporation. The people's own rights are exercised through it. On that view there is no corporate right for Article V to have omitted, and the article's question dissolves.

B. Where the Theory Is True: The First Set, Stated as a Theory

The article accepts the theory within its proper class, and states the class precisely. The derivative theory is true for every claim a member could bring in their own name. The members' property, held under the corporate name, is the members' property, and a taking of it without due process injures them. The members' association, carried on under the corporate name, is the members' association, and a State that punishes membership abridges their liberty. For claims of this kind the corporation needs no grant, the name is a medium, and the Court's protection of "the corporation" is correct in result. This is the first set, and the theory describes it accurately.

What is theirs should be stated exactly, because Section VI depends on it. The members' property in the pool is the residual claim: the right to distributions, and to the surplus on dissolution, which the Court protects, under the name,[231] and which a taking of the pool injures. The direction of the pool while it is pooled, what it may be spent on and by whom, is not theirs; it is the rule's, fixed by the charter's purposes, the doctrine of ultra vires, and the power the

[231] 558 U.S. at 475 (Stevens, J.) ("it is the shareholders, as the residual claimants, who are effectively footing the bill"); *Hale v. Henkel*, 201 U.S. 43, 76 (1906) (in the Court's voice, of the name: "Its property cannot be taken without compensation. It can only be proceeded against by due process of law").

people reserved in the section that made the grant.[232] *Citizens United* protected the direction. The claim was never touched.

C. Where the Theory Ends: A Right No Member Holds, from Either End of the Chain

The theory's own logic fixes its limit. A right that derives from the members cannot exceed what the members hold. A medium carries what passes through it. Two forms of one claim exceed the members' rights, and for each the theory has no answer.

The first is a right no member holds. The treasury speech in *Citizens United* is the instance. A shareholder has no right to spend another shareholder's money on political speech the second shareholder opposes. Yet that is what general-treasury expenditure is: "it is the shareholders, as the residual claimants, who are effectively footing the bill," as Justice Stevens wrote in the passage Section VI.C sets out.[233] Speech funded by persons who oppose it derives from none of them. The derivation stops. The right the majority protected has no member as its source, and on the theory's own terms it is therefore not derivative; it is the name's.

The second is the same claim seen from the other end of the chain. In the modern public corporation the "members" from whom rights would derive are, for the most part, other corporations, funds, and nominees, and the derivation regresses from name to name before it reaches a natural person. It does reach one: every chain of ownership ends in persons, and the Court's reason in *Hobby Lobby* for reading a statute's "person" to a company, that "the purpose of this fiction is to provide protection for human beings," is the reason the regress is not by itself

[232] Section II.G.4 above (the reservation in the same section: Michigan 1850, Alabama 1867; the fifty-two of Appendix A).

[233] 558 U.S. at 475 (Stevens, J., concurring in part and dissenting in part).

an answer to the theory.[234] What the regress never reaches is those persons' consent to the particular speech. The beneficiary at the end of a chain of funds was never asked whether the treasury at its head should speak, and a right that derives from members derives from no one who did not choose it. That is the first form again, with the dissenting shareholder replaced by a person who was never consulted, and the theory's answer to it is the same: none.

The derivative theory has a rival that reaches the same edge from the other side, and the rival should be answered here, once, because it is the ground on which the treasury's speech is most often defended in the literature. The realist, or association, theory holds that the corporation is neither an unreal thing nor a sum of its members but a real group, with a life and a will that the law recognizes rather than creates. Its American statement is Machen's, in 1911: "A corporation is an entity—not imaginary or fictitious, but real, not artificial but natural. Its existence is as real as that of an army or of the Church."[235] Its question is Laski's, in 1916: "The state knows certain persons who are not men. What is the nature of their personality? Are they merely fictitious abstractions, collective names that hide from us the mass of individuals beneath? … Or is that personality real?"[236] Its modern voices, Ripken, Tucker and Greenfield among them, draw from the group's reality a conclusion the theory's first exponents did not draw: that a body real enough to act is real enough to hold the rights of those who act, so that a corporation's speech is its own because the corporation is a real association, and citizens do not lose their rights by associating.[237] The article does not dispute the reality. An army is real, a church is real, and a

[234] *Hobby Lobby*, 573 U.S. at 706; Section V.A above.

[235] Arthur W. Machen, Jr., "Corporate Personality," 24 Harv. L. Rev. 253, 262 (1911) (the shelf's copy, pdf 10).

[236] Harold J. Laski, "The Personality of Associations," 29 Harv. L. Rev. 404, 404 (1916) (the shelf's copy, pdf 1).

[237] Susanna Kim Ripken, "Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle," 15 Fordham J. Corp. & Fin. L. 97 (2009); Anne Tucker, "Flawed Assumptions: A Corporate

company is real as a going concern; the law's recognition of a body that acts is what Section II.A called a name that functions in a sovereign's rule, and a rule is as real as anything in law. What the article disputes is the step from reality to right, and the theory's own American exponent refused that step on the page where he asserted the reality. Having "established that a corporation is a real and natural entity," Machen asked whether the entity is a person and answered that in the word's ordinary sense "the corporate entity is not, in truth and reality, a person. For the corporate entity is not a human being; it is not even a rational creature capable of feeling and willing."[238] Laski, for his part, records the English lawyers' answer in a sentence the article quotes as his and not its own, "The corporation is the creature of the state. Its will is a delegated will; its purpose exists only because it has secured recognition," and records in the note to it that the English lawyers hold the concession theory, the body existing by the sovereign's grant, and that Sir Frederick Pollock had denied in 1911 that they had received the "fiction theory" at all; so that on the realists' own account the English lawyers' theory was the article's, the grant, and the fiction theory, which the common law is often said to have taken, is the one Pollock denied it ever took.[239] What Section III found in the Reports is the American half of the same finding: the Court adopted no theory and used a word.

Law Analysis of Free Speech and Corporate Personhood in *Citizens United*," 61 Case W. Res. L. Rev. 497 (2011); and Kent Greenfield, *Corporations Are People Too (And They Should Act Like It)* (2018). None is on the shelf and none is quoted; each is cited for the thesis named in the text, and answered once here.

[238] Machen, 24 Harv. L. Rev. at 262 (the opening of his Part IV, on the same page).

[239] Laski, 29 Harv. L. Rev. at 406 & n. 7 (pdf 3). The note reads, of the English lawyers: "I. e., they accept the 'concession' theory, so called. That they have accepted the 'fiction theory' is denied by Sir F. Pollock in the LAW QUART. REV. for 1911," which is Pollock, "Has the Common Law Received the Fiction Theory of Corporations?," 27 L.Q. Rev. 219 (1911), cited here as Laski cites it and not consulted at its own page. "Creature" is Laski's word. The same page carries Kyd's "the King's consent is absolutely necessary" (1793), Salmond's ten men who "do not become in fact one person" any more than two horses drawing one cart become one animal, and Holland's "treated by law for certain purposes as if they were individual human beings," the common law's rule of treatment in a textbook's words.

The step from reality to right fails by two measures this article has already stated, and the failure is the same whichever way the group is described. The first is the measure of consent, which Section V.D makes checkable. A real group acts only through persons, and what it does as a group is what its members consented to do together; the record of that consent is the charter or the terms of membership. The association theory supposes that a body which may act in one name may speak in one name. But a body speaks only as its members' consent reaches the utterance, and the ordinary business charter, "any lawful business" in the words the general incorporation laws have used since Brandeis counted them (Section IV.C), records consent to business and to no utterance. The reality of the group does not supply the consent of its members: a real army does not thereby cast its soldiers' votes, and a real company does not thereby hold its shareholders' speech. The second is the measure the common law set on its own fictions and rules of treatment, the possible matter (Section II.D): the law may proceed "as if" only of what could be true, for the law imitates nature. That a group may hold land, sue in one name and succeed to itself is possible, and the grant makes it actual. That a group has a conscience, a belief or a voice of its own, distinct from the consent of the persons who compose it, is not a possible matter, and Machen said as much in the sentence just quoted. The realists are right that the corporation is not an unreal thing, and Part One never said it was: it said the corporation is a name that functions in a sovereign's rule, with nothing maintained for convenience (Section II.A). What is a fiction of the impossible, and by the common law's own test an unlawful one, is the person the Court made of the name against the people's instrument. So the two theories end at one place. The derivative theory ends where no member's consent is found. The association theory ends there too, because the reality it rightly asserts is the reality of persons acting together, and when the persons' consent is subtracted there is nothing of the

group's own left over to hold a right. The article names the edge once here and measures it, case by case, in the section that follows.

D. The Association Cases: The Charter-Consent Criterion and the Usurpation Harm

A church is a different body from a business corporation, and the difference is not where the adversary looks for it. It is not in the grant. An incorporated church and a trading company are both formed under the people's general laws, both hold property in one name, both sue and are sued under it, and the incorporation of each is the second set and nothing else. Madison saw that in 1811, when as President he vetoed a bill incorporating the Protestant Episcopal Church in Alexandria, and the Court recounts the veto in the case that protects a church's choice of its ministers: the Religion Clauses "ensured that the new Federal Government—unlike the English Crown—would have no role in filling ecclesiastical offices," and Madison's ground was that the bill "exceeds the rightful authority to which Governments are limited, by the essential distinction between civil and religious functions," because it "enacts into, and establishes by law, sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the Minister of the same."[240] The civil power may grant the name; it may not write the religion into the grant. That is the two sets stated about a church's charter by the man the Court calls "the leading architect of the religion clauses of the First Amendment." The difference is in what the charter contains. A church's charter contains speech. Its creed is a declaration that every member consents to by joining, and when

[240] *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 184–185 (2012) (the cut, pdf 14–15). The Court recounts Madison's 1806 letter to Bishop Carroll and his 1811 veto of the bill incorporating the Protestant Episcopal Church in Alexandria, quoting the veto message from 22 Annals of Cong. 982–983 (1811); the veto's ground straddles 184–185 and the "election and removal of the Minister" sentence is at 185, where the Court's own emphasis falls on it. "The leading architect of the religion clauses of the First Amendment" is the Court's phrase at 184, quoting *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125, 141 (2011), quoting *Flast v. Cohen*, 392 U.S. 83, 103 (1968).

the body declares it the declaration is the members' own act performed together: a right of participation in Section IV.B's sense, exercised by the persons who hold it, through the body as their medium, in the one way the Court allows a right of that kind to be asserted through a name, where the consent to the act is recorded. A business corporation's ordinary charter contains no speech. Its purpose clause is "any lawful business," and no shareholder consents to any utterance by buying a share; what a shareholder consents to is business, and the shareholder's rights of participation stay where they were before the purchase, in the shareholder (Section IV.B). The criterion follows. Speech through a sanctioned body is the members' own act, in the first set, only where the charter or the terms of membership contain that speech, because the charter is where consent at formation is recorded. That is the rule Section VI.A states for the pool, that consent enters at the formation and never by headcount, made checkable: one reads the instrument the members joined under.

The criterion limits as much as it permits, and the limit is the part the adversary will resist. "Christ is King" is in a creed. "Candidate X should be President because X holds the creed" is in no creed. The step from the first sentence to the second is an inference the body's officers draw, and an inference is not consent. A member who joined under the creed consented to the declaration and to nothing the officers derive from it; the declaration the members made together does not carry the endorsement the officers make in its name; and the creed's speech is not transferable to advocacy the charter does not contain. The body remains free to declare what its charter declares. Its officers and members remain free to endorse whom they please as the persons they are. What the body cannot do is lend the weight of its members' consent to a position its members never consented to. Where the advocacy is paid for from the body's treasury a second bar falls independently of this one, since the pool is the people's grant and the

people may condition its political use whatever the charter says (Section VI.I); the two measures are independent, and a body may pass one and fail the other. For the business corporation the criterion leaves exactly what Section IV.B left: nothing passes through the name as the persons' own except an identified officer's or employee's speech as themselves.

Consent is the point, and it should be said why. The weight of a body's speech is its members' consent, and nothing else; the name has no weight of its own, because a name has nothing of its own. When a church declares its creed, the declaration carries every member who joined under it, and those who hear it are told the truth about whose voice it is. When officers endorse a candidate in the body's name and the charter contains no such endorsement, the speech carries no member's consent, and those who hear it are told something false: that the members stand behind it. The weight the speech carries is borrowed from the members' consent, and where the consent is absent it is usurped. The harm runs two ways. It runs against the members, whose consent is taken and spent on a position they never sanctioned, so that each is made to appear to hold a view they may reject. That is the dissenting shareholder's injury of this Part's third section and the union member's injury of Section VI.E, and the Court has named the injury in its own words. "Compelling individuals to mouth support for views they find objectionable violates that cardinal constitutional command," the Court wrote in *Janus*; when speech is compelled "individuals are coerced into betraying their convictions. Forcing free and independent individuals to endorse ideas they find objectionable is always demeaning"; and "[c]ompelling a person to subsidize the speech of other private speakers raises similar First Amendment concerns," with Jefferson's sentence that to compel a man to furnish contributions for the propagation of opinions he disbelieves "is sinful and tyrannical."[241] The Court was

[241] *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878, 892, 893 (2018) (the cut, pdf 15–16). At 892 the Court cites *Roberts v. United States Jaycees*, 468 U.S. 609, 623

describing a compulsion by the State, and the article takes its description of the injury and not its claim. A body that speaks in its members' name compels no one; it attributes. The First Amendment runs against no private body, and the article asserts no claim under it against one. What the Court's sentences supply is the name of the thing taken: the attribution to a person of a position they reject, which is what a member suffers when a body speaks in the members' name without the members' consent.

And the harm runs against the sovereign. The people's deliberation, the process by which they govern themselves and in which each member's voice is the sovereign's own distributed to each (Section IV.B), receives a weight that does not exist: a candidate is characterized by a consent no member gave, and the people who must decide are told that a body of their fellow citizens stands where it does not. That is why the people may condition the use of their grant in their own deliberation, under Section VI.I and Section IV.B together. Not because the speech is corporate. Not because it is wealthy, which was *Austin*'s ground, which *Citizens United* rejected and which this article does not revive (Section VI.I). But because speech in a sanctioned body's name claims a consent it does not have, and the sovereign is the party deceived. The Court has met the members' half of this injury once and rejected it, and the rejection should be named where the harm is stated. In *Citizens United* the Government argued that corporate expenditures could be limited because of "its interest in protecting dissenting shareholders from being compelled to fund corporate political speech"; the majority answered that the interest "would allow the Government to ban the political speech even of media corporations" and that abuses could be corrected "through the procedures of corporate democracy," the coinage Section III

(1984), for the proposition that "[f]reedom of association … plainly presupposes a freedom not to associate"; at 893 it quotes Jefferson's *Bill for Establishing Religious Freedom*. Section VI.E runs the *Abood–Janus* line for the shareholder; this section cites the Court's description of the injury only.

measured, in the two sentences Section VI.C meets in the treasury's own case.[242] What this section does with the injury is not what the Government asked. The dissenting member's injury is not offered as a ground for restricting the name's speech, which is what the Court rejected; it is the first half of the reason the people may condition their own grant, and the second half, the sovereign deceived, the majority never addressed. The media reductio is met by the criterion itself: a newspaper's instrument contains publication, so what it publishes is what its owners consented to at formation, and Section IX.E measures the media corporation on that ground. And the majority's own sentence left the door open: "As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms."[243] A condition on the people's grant is such a mechanism, and it is the people's to impose.

The Court has said each half of this, in the two opinions that bound the treasury's question. In *Massachusetts Citizens for Life* the Court let an advocacy corporation spend from its treasury and said why in the grammar of consent: "The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers," whereas the statute's committee is funded so that "[t]he resources available to this fund, as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee."[244] The three features of the exempt corporation that Section VI.A quotes, formation "for the express purpose of promoting political ideas," no shareholders with a claim on its assets,

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[242] *Citizens United*, 558 U.S. at 361–362 (the bound volume, pdf 522–523). The inner quotation is *Bellotti*, 435 U.S. at 794, as the Court cites it. Section VI.C quotes the same passage and the majority's second sentence at 370; Section III.H measures "corporate democracy."

[243] *Id.* at 362 (pdf 523). The sentence follows the Court's finding that the statute "is overinclusive because it covers all corporations, including nonprofit corporations and for-profit corporations with only single shareholders."

[244] *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (the cut, pdf 21). The three features are at 263–264, quoted in Section VI.A and measured in Section VI.I.

and no business corporation behind it, are the criterion in the Court's own hands: the charter contained the speech, so the treasury's political resources reflected political support. In *Citizens United* the majority, upholding disclosure, said the other half: "This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."[245] Weight, in the Court's sentence, depends on who stands behind the speech, and the electorate is entitled to know it; that is the hearer's half of the usurpation harm, stated by the majority in the opinion that let the business treasury speak. The article does not say that the Court has held the criterion. It says that the Court has stated both of its premises, the one in 1986 and the other in 2010, and that the criterion is what the two premises require when they are held together.

E. The Criterion Run on the Cases: The Four Religion Cases Sorted, Dale Measured by Its Method on the Question the Court Declined to Ask, and the Court's Own Grammar Found to Be the Criterion's

The criterion should then be tested against the Court's religion cases, which the adversary offers as proof that bodies hold rights of their own, and it sorts each of the four. *Hosanna-Tabor*: the Court held that the Religion Clauses bar the government from interfering with "the freedom of religious groups to select their own" ministers, and distinguished *Smith* because "a church's selection of its ministers is unlike an individual's ingestion of peyote": the case "concerns government interference with an internal church decision that affects the faith and mission of the church itself."[246] The selection of ministers is within the faith the members joined under; a

[245] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (the Library of Congress bound volume, pdf 532). Section IX.C takes disclosure as the Court's own acknowledgment that weight follows the speaker.

[246] *Hosanna-Tabor*, 565 U.S. at 184, 190 (pdf 14, 20). The Court's holding that the ministerial exception applies, "We hold that it does," is at 190.

congregation that confesses a creed has consented to a ministry that teaches it; and the Court's own phrases, "religious groups" and "the faith and mission of the church itself," name the consented matter. The congregation's free exercise carries the holding through the body, and the criterion is the reason the holding is right. *Trinity Lutheran*: the State's policy "expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious character," and the Court said the church was "free to continue operating as a church" but at "the cost of automatic and absolute exclusion from the benefits of a public program for which the Center is otherwise fully qualified."[247] The religious character is the congregation's; the benefit was open to all; the exclusion fell on the persons' exercise through the body's name, and the name was the medium of a first-set right. *Lukumi*: the Court's own first sentence sorts the case. "Petitioner Church of the Lukumi Babalu Aye, Inc. (Church), is a not-for-profit corporation organized under Florida law in 1973. The Church and its congregants practice the Santeria religion."[248] The corporation is the grant, organized under the State's law; the practice is the Church's and its congregants', and the ordinances reached the congregants' own act. *Fulton*: Justice Barrett, concurring, asked the question this section answers: "Should entities like Catholic Social Services—which is an arm of the Catholic Church—be treated differently than individuals? Cf. *Hosanna-Tabor*."[249] The answer is that the entity is treated differently from the individuals exactly to the extent of the grant and no further. What it holds by grant, its property, its contracts in one name, its capacity to be the City's contractor, the people

[247] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 462 (2017) (the cut, pdf 14).

[248] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 525 (1993) (the cut, pdf 6).

[249] *Fulton v. City of Philadelphia*, 593 U.S. 522, 543–544 (2021) (Barrett, J., concurring, joined by Kavanaugh, J., and by Breyer, J., as to all but the first paragraph) (the official R-slip, pdf 23–24, which carries the United States Reports pagination). The question is at 544; at 543 Justice Barrett writes that "the textual and structural arguments against *Smith* are more compelling," a method the article shares and a question it does not reach.

may condition as they condition every grant; what it does as its members' consented faith, which the placement of children according to the Church's teaching is, is the persons' free exercise through the body, and the body's incorporation adds nothing to it and takes nothing from it. In each of the four the body is a church or an arm of one, the charter contains the faith, and the right vindicated is the members'. Where a church is incorporated, the incorporation is the people's grant for holding property and acting in one name; the members' worship is theirs; and nothing in the Free Exercise Clause attaches to the charter, which is what Madison's veto said in 1811 and *Hosanna-Tabor* repeated in 2012.

Dale is the case the criterion would have decided on the question the Court declined to ask, and the article measures its method and says nothing of its result. The Boy Scouts is not a church, and its instrument did not contain the message; the Court said so. The values the Scouts seek to instill are "based on" those listed in the Scout Oath and Law, and "the Scout Oath and Law do not expressly mention sexuality or sexual orientation," while the terms "morally straight" and "clean" "are by no means self-defining. Different people would attribute to those terms very different meanings."[250] The message came from the officers. The Scouts "asserts" its teaching in its briefs; "We accept the Boy Scouts' assertion. We need not inquire further to determine the nature of the Boy Scouts' expression with respect to homosexuality"; and the written evidence the Court then consulted, "if only on the question of the sincerity of the professed beliefs," was a 1978 position statement "signed by Downing B. Jenks, the President of the Boy Scouts, and Harvey L. Price, the Chief Scout Executive."[251] That is the step from the creed to the candidate, taken by the officers and deferred to by the Court. The deference sentence

[250] *Boy Scouts of America v. Dale*, 530 U.S. 640, 650 (2000) (the cut, pdf 10). "Based on" is the Court's quotation of the record, App. 184.

[251] *Id.* at 651 (pdf 11). The assertions are cited to "Brief for Petitioners 39" and "Reply Brief for Petitioners 5"; the 1978 statement is quoted on the same page and the next.

of 653, "we must also give deference to an association's view of what would impair its expression," with its own bound in the next sentence, "That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message," is the Court stating that the deference has a limit without saying where.[252] The criterion says where: at the instrument the members joined under. It would have asked what the Oath and Law, as the members took them, contained, which is the question the Court declined to ask. "An association's view," taken from the officers for the members, is the aggregate word of Section III.I arriving in the law of associations, and the criterion is its correction in the Court's own vocabulary, since the Court had said in *Jaycees* that a forced-membership rule "may impair the ability of the original members to express only those views that brought them together."[253] The original members, and the views that brought them together: that is the formation measure, and it asks after the instrument and not the officers. Whether the Scouts' members had in fact joined under the view the officers asserted is a question of their record, and the article does not answer it; it answers only that the Court did not ask.

The Court's own grammar in these cases is the criterion's. *Roberts v. United States Jaycees* opens, in Justice Brennan's words for the Court, with "the constitutional freedom of association asserted by members of a private organization"; the Jaycees are described as "a nonprofit membership corporation" whose objective is "set out in its bylaws," which the Court then reads; and the court below is described as having found a violation of "the First and

[252] *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000) (the cut, pdf 14).

[253] *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (the Library of Congress bound volume, cut pdf 15). The sentence precedes "Freedom of association therefore plainly presupposes a freedom not to associate," which *Janus* quotes at 892.

Fourteenth Amendment rights of the organization's members."[254] The right is the members'; the body's instrument is read for what the members joined under; and the group right is derived from the individual's in terms: "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed," so that the Court has "long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."[255] On the next page the Court gave the formation measure in terms: a regulation that forces a group to accept members it does not desire "may impair the ability of the original members to express only those views that brought them together," and the statute's impact is measured, on the same page, on "the male members' associational freedoms." *Americans for Prosperity Foundation v. Bonta* holds that the State's demand "imposes a widespread burden on donors' associational rights," and says what triggers the protection: "not only … actual restrictions on an individual's ability to join with others to further shared goals."[256] The donors', the individual's. *303 Creative* locates the right in the designer and treats her company as the form: "Ms. Smith offers her speech for pay and does so through 303 Creative LLC, a company in which she is 'the sole member-owner.' … But none of that makes a difference. … Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their

[254] *Roberts v. United States Jaycees*, 468 U.S. 609, 612 (1984) (Brennan, J., for the Court) (the Library of Congress bound volume, cut pdf 4).

[255] *Id.* at 622 (pdf 14).

[256] *Americans for Prosperity Foundation v. Bonta*, 594 U.S. 595, 618 (2021) (the official R-slip, pdf 25). The sentence is the Court's; the Ninth Circuit's use of the same phrase is recited at 605 (pdf 12), and the syllabus at 596 is the Reporter's, not the Court's.

speech."[257] *Masterpiece Cakeshop* is Phillips's case from its first page to its last, the Ltd. the petitioner in the caption and the person in every sentence: "Phillips was entitled to the neutral and respectful consideration of his claims"; the Commission's treatment showed "a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection"; and "the Commission's treatment of Phillips' case violated the State's duty under the First Amendment."[258] In each the Court located the right in persons, members, donors, a sole owner, a baker, and treated the body as the medium through which it was asserted. That is the derivative method in the modern Court, and it is the criterion's grammar: the right is the persons', the body carries it, and the charter or the terms of membership are read to find whose consent the body's act records.

The same opinions also write the body's name as the holder, and the article names those sentences rather than leaving them to the adversary. *Hobby Lobby* lists *Hosanna-Tabor* and *Lukumi* as "free-exercise claims brought by nonprofit corporations"; *Trinity Lutheran* writes of the institution, "free to continue operating as a church," and of its "religious character"; *Jaycees* speaks of "the group's freedom of expressive association" on the page that derives the group's freedom from the individual's; the sentence before the one quoted from *Citizens United* says that disclosure "permits citizens and shareholders to react to the speech of corporate entities in a proper way"; and *303 Creative* adds that the same fact "underlies our cases involving everything from movie producers to book publishers to newspapers."[259] The article measures those

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[257] *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023) (the official R-slip, pdf 26), citing among others *Grosjean v. American Press Co.*, 297 U.S. 233, 240–241, 249 (1936), which Section IX.E measures.

[258] *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 584 U.S. 617, 634, 638 (2018) (the cut, pdf 18, 22).

[259] *Hobby Lobby*, 573 U.S. at 708 (the cut, pdf 27) (citing *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418 (2006), *Hosanna-Tabor* and *Lukumi*, and noting that "HHS concedes that a nonprofit corporation can be a 'person' within the meaning of RFRA"); *Trinity Lutheran*, 582 U.S. at 462; *Jaycees*, 468 U.S. at 622 ("the extent to which application of the Minnesota statute to compel the Jaycees to accept women infringes

sentences as Section IV.B measured the Fourth Amendment standing rule, as descriptions that name the name where the right is the persons', and takes the members' sentences on the same pages as the ground the Court itself gives; the media cases are Section IX.E's. The business treasury's cases alone speak otherwise throughout, and Section VI measures them.

F. The Sovereign's Different Terms: The Exempt Class's Condition as Regan Reasons It, Four Replies Met in Advance, and the Two Cases That Bound the Treasury's Question Sorted by Both Bars

The bodies sorted above receive different terms from the sovereign, and the difference confirms the criterion rather than complicating it. The exempt class is defined by the people's statute, which lists the purposes an exempt body may pursue, forbids the inurement of its earnings to any private shareholder, limits its lobbying, and provides that the body is one "which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[260] That is Section VI.I's exception in the form the exempt class takes. The exemption is the people's grant on the people's terms, and the bar on campaign intervention is a condition on the exempt pool's use, accepted at formation by every body that takes the exemption. The Court upheld the same structure for the same paragraph's lobbying condition in *Regan v. Taxation With Representation*, and said what such a condition is. "The Code does not deny TWR the right to receive deductible contributions to support its non-lobbying activity, nor does it deny TWR any independent benefit

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the group's freedom of expressive association"); *Citizens United*, 558 U.S. at 371; *303 Creative*, 600 U.S. at 594 (citing *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board*, 502 U.S. 105 (1991), and *Grosjean*).

[260] 26 U.S.C. § 501(c)(3) (the Office of the Law Revision Counsel's release point 119-111, Title 26, leaf 2829; the paragraph opens on the preceding leaf). The same leaf carries § 501(c)(4), "[c]ivic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare," the class of the affiliate *Regan* describes.

on account of its intention to lobby. Congress has merely refused to pay for the lobbying out of public moneys"; "Congress has not infringed any First Amendment rights or regulated any First Amendment activity. Congress has simply chosen not to pay for TWR's lobbying," and the Court rejected "the 'notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State'"; "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny," exemptions and deductions being "a matter of grace."[261] The members' own speech stays open, as persons and through an affiliate that takes no exemption; the Court noted that the Service "apparently requires only that the two groups be separately incorporated and keep records adequate to show that tax-deductible contributions are not used to pay for lobbying," and found this "not unduly burdensome."[262]

Justice Blackmun, concurring, made that the condition of the result: in his view the outcome "depends entirely upon the Court's necessary assumption—which I share—about the manner in which the Internal Revenue Service administers § 501," because the exempt body "is free to make known its views on legislation through its § 501(c)(4) affiliate without losing tax benefits for its nonlobbying activities," and "[a]ny significant restriction on this channel of communication, however, would negate the saving effect of § 501(c)(4)."[263] That condition is the

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[261] *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 545, 546, 549 (1983) (the Library of Congress bound volume, cut pdf 6, 7, 10). The inner quotation at 546 is Justice Douglas's, concurring in *Cammarano v. United States*, 358 U.S. 498, 515 (1959), as the Court cites it; at 549 the Court quotes *Commissioner v. Sullivan*, 356 U.S. 27, 28 (1958), for "a matter of grace."

[262] *Id.* at 545 n. 6 (the footnote is carried onto 545 from 544 and describes the § 501(c)(4) affiliate; its number is confirmed by Justice Blackmun's citation of it, "*Ante*, at 545, n. 6," at 553).

[263] *Regan*, 461 U.S. at 552, 553 (Blackmun, J., concurring) (the Library of Congress bound volume, cut pdf 13, 14). At 552 Justice Blackmun also writes that § 501(c)(3) "does not merely deny a subsidy for lobbying activities" but "deprives an otherwise eligible organization of its tax-exempt status and its eligibility to receive tax-deductible contributions for all its activities, whenever one of those activities is 'substantial lobbying,'" a defect "avoided by § 501(c)(4)"; at 554 (pdf 15) he assumes the Service "will continue to administer §§ 501(c)(3) and 501(c)(4) in keeping with Congress' limited purpose."

article's own point, that the persons' speech stays open through a body that takes no exemption, and the article's placement carries it. The line between a condition on the exempt pool and a penalty on the persons' exercise is the Court's own, drawn in *Regan* against *Speiser*: the government "may not deny a benefit to a person because he exercises a constitutional right," but a refusal to pay for the exercise out of public moneys denies no benefit on that account.[264] *Trinity Lutheran* stands on the penalty side of that line, a benefit open to all withheld for religious character. The campaign-intervention condition, on which no opinion of the Court has passed, stands on *Regan*'s side by *Regan*'s reasoning, a term of the exempt grant accepted by the body that took it, with the affiliate open; the placement is the article's, by the Court's reasoning and under Blackmun's condition, and not a holding the article attributes to the Court. *Bonta* itself marks the difference when it says that "conferral of tax-exempt status may raise issues not presented by California's disclosure requirement," citing *Regan*.[265] So the sovereign's different terms run exactly as Section VI.I says the exception runs. The measure is one-directional: a body that takes no exemption bears no condition from this ground, and the measure of consent, which is Section V.D's, is independent of it. An exempt church whose officers endorse a candidate in its name fails both measures at once, the charter's and the grant's; an unexempt association whose charter contains the endorsement fails neither; and a business corporation with the ordinary charter whose treasury speaks fails the first whatever its tax position, because its charter contains no speech, and fails the second to the extent of its exception (Section VI.I).

Four replies are met in advance. First, a body may amend its charter to adopt a political position. Then the consenting members' declaration of it is theirs through the body, and the

[264] *Id.* at 545, citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), and distinguishing *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

[265] *Bonta*, 594 U.S. at 618, citing *Regan*, 461 U.S. at 545.

criterion is permissive; but the treasury's spending remains the pool's, the dissenting members' money cannot be spent on it (Section VI.E's rule, which *Janus* states for the union), and if the body is exempt the people's terms still condition the pool's electoral use. Second, a doctrinal position may also be a political one. Where the creed contains it, its declaration is the members' act and the criterion protects it, however political the question; what the criterion refuses is the officers' inference from the creed to a candidate; and the members and the ministers remain free to endorse as the persons they are. Third, the business corporation whose shareholders unanimously endorse. The treasury is still the pool, by the rule that made it not theirs (Section VI.A's answer to the sole owner); the shareholders may distribute it and speak with their own money as their own at any scale; and consent by headcount never enters, because the criterion reads the instrument and not the room. Fourth, that the criterion gives churches more than companies. It gives persons exactly what they consented to and no more. A church whose officers endorse candidates in its name outside its creed usurps its members as a company's officers do, and the people's terms on the exempt pool reach it as they reach no unexempt body; a company whose shareholders adopt a declaration in the charter has, to that extent, a charter that contains speech, and the criterion treats it as it treats a church.

Citizens United fails on both bars, and *Massachusetts Citizens for Life* passes both, which is the whole of the difference between the two cases that the Court itself did not state. The exempt corporation of 1986 had a charter formed for the express purpose of promoting political ideas and a treasury that reflected popular support for them, in the three features Section VI.A quotes; its speech was its members' consented act, carried by a pool whose formation was the consent. The business treasury of 2010 had a charter that bound no contributor to any candidate and a pool that the people had granted on their standing terms; its speech was no member's act,

and its weight was borrowed. The derivative theory, which the majority invoked by calling corporations "associations of citizens," had its answer in its own premise: an association speaks for its members only as its members consented to the speech, and the record of the consent is the charter. The Court has the criterion's two premises in its own opinions and the criterion's grammar in its association cases. What it has not done is hold them together, and holding them together is what this Part has done.

G. The Theory's Own Witness: Pembina's Reason, and Citizens United's Two Uses of "Association"

The limit is not imposed on the theory from outside; the Court's own uses of the theory mark it. In *Pembina*, the one case that gave a reason for calling the corporation a "person," the reason was the aggregate theory, and the sentence that stated it said what the aggregate receives: corporations "are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution."[266] Associations of individuals, permitted, under a name, with succession. The theory that was to extend "person" to the corporation reaches, by its own words, the individuals and the permission and the incident, and nothing of the name's own.

In *Citizens United* the theory was invoked and denied in one opinion, in the two uses of "association" Section III.I set out: the corporation was its members' association when the question was whether it might speak,[267] and a separate association from the citizens' own PAC when the question was whether their speaking sufficed.[268] A derivative theory cannot be run in

[266] *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

[267] 558 U.S. at 354, 356.

[268] *Id.* at 337.

that direction. If the corporation's speech is the citizens' speech, then the citizens' speech through the PAC was the corporation's speech, and the statute left it open. Only a name can be both, and only because a name is whatever the sentence using it requires.

H. What Is Left: Beyond the Edge a Right Is the Name's, and a Name Holds Rights Only by a Rule the People Never Made

The derivative theory survives as a true account of the first set and fails at its edge, and the association theory, which rightly asserts the group's reality, ends at the same edge, since the reality it asserts is that of persons acting together (Section V.C). For every claim beyond that edge, the right is held by the name, and a right held by a name exists only by a rule conferring it. The rule is the sovereign's. In the American order the sovereign is the Constitution the people ratified, the people sovereign through it and through the constitutions of their States, and the people have enacted no rule conferring constitutional rights on names. They enacted the opposite. They defined the corporation as the holder of powers individuals lack, they granted its existence under general laws, and they reserved the power to alter, amend, or repeal. What the Court attached to the name beyond the members' own rights it attached by a figure of speech or a transplanted word, and Section III has shown which. Section VII asks what remains when the figure is removed.

VI. The Treasury Is Not a Speaker: Citizens United Run Through the Two Sets

Section IV sorted everything a corporation might claim as a constitutional right into two sets, what natural persons already hold in full before any charter and what incorporation alone confers, and found no third (Section IV.A); the sets are the measure here. The test Section VII

states, which strikes the coined term and looks for the clause, comes after this case because the case supplies the term it strikes.

Citizens United v. Federal Election Commission is the case in which the Court conferred one, and it is the right case to examine because the line between the two sets ran through the middle of the statute. Congress had drawn it with care. On one side stood every natural person's speech and association, which the statute left untouched. On the other stood the general treasury, which the statute reached. The Court held that reaching the treasury abridged the freedom of speech. The question this section asks is whose.

A. What the Statute Reached, and What It Left Alone: Every Natural Person's Speech Open, the General Treasury Alone Restricted

Section 441b of Title 2, as amended by the Bipartisan Campaign Reform Act of 2002, prohibited corporations and unions "from using their general treasury funds" to make independent expenditures for speech expressly advocating a candidate's election or defeat, or for electioneering communications within thirty or sixty days of an election.[269] That was the whole of the prohibition. It did not forbid any officer, shareholder, or employee of a corporation from speaking. It did not forbid them from speaking together. It did not forbid them from pooling money to speak.

The statute said so in terms. Subsection (b)(2)(C) exempted from the ban "separate segregated funds established by a corporation for political purposes," the political action committee, which a corporation could create and administer, and which could be financed by voluntary contributions from the corporation's "stockholders and their families and its executive

[269] *Citizens United v. FEC*, 558 U.S. 310, 318, 321 (2010); 2 U.S.C. § 441b (2006 ed.).

or administrative personnel."[270] The Court had already held, in what it called "this Court's unanimous view," that "the ability to form and administer separate segregated funds … has provided corporations and unions with a constitutionally sufficient opportunity to engage in express advocacy."[271] A second route stood open beside the first. A nonprofit advocacy corporation of the kind described in *Massachusetts Citizens for Life* could spend without limit, so that "if ideologically aligned individuals wish to make unlimited expenditures through the corporate form, they may utilize an MCFL organization."[272]

Set these two routes against the two sets. The PAC is identified natural persons putting in their own money, knowingly, for political speech they chose. The persons speaking are the persons paying. That is assembly, speech, and the members' own property, which is the first set entire, and nothing in it depends on limited liability or perpetual succession. The MCFL organization is the same thing under a corporate name that the Court had already recognized as a medium. Both routes were open. Every right in the first set was available to every person connected with every corporation in the country on the day the case was argued.

What the statute left on the far side of the line was the general treasury alone. The general treasury is the pool of assets accumulated under the corporate form. It is shielded from the members' creditors by limited liability. It passes to no one at any member's death because of perpetual succession. It accumulates under the favorable treatment of accumulated assets that

[270] 558 U.S. at 415 (Stevens, J., concurring in part and dissenting in part), describing 2 U.S.C. § 441b(b)(2)(C) and (b)(4)(A).

[271] *McConnell v. FEC*, 540 U.S. 93, 203 (2003) (joint opinion of Stevens and O'Connor, JJ., for the Court on this question, 5–4; the "unanimous view" is the earlier cases'), as quoted at 558 U.S. at 415 (Stevens, J., concurring in part and dissenting in part) (cut pdf 106).

[272] 558 U.S. at 416 (Stevens, J.), citing *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263–264 (1986).

Austin named among the form's special advantages, in the sentence Section VI.H reads whole.[273] Every one of those features is the sovereign's rule. The treasury exists in the form it has only because the rule exists. It is the second set, and it is nothing but the second set.

The objection to that sentence is the sole owner's, and it should be met where it is strongest. A corporation with one shareholder, or a family's, or a company whose every member directs the expenditure, has a treasury that is, in every economic sense, its members' money: they bear its gains and its losses, and Justice Stevens's own word for them is "the residual claimants."[274] Why is such a treasury not the members' medium, carrying their own speech in the first set, so that § 441b reached first-set speech in their case and the ban was unconstitutional at least as applied to them? The answer is that the pool is not theirs by the very rule that made it. The shield exists only because the law says the pool is *not* the members': their creditors cannot reach it, their tort victims cannot, their deaths do not pass it, and no one of them can be sued for its debts.[275] A member cannot have the pool be not theirs when they owe and theirs when they speak. That is the same word used two ways that Section V.G found in *Citizens United* itself, an association of citizens when the question was whether the corporation might speak and a separate association when the question was whether the citizens' PAC sufficed;[276] only a name can be both, and the sole owner who claims the treasury's speech as their own while keeping the shield is asking the name to be both for them. The route the law leaves them is real: they may distribute the pool to themselves under the ordinary rule and speak with it as their own, at any scale, since a natural person's independent expenditure in their own name has been unlimited since

[273] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 658–659 (1990), quoted at 558 U.S. at 351.

[274] 558 U.S. at 475 (Stevens, J., concurring in part and dissenting in part).

[275] Dig. 3.4.7.1 (Ulpian) (pdf 148) (the body's debts are not the members'); *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (the corporation "receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter"); Section IV.D above.

[276] 558 U.S. at 337, 354, 356; Section V.G above.

Buckley.[277] What they may not do is speak from behind the shield. The distribution's cost, the tax on the dividend and the loss of the shield over what is withdrawn, is not a burden laid on speech because it is speech, which is the class the Court condemns;[278] it falls on withdrawal for any use, a vessel as much as a broadcast, and is therefore a condition on the privilege and not an abridgment of anyone's freedom. The same answer meets the majority's complaint that PACs are "burdensome alternatives," "expensive to administer and subject to extensive regulations":[279] a burden on the convenience of a privilege is not an abridgment of a freedom that was never touched.

The Court has drawn this line itself, for the pool's papers, in a line of cases from 1906 to 1988 whose rule is unbroken and whose last case was decided five to four, and the line is the article's. In *Hale v. Henkel* the Court distinguished the individual, who "may stand upon his constitutional rights as a citizen" and "owes no duty to the State or to his neighbors to divulge his business," from the corporation, which "is a creature of the State," "presumed to be incorporated for the benefit of the public," receiving "certain special privileges and franchises" and holding them "subject to the laws of the State and the limitations of its charter"; and *Wilson v. United States* in 1911 quoted the passage whole and drew the consequence for the officer who holds the books. "The corporate form of business activity, with its chartered privileges, raises a distinction when the authority of government demands the examination of books"; "the corporation has no

[277] *Buckley v. Valeo*, 424 U.S. 1, 51 (1976) ("we conclude that § 608 (e) (1)'s independent expenditure limitation is unconstitutional under the First Amendment"). The $5,000 annual limit on an individual's contribution to a corporation's PAC, 2 U.S.C. § 441a(a)(1)(C) (2006 ed.), is a contribution limit of the kind *Buckley* sustained on the anti-corruption interest, *id.* at 23–29, and is not a limit on the person's own expenditure.

[278] *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581, 585 (1983) ("It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems"; "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern"). The dividend tax is the generally applicable kind; it is not laid on the withdrawal because the withdrawal will be spent on speech.

[279] 558 U.S. at 337–338.

privilege to refuse. It cannot resist production upon the ground of self-crimination"; and its officers "may decline to utter upon the witness stand a single self-criminating word," but "the visitatorial power which exists with respect to the corporation of necessity reaches the corporate books without regard to the conduct of the custodian," because to hold otherwise "would not be a recognition, but an unjustifiable extension, of the personal rights they enjoy."[280] That is the object-and-direction principle of Section IV.B in the Court's hands: the privilege is the person's own act and stays with the person; the books are the pool's and travel with the grant.

The Court then kept the line when the ground under it changed. In *White* it extended the rule to an unincorporated union, and *Braswell* says what that did: "the Court jettisoned reliance on the visitatorial powers of the State over corporations owing their existence to the State—one of the bases for earlier decisions."[281] What survived the jettisoning is the rule the article stands on, which *Bellis* states from *White*: "individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers"; the privilege "is a purely personal one"; and "an artificial entity can only act to produce its records through its individual officers or agents."[282] *Bellis* then refused the count in terms, "It is well settled that no privilege can be

[280] *Wilson v. United States*, 221 U.S. 361, 382, 383, 385 (1911) (the Library of Congress bound volume, cut pdf 22, 23, 25). At 383 the Court quotes *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906), at length; the individual's and the corporation's sentences are *Hale*'s as *Wilson* sets them out, and "creature of the State" is the Court's word there. At 384 (pdf 24) the extract from *Hale* continues: "it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges" (*Hale*, 201 U.S. at 75, as *Wilson* quotes it). Section IV.C quotes *Hale* 74 for the privileges held "subject to the laws of the State."

[281] *Braswell v. United States*, 487 U.S. 99, 108 (1988) (the cut, pdf 10), describing *United States v. White*, 322 U.S. 694, 700–701 (1944). Section VII.C quotes *Braswell* 110 for the custodian's production as "an act of the corporation."

[282] *Bellis v. United States*, 417 U.S. 85, 90 (1974) (the Library of Congress bound volume, cut pdf 6), quoting *White*, 322 U.S. at 699, 701; at 89 (pdf 5) the Court notes that the earlier decisions "were based upon the particular incidents of the corporate form," citing *Wilson* at 382–385, and that *White* "put to rest" any thought that the rule was limited to corporate records. Section IV.B and Section VII.C quote 90's "purely personal."

claimed by the custodian of corporate records, regardless of how small the corporation may be," and *Braswell* restated the rule against the claim that the doctrine "does not apply when a corporation is so small that it constitutes nothing more than the individual's alter ego," adding that "it is well established that such artificial entities are not protected by the Fifth Amendment."[283] The Court has reserved one case at the rule's edge, and the reservation is the article's principle and not an exception to it. *Braswell* left open "whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records."[284] The reserved question concerns the person's act of production, which in a one-person corporation collapses into the person's own act, and never the pool's papers, which remain the body's: that is the object-and-direction line at its narrowest point, the act the person's and the thing the body's. And *Braswell* was five to four. Justice Kennedy wrote for the four that the privilege "is an explicit right of a natural person, protecting the realm of human thought and expression," and that the Court had denied "an individual his Fifth Amendment privilege against self-incrimination in order to vindicate the rule that a collective entity which employs him has no such privilege itself"; the rule was contested on the article's side, for the person, and never against the rule that the body has none.[285] The article never needed the visitatorial power. What it needs is the rule that outlived it, that a person acting for a body is not exercising a personal right, which is Section

[283] *Bellis*, 417 U.S. at 100 (pdf 16); *Braswell*, 487 U.S. at 102 (pdf 4). The "alter ego" sentence at 102 is the Court's account of the argument the District Court rejected, which the Court then rejected itself at 108–110.

[284] *Braswell*, 487 U.S. at 118 n. 11 (the cut, pdf 20–21; the footnote straddles 118–119). The reservation follows the Court's statement that the custodian's production "is deemed one of the corporation and not the individual" and that the Government "may make no evidentiary use of the 'individual act' against the individual."

[285] *Id.* at 119 (Kennedy, J., dissenting, joined by Brennan, Marshall and Scalia, JJ.) (pdf 21).

IV.B's consent to the act stated from the other side; and the Court's two hedges on the pool's privacy, *Morton Salt*'s and *Oklahoma Press*'s, belong beside it (Sections IV.B and VII.C).[286]

What the article takes from the line should be stated exactly, and so should what it does not. It takes the Court's sorting by the act and the Court's refusal of headcount for the pool's papers. It does not take the privilege's result and carry it into another clause, because the Court confined the collective-entity rule to the guarantees it called "purely personal" and put speech outside them in terms, in *Bellotti*'s footnote and Justice O'Connor's inventory, which Section VII.C quotes; her criterion is that paying a penalty, unlike remaining silent, "is something that a corporation can do as an entity."[287] That is the Court's line. Section VI.G's fourth step contests it for the negative claim, where O'Connor's own words place the ability to remain silent among the things a corporation cannot do as an entity. For the sole owner the Court's line and the article's agree. The custodian of a one-person corporation's books has no privilege "regardless of how small the corporation may be," because the books are the body's; the treasury is the body's by the same rule, the shield that makes the pool not the owner's for the owner's debts; and when *Citizens United* counted "for-profit corporations with only single shareholders" among the reasons the statute was overinclusive, it counted heads where the rule counts the shield, since the single shareholder who keeps the shield keeps the pool as the body's and may distribute it and

[286] *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946); both quoted in Section VII.C.

[287] *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 778–779 n. 14 (1978) (the cut, pdf 14–15), citing *Wilson*, 221 U.S. at 382–386, *Morton Salt*, 338 U.S. at 651–652, and *United States v. White*, 322 U.S. 694, 698–701 (1944); the footnote also says that the Massachusetts court "did not go so far as to accept appellee's argument that corporations, as creatures of the State, have only those rights granted them by the State," and that the denials of the privilege and of privacy are "not because the States are free to define the rights of their creatures without constitutional limit" ("creatures" the Court's word). *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 284–285 (1989) (O'Connor, J., concurring in part and dissenting in part) (the Library of Congress bound volume, cut pdf 28–29); Section VII.C quotes the footnote's two sentences and O'Connor's paragraph beside *Hale*'s sorting.

speak with it as a person at any scale.[288] Headcount never enters the article's sorting, and where the Court has counted, the count was of the wrong thing.

The sorting the article needs is therefore not by the number of members but by what the law reached. A law that compels a person's act through the name reaches the person, and the name is the medium: Alabama demanded the members' names, and the compulsion reached the members' own association through the Association's name;[289] the contraceptive mandate compelled the companies, as employers, to arrange coverage under penalty, and through them the owners, and the Court found the burden on "the humans who own and control those companies."[290] *NAACP* is a first-set case, and the article claims it. *Hobby Lobby* the article claims differently and more exactly (Section V.A): the Court reached the companies through a statute's "person," the people's own rule for the name, and the burden it found was on the persons, whose exercise through the name their own instruments recorded (Section V.D); the sorting there is by the source of the claim, as it is here, and never by the count. A law that conditions the use of the rule's own product, compelling no one, reaches the rule: § 441b compelled no person to speak or to be silent in their own name, and reached the pool's spending and nothing else. That is a second-set case, and the condition was the grantor's to impose. The Court itself once sorted a pool by its formation rather than by the identity of its holder. The advocacy corporation in *Massachusetts Citizens for Life* could spend from its treasury because of "three features essential to our holding": it "was formed for the express purpose of promoting political ideas, and cannot engage in business activities," which "ensures that political resources reflect political support"; it "has no shareholders or other persons affiliated so as to have a claim

[288] *Citizens United*, 558 U.S. at 362 (the bound volume, pdf 523); the shield rule is this section's, at the sole owner's paragraph above, with *Hale* 74 and Dig. 3.4.7.1 (n. 275).

[289] *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459–460 (1958).

[290] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–707 (2014).

on its assets or earnings"; and it "was not established by a business corporation or a labor union."[291] "Voluntary political associations," the Court said on the page before, "do not suddenly present the specter of corruption merely by assuming the corporate form,"[292] which is to say that such a treasury is persons' pooling under a corporate name and not the shield's product. The PAC is the same thing: identified persons' money, put in for this speech, an agreement among persons, which is the first set. The general treasury is what no agreement among persons can make. Consent enters the analysis at the pool's formation and nowhere else; it never enters by headcount.

B. What the Court Held, in Its Own Words: "A PAC Is a Separate Association from the Corporation," and the Forfeiture Sentence at Page 351

The majority did not deny that the members could speak. It held that their speaking was not enough, because the corporation could not. The sentence is at page 337:

> A PAC is a separate association from the corporation. So the PAC exemption from § 441b's expenditure ban, § 441b(b)(2), does not allow corporations to speak. Even if a PAC could somehow allow a corporation to speak—and it does not—the option to form PACs does not alleviate the First Amendment problems with § 441b.[293]

The first of those sentences is true, and it is beside the point unless a corporation is something that speaks, a premise Section VI.G returns to. Read the passage against the first set. It concedes that the association of citizens behind the corporation was free to speak through the PAC. It holds that this concession is beside the point, because "the corporation" is a speaker distinct from that association, and the statute silenced it. The speaker whose right the Court

[291] *Massachusetts Citizens for Life*, 479 U.S. at 263–264.

[292] *Id.* at 263.

[293] 558 U.S. at 337.

vindicated is therefore not the natural persons, whose speech was never restricted. It is the name, holding the treasury.

The majority then addressed the second set directly. *Austin* had distinguished corporations from wealthy individuals on the ground that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets."[294] The majority answered in one sentence: "This does not suffice, however, to allow laws prohibiting speech. 'It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights.'"[295]

That sentence presupposes the thing in dispute. For the special advantages to be the "price" of a "forfeiture," the corporation must already hold a First Amendment right that could be forfeited. The sentence does not establish that it does. It assumes it, and then treats a condition on the grant as a penalty on the right. But the only right the statute could have reached was one the name held as itself, because the members' rights were untouched. If the name holds no such right, there was nothing to forfeit. What the statute actually did was condition the sovereign's own grant: you may accumulate under limited liability and perpetual succession, and you may not spend the accumulation on candidate elections. Conditioning a grant is what a grantor does. The Court had said so for the municipal corporation, which "remains the creature of the State exercising and holding powers and privileges subject to the sovereign will,"[296] and it had said so for the private corporation's claim to be a citizen, confined in *Paul* to "natural persons, members of the body politic" and denied to "artificial persons created by the legislature" (Section III.D).[297]

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[294] *Austin*, 494 U.S. at 658–659, quoted at 558 U.S. at 351.

[295] 558 U.S. at 351.

[296] *Trenton v. New Jersey*, 262 U.S. 182, 187 (1923); see *Hunter v. Pittsburgh*, 207 U.S. 161, 178–179 (1907).

[297] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869).

The majority at page 351 treated the condition as censorship of a rights-holder, and the rights-holder is a word.

The Court had answered page 351 a century before, in the case this article owns with its use named. "In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual," the Court said in *Berea College*, upholding the Day Law as applied to the corporation alone, in the sentences Section IV.B quotes whole and whose use it names.[298] The sentence is the second set stated by the Court: what the name holds, the grantor may withhold or condition, and a condition on a grant is not a price exacted for a right the grantee holds, because the grantee holds none of its own. The article takes the rule and names its use in each place it cites it, as Section IV.B does at length: the rule was used to segregate a college because the Court held only half of it, and let a condition on the name's power reach the teachers' and students' own act. Page 351 is the other half held alone. The majority treated a condition on the name's grant as a penalty on a right, and so found a holder where *Berea* had rightly found none; *Berea* had denied the persons what page 351 would give the name. *Pierce* holds both halves in two sentences and is the measure of each, as Section V.A quotes them: the liberty the corporations could not claim for themselves, and the business and property for which they claimed protection, the liberty vindicated being the parents'.[299] Read against page 351, *Pierce* says what the statute could and could not reach: the name's business and property, the second set, which the sovereign's condition may touch, and the persons' liberty, the first, which the statute left whole. The sentence the majority quoted at 351 is Justice Scalia's, dissenting in

[298] *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908) (Brewer, J., for the Court) (the cut, pdf 10). Section IV.B carries the case at length, with Harlan's dissent and the Court's own correction in *Pierce*; Section VII.D names it as the substitution form run by a State; Section III.J's census entry carries it in the line from *Riggs* to *Citizens United* 342. The use is named in each place.

[299] *Pierce v. Society of Sisters*, 268 U.S. 510, 535, 536 (1925) (the pages for stages four and five). Section V.A quotes the two pages in full as the derivative theory's principal authority.

Austin, and it assumes the one thing *Pierce* and *Berea* agree in denying: a right of the name's own for the condition to forfeit.[300]

One reply must be met here, because *Berea*'s sentence is the creating State's. Section 441b is Congress's, and Congress chartered none of the corporations it reached, so the adversary says that Congress conditioned a grant it never made. The answer is Section VI.I's. The federal condition rides on the people's federal grant, the exception in their own revenue law that excepts the treasury from the charge persons bear, and on the national instrument the treasury spends; and the people are one sovereign through both instruments, so that the States' grants, in the Court's words, "cannot repeal the Constitution," and by the same reasoning cannot enlarge it. A condition the people lay through Congress on the use of their own exception is a grantor's condition in the only sense this article uses (Sections VI.I and VII.C).[301]

The sentence is the unconstitutional-conditions doctrine, and the article names it so that no reader can say it was missed. *Frost & Frost Trucking* in 1926 held that what a State may not do "by words of express divestment" it may not accomplish "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold"; *Western Union Telegraph* in 1910 had held that a foreign corporation admitted to local business could not be made to surrender its federal exemption as the price of staying, "any more than it would have been bound to surrender any other right secured by the National Constitution," and that "any such condition was unconstitutional and void"; and *Alliance for Open Society* in 2013

[300] *Citizens United*, 558 U.S. at 351, quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting). Section VI.H measures the "special advantages" of Scalia's sentence as the exception the people may condition.

[301] Sections VI.I (the exception in Title 26 as the people's federal grant on which the federal condition rides; the national instrument) and VII.C; *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1854) ("State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution"), from the official report (the Library of Congress bound volume; the sentence follows the *327 mark of the shelf's star-paged reprint, whose leaf is headed 326, so the pin is 327 as note 394 has it) and quoted in Section VII.C, with the converse the article supplies there. The one-sovereign point is Section II.E's.

drew the line between "conditions that define the limits of the government spending program" and "conditions that seek to leverage funding to regulate speech outside the contours of the program itself."[302] The doctrine forbids a government to condition a privilege on the surrender of a right the holder of the privilege has. It cannot create a holder. Where the condition left every natural person's own money and speech untouched, the PAC and the advocacy corporation's pool, there is no person whose right the condition exacts, and the only forfeiture is of a right the name would have to hold as itself, which is the question.

C. The Shareholders: Speech Funded by Persons Who Oppose It Derives from No One

The point is not an abstraction, because the Court was told who would pay for the speech it protected. Justice Stevens, dissenting, put it at page 475:

> When corporations use general treasury funds to praise or attack a particular candidate for office, it is the shareholders, as the residual claimants, who are effectively footing the bill. Those shareholders who disagree with the corporation's electoral message may find their financial investments being used to undermine their political convictions. The PAC mechanism, by contrast, helps ensure that those who pay for an electioneering communication actually support its content and that managers do not use general treasuries to advance personal agendas.[303]

This closes the one route by which the majority's holding might have been brought back inside the first set. If treasury speech were the members' own speech carried through a medium,

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[302] *Frost & Frost Trucking Co. v. Railroad Commission*, 271 U.S. 583, 593 (1926) (cut pdf 11; the same leaf: "constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect but no less effective process of requiring a surrender, which, though, in form voluntary, in fact lacks none of the elements of compulsion"); *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U.S. 1, 36, 48 (1910) (Harlan, J., for the Court: at 36 the Court's own line of cases, *Barron v. Burnside*'s "no conditions can be imposed by the state which are repugnant to the Constitution and laws of the United States"; the holding at 48, where the opinion of the Court closes on a leaf whose running head already carries the concurrence of White, J., which opens at its foot and runs to 51); *Agency for International Development v. Alliance for Open Society International, Inc.*, 570 U.S. 205, 214–215 (2013) (cut pdf 10–11; the sentence turns the leaf at "lever-"); the three cut from the Reports on the shelf.

[303] 558 U.S. at 475 (Stevens, J.).

every member would be a willing source of it, as every member of the NAACP was a willing source of the association's claim to keep its membership list private. Dissenting shareholders show that the treasury's speech derives from no one. It is officers spending second-set assets in the name's voice, funded by persons who oppose what is said. A right that derives from no member cannot come from the first set, and a second-set incident is not a constitutional right. The right the majority protected has no source in either. It is the residue the two-set analysis says cannot exist, and the majority created it.

The interest in protecting those shareholders was not new. The Court had recognized it in *National Right to Work Committee* as the interest in "protect[ing] the individuals who have paid money into a corporation or union for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed,"[304] and in *Massachusetts Citizens for Life* as the protection of "members or shareholders who may disagree with the object of the expenditures."[305] The majority disposed of it in two sentences. At page 362: "There is, furthermore, little evidence of abuse that cannot be corrected by shareholders 'through the procedures of corporate democracy.' … Those reasons are sufficient to reject this shareholder-protection interest."[306] At page 370: "Shareholder objections raised through the procedures of corporate democracy … can be more effective today because modern technology makes disclosures rapid and informative."[307]

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[304] *FEC v. National Right to Work Committee*, 459 U.S. 197, 207–208 (1982), quoted at 558 U.S. at 476 (Stevens, J.).

[305] *Massachusetts Citizens for Life*, 479 U.S. at 260, as restated at 558 U.S. at 437 (Stevens, J.).

[306] *Citizens United*, 558 U.S. at 362, quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 794 (1978), and citing *id.* at 794 n. 34.

[307] 558 U.S. at 370.

D. "Corporate Democracy": A Presumption of 1978, Applied in 2010 Without a Record

The phrase in the majority's quotation marks is a term of art with a known origin. It entered the Reports in 1978, in the sentence of *First National Bank of Boston v. Bellotti* that the census quotes (Section III.H).[308] The next page explained what the procedures were: "Acting through their power to elect the board of directors or to insist upon protective provisions in the corporation's charter, shareholders normally are presumed competent to protect their own interests. In addition to intracorporate remedies, minority shareholders generally have access to the judicial remedy of a derivative suit."[309] A footnote distinguished the compelled-subsidy cases on the ground that union members were "required … to pay dues," whereas investment in a corporation is "voluntary," and observed that on that record "[n]ot a single shareholder" had objected.[310]

Consider the verbs. Shareholders *may* decide. They *normally are presumed* competent. They *generally have access* to a derivative suit. The procedures *can be* more effective today. Not one of these is a finding that the procedures exist in any given corporation or work in any. *Bellotti* stated a presumption and said so in the word "presumed." *Citizens United* applied the presumption as if it were conclusive, to reject a governmental interest that Congress had found on a legislative record, and it did so, as the dissent observed, with "no record" and "just the majority's own unsupported factfinding."[311] A rebuttable presumption of remedial adequacy was used to deny a constitutional protection without the presumed fact ever being found.

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[308] *Bellotti*, 435 U.S. at 794.

[309] *Id.* at 794–795.

[310] *Id.* at 794 n. 34. Justice White's dissent noted the Court's proposal "that the aggrieved shareholder assert his interest … through the channels provided by 'corporate democracy'" and its professed mystification at the dissenting shareholder's claim to solicitude. *Id.* at 815 (White, J., dissenting).

[311] 558 U.S. at 400, 416 (Stevens, J.).

What the presumption presumes is also worth stating. Justice Stevens read "corporate democracy" as "the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty," and reported what practitioners say of them: "these rights are so limited as to be almost nonexistent, given the internal authority wielded by boards and managers and the expansive protections afforded by the business judgment rule."[312] The shareholder's remedy for having their money spent against their convictions is therefore a vote that management controls, a suit the business judgment rule defeats, or exit, which is selling the shares. Exit is an opt-out. The dissenting shareholder keeps their First Amendment protection only by leaving.

The presumption also answers the wrong question. "Corporate democracy" is offered as the dissenting shareholder's remedy, and the article has shown it to be a presumption and not a finding. But the harm the shareholder suffers is not only the loss of money to a cause they oppose; it is the attribution, which Section V.D stated: speech in the name claims a consent no member gave. A vote the board controls and a suit the business judgment rule defeats do not restore a consent that was never given. They are procedures for the money, not for the attribution, and exit by sale leaves the attribution standing for every share that remains. The majority rejected the shareholder-protection interest as a ground for restricting speech and left "other regulatory mechanisms" open (Section V.D; page 362), and the people's conditions on their own grant are such a mechanism. The usurpation is the ground the presumption never reaches, because "corporate democracy" presumes that the members' consent is there to be exercised, and the charter says it never was.

[312] *Id.* at 477 (Stevens, J.), quoting Blair & Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247, 320 (1999).

E. The Court's Own Standard, Applied to the Other Collective: Abood, Hudson, Knox and Janus Against the Shareholder's Exit

The Court has a settled standard for exactly this situation, and it is not a presumption. When the collective is a union, and the question is whether a natural person may be made to fund political speech they oppose, the Court does the opposite of presuming the remedy adequate.

In *Abood*, the Court held that a union's expenditures for "the advancement of other ideological causes not germane to its duties as exclusive bargaining representative" must be "financed from charges, dues, or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment."[313] In *Chicago Teachers Union v. Hudson*, the Court did not presume that the union's procedures for objectors were adequate; it prescribed them. "We hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending."[314] The union's own voluntary escrow arrangement "does not cure all of the problems in the original procedure."[315] In *Knox v. Service Employees*, the Court held that an opt-out structure was itself insufficient: a union "may not exact any funds from nonmembers without their affirmative consent," and requiring objecting nonmembers to opt out "as opposed to exempting them from making such payments unless they opt in" was "a remarkable boon for unions," since "[a]n opt-out system creates a risk that the fees paid by nonmembers will be used to further political and ideological ends with which they

[313] *Abood v. Detroit Board of Education*, 431 U.S. 209, 235–236 (1977) (the Court's words; the syllabus at 210 paraphrases them).

[314] *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

[315] *Id.* at 310.

do not agree."[316] In *Janus*, the Court completed the line: a waiver of the right not to subsidize "cannot be presumed," it "must be freely given and shown by 'clear and compelling' evidence," and "[u]nless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."[317]

Set the two standards side by side. For the union collective, the Court prescribed the dissenter's procedures itself, rejected the collective's own remedy as inadequate, refused opt-out, and forbade presumed consent. For the corporate collective, the Court presumed the procedures adequate, accepted that they "can be" effective, left the shareholder to exit or to a vote the dissent called almost nonexistent, and presumed consent from the "voluntary" character of investment, a premise that does not survive the observation that the second-set rule locks the capital in after entry, so that consent at purchase is not consent to each expenditure afterward, which is precisely the point on which *Knox* and *Janus* turned for union members. The two treatments cannot both be the First Amendment's measure of one interest, and the article is exact about what is being compared. It does not claim that the shareholder holds a First Amendment right against the board. Congress found a governmental interest in protecting the shareholder, the "shareholder-protection interest" the Court names and rejects at page 362, and the Court disposed of that interest by a presumption it refuses to apply to the identical interest when the collective is a union, where it prescribes the dissenter's procedures itself.[318] The comparison is of the Court's treatment of two legislative interests in the same persons' money, not of two

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[316] *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 312, 322 (2012) (cut pdf 15, 25).

[317] *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878, 930 (2018).

[318] 558 U.S. at 362 ("Those reasons are sufficient to reject this shareholder-protection interest"; "As to other corporations, the remedy is not to restrict speech but to consider and explore other regulatory mechanisms. The regulatory mechanism here, based on speech, contravenes the First Amendment.") (cut pdf 53).

constitutional claims. And the State is in the room in both: the compulsion the union cases condemn is a statute's, and the lock-in that makes the shareholder's money the name's, no withdrawal, no direction, exit only by sale, is the sovereign's own rule, the second set, enacted by the general incorporation law the people's constitutions commanded. Between 1978 and 2018 nothing changed in the text. The only variable is the identity of the speaker. In the union cases the Court looked through the collective to the natural persons who paid, and protected them. In the corporate case it did not look through, because the speaker in its account was the corporation, and a corporation that is a speaker in its own right has no dissenting members, only assets.

F. The Question the Court Did Not Ask: Whose Speech, and Under Which Clause

Citizens United is not, on this analysis, a case about how much speech money may buy, and the article does not join the argument the majority rejected at page 350, that the government may restrict some voices "in order to enhance the relative voice of others."[319] That argument concedes what is in dispute. It treats the treasury's holder as a speaker with a right and asks only that the right be turned down. The article's claim is prior, and Sections VI.A, VI.B and VI.D have stated it.

The clause that protects the speaker in *Citizens United* does not exist. The holding rests on the word.

[319] *Buckley v. Valeo*, 424 U.S. 1, 48–49 (1976), quoted at 558 U.S. at 349–350 and at *id.* at 379 (Roberts, C.J., concurring).

G. The Clause Names No Holder: The Freedom Is Someone's, the Hearer's Interest Is First-Set, and the Coined Term Is "Speaker"

The strongest answer to the two sets is not *Pembina*'s but *Bellotti*'s, and the article meets it in the Court's own words. "The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether § 8 abridges expression that the First Amendment was meant to protect."[320] The Speech Clause restrains Congress; it names no person, no citizen, no people, and no holder. On this account the two sets answer a question the Court declined to ask, and the removal test, run honestly, would have nothing against the holding: strike every term in the census and what remains is a statute that silenced political speech the public would otherwise have heard, and a clause that forbids Congress to abridge the freedom of speech. *Citizens United* rests on exactly this line: political speech does not lose First Amendment protection "simply because its source is a corporation."[321]

Four steps meet it, each in the text's own grammar.

First, the clause presupposes a holder though it names none. "The freedom of speech" is a freedom, with the definite article, and a freedom is someone's. The Court's own listener cases say whose. "Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both."[322] The recipients were natural persons who wished to hear; the source was a pharmacist who would advertise; "if there is a right to advertise, there is a reciprocal right to receive the

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[320] *Bellotti*, 435 U.S. at 776.

[321] *Citizens United*, 558 U.S. at 342 (quoting *Bellotti*, 435 U.S. at 784). The same page opens by citing *Bellotti*'s note 14 for the proposition that "First Amendment protection extends to corporations."

[322] *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

advertising, and it may be asserted by these appellees."[323] A clause that forbids Congress to abridge *the freedom* forbids it to abridge a freedom natural persons have. It says nothing about a sovereign's grant to a name, because the name has no freedom to abridge.

Second, the hearer's interest is first-set, and the statute served it. Whatever a hearer may claim is a natural person's claim and sits in the first set. Every word the general treasury would have bought could reach the same hearer through the PAC the statute left open, from the same persons, in the same words, as Section VI.A showed. The Court has said that a hearer's right is not defeated because the message could be had by other means,[324] but that principle protects a speaker's message from being rationed, and here no speaker's message was rationed: the persons who wished to speak could speak, and could pool their speech. The only speech § 441b kept from any hearer was speech that no natural person had chosen to fund. The listener theory therefore proves the article's point rather than the Court's. The hearer lost nothing a natural person had offered.

Third, the Court's sentence smuggles the holder back. "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech," *Bellotti* said, and the speech's worth "does not depend upon the identity of its source, whether corporation, association, union, or individual."[325] The sentence assumes what the two sets deny: that a name is a speaker, a source with an identity. Strike the name as a speaker and the sentence reads: the speech comes from officers spending assets accumulated under a sovereign's rule, funded in part by persons who oppose it. That is not a source the First Amendment protects,

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[323] *Id.* at 757.

[324] *Id.* at 757 n. 15 ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means, such as seeking him out and asking him what it is.").

[325] *Bellotti*, 435 U.S. at 777.

because it is not a source. It is a medium, in the Court's own word of 1958, with no one behind the particular words. The coined term in *Citizens United* is therefore not "person," which the Fourteenth Amendment line supplied, but "speaker," the name used as the subject of the verb to speak; Section VII.B runs the test on that word. The Court has never said that every guarantee belongs to a corporation. In the footnote that rejected the appellee's "creatures of the State" argument as "an extreme position," *Bellotti* said that "purely personal" guarantees are unavailable to corporations, and that whether a guarantee is so limited "depends on the nature, history, and purpose of the particular constitutional provision"; Section VII.C quotes the footnote whole.[326] The nature of the freedom of speech is that it is someone's; its history is a natural person's; its purpose, on the Court's own listener account, is a natural person's hearing. The Court's test, applied to the Court's clause, reaches the people who speak and hear, and stops.

Fourth, the test must be run on the negative claim, because the strongest form of the adversary's case is not a corporation's right to speak but its right not to. *Pacific Gas & Electric* is the case. California's commission ordered a regulated utility to carry a ratepayer group's messages in its billing envelopes, and a plurality of the Court held the order a violation of the utility's First Amendment rights. Justice Powell, announcing the judgment in an opinion joined by Chief Justice Burger and Justices Brennan and O'Connor, wrote that "[t]he identity of the speaker is not decisive in determining whether speech is protected," that "[f]or corporations as for individuals, the choice to speak includes within it the choice of what not to say," and that "[w]ere the government freely able to compel corporate speakers to propound political messages

[326] *Id.* at 778–779 n. 14. The "creatures of the State" argument was the appellee's, and the Court declined to accept it; the "purely personal" sentences close the note at 779, citing *United States v. White*, 322 U.S. 694, 698–701 (1944).

with which they disagree, this protection would be empty."[327] A right not to speak is the purest right of participation, because its object is nothing but the self: a person's refusal to utter what they do not believe. By Section IV.B it cannot be held by a name. By Section V.D the utility's charter contains no speech, so there is no member whose consented declaration the envelope could carry or betray; the ratepayers joined under no creed, and the employees who filled the envelopes said nothing. Strike "speaker" as applied to the name and what remains is this. The envelopes were the utility's property, which the article does not dispute: "The envelopes themselves, the bills, and *Progress* all remain appellant's property." Five Justices in three opinions rejected by name the argument that the utility's regulated status lessened its right, the plurality because a regulated monopoly's position "does not decrease the informative value of its opinions on critical public matters," Justice Marshall because passing overhead to ratepayers "cannot affect the utility's ownership of its property, nor its right to use that property for expressive purposes," and the Chief Justice because the envelopes were "property like the mailing envelopes acquired by Pacific from its income and resources"; and the article does not rest on that argument.[328] It rests on the thing the property does not supply, which is a conscience. The plurality's own reason for rejecting the regulated-status argument is the informative value of the utility's opinions to hearers, and a right not to carry another's message serves no hearer: the

[327] *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1, 8, 16 (1986) (opinion of Powell, J., announcing the judgment, joined by Burger, C.J., and Brennan and O'Connor, JJ.; Marshall, J., concurring in the judgment; Rehnquist, J., dissenting, joined in Part I by White and Stevens, JJ.; Stevens, J., dissenting; Blackmun, J., taking no part) (the Library of Congress bound volume, cut pdf 2 (the lineup), 8, 16). At 16 the plurality cites *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974), and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), for the choice of what not to say.

[328] *Pacific Gas & Electric*, 475 U.S. at 17 & n. 14 (opinion of Powell, J.) (the LoC cut, pdf 17), the footnote citing *Consolidated Edison*, 447 U.S. at 534 n. 1, and *Central Hudson*, 447 U.S. at 566–568; *id.* at 21 (Burger, C.J., concurring) (pdf 21); *id.* at 22 n. 1 (Marshall, J., concurring in the judgment) (pdf 22), which also cites *Consolidated Edison* 534 n. 1 and offers the grocery-store analogy.

First Amendment, in the plurality's words, "protects the public's interest in receiving information," and a hearer's interest cannot ground a right to keep hearers from hearing.[329]

Nor was any natural person made to say anything. The Commission required TURN "to state that its messages are not those of appellant," so the speech was TURN's, in TURN's name, disclaimed; what was attributed to the utility and its shareholders was the envelope and the return address, and Section V.D's harm, speech in a body's name claiming its members' consent, has no purchase on a disclaimed insert.[330] What the plurality feared was that the utility would "feel compelled to respond," and the response it had in mind was the pool's newsletter, no person's own speech. And the conscience ground had four votes, not five. Justice Marshall concurred in the judgment on the ground that California "has taken from appellant the right to deny access to its property—its billing envelope," a redefinition of a property right in the extra space, so that the narrowest ground of the judgment is property and not conscience; and the plurality's own footnote states the article's question without answering it, that "the public's ownership of the 'extra space' does not nullify the First Amendment rights of the owner of the property from which that space derives," which assumes that the owner, being a name, has the right in question.[331]

Justice Rehnquist's dissent, in the Part he wrote for himself alone, is the article's argument in the Reports. "Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to

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[329] *Id.* at 8 ("By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information").

[330] *Id.* at 7 (opinion of Powell, J.) (pdf 7) ("TURN is required to state that its messages are not those of appellant"); *id.* at 18 (pdf 18) ("envelopes that appellant owns and that bear appellant's return address"); *id.* at 16 (pdf 16) ("appellant will feel compelled to respond to arguments and allegations made by TURN").

[331] *Id.* at 22 (Marshall, J., concurring in the judgment) (pdf 22); *id.* at 18 n. 15 (opinion of Powell, J.) (pdf 18). The plurality's text at 18 says the result "is so whoever is deemed to own the 'extra space.'"

such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality"; corporate speech rights, he wrote, "do not arise because corporations, like individuals, have any interest in self-expression," but were recognized "as an instrumental means of furthering the First Amendment purpose of fostering a broad forum of information to facilitate self-government"; and "the two constitutional liberties most closely analogous to the right to refrain from speaking—the Fifth Amendment right to remain silent and the constitutional right of privacy—have been denied to corporations based on their corporate status."[332] That is the object-and-direction line drawn by a Justice, and it is older than the Republic. The common law said in 1614 what the dissent said in 1986. In *Tipling v. Pexall*, Coke, reciting Chief Baron Manwood's opinion, said of corporations "that they were invisible, immortall, and that they had no soule; and therefore no subpœna lieth against them, because they have no conscience nor soule; a corporation, is a body aggregate, none can create soules but God, but the King creates them, and therefore they have no soules; they cannot speak, nor appear in person, but by attorney."[333] And in *Sutton's Hospital* two years before, in Coke's own report, a corporation aggregate "cannot commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person, but by attorney."[334] Two things are in those sentences. The

[332] *Id.* at 33, 34 (Rehnquist, J., dissenting) (pdf 33, 34). Justices White and Stevens joined Part I of the dissent only; the quoted pages fall in Part II (the dissent's Part headings stand at 27, 31 and 35, located at the text layer of the cut), so the sentences are Justice Rehnquist's alone. At 33 the dissent cites *Bellotti*, 435 U.S. at 776, 777 & n. 12, 783, and *Consolidated Edison*, 447 U.S. at 533, 534–535 & n. 2, for the distinction between the First Amendment rights of corporations and those of natural persons; at 34 it cites *Bellotti*'s n. 14 for the "purely personal" guarantees, the footnote Section VI.G's third step quotes.

[333] *Tipling v. Pexall* (K.B. 1614), 2 Bulst. 233, 80 Eng. Rep. 1085 (the English Reports cut, the single leaf headed "2 BULSTRODE, 233"; the case opens at the [233] mark). The leaf's running head reads "TERMIN. PASCH. 12 JAC." and the case is "Entred Hill. 11 Jac. B. R. Rott. 274"; Easter term of the twelfth year of James I and Hilary term of the eleventh both fall in 1614 by the regnal calendar, so the article dates the case 1614 where the conventional citation and the shelf's filename say 1613. The report is Coke's, reciting "the opinion of Manwood Chief Baron … touching corporations"; the spelling is the report's.

[334] *The Case of Sutton's Hospital* (K.B. 1612), 10 Co. Rep. 1a, 32b, 77 Eng. Rep. 937, 973 (the English Reports cut, pdf 37, the leaf headed "10 CO. REP. 32 b."). Section II.E quotes the same page for "invisible, immortal, and rests only in intendment and consideration of the law."

first is the common law's rule of treatment, that a name acts only through natural persons, "by attorney," which Section II.D received and Section IV.B applied; and the report's own grammar answers the adversary who reads "by attorney" as mere agency, since Manwood's "therefore" runs from the incapacity to the procedure. A body appears by attorney because it has no person and no conscience of its own, and the procedure records the incapacity, as *Sutton's Hospital* says in the same breath: "for they have no souls, neither can they appear in person, but by attorney." The second is the possible-matter bound of Section II.D stated in 1614: the king can create the body and not the soul, so the body has no conscience to be compelled, and a law that feigned one would feign the impossible. "To confuse metaphor with reality" is "none can create soules but God" in a modern voice, and the Court's own criteria say the same thing a third time. *Bellotti*'s "purely personal" guarantees, O'Connor's "unlike the ability to remain silent," and Rehnquist's "metaphor with reality" are three statements of one rule, that a name has no conscience to be compelled, and the fourth step rests on that rule and on nothing else.

The corporate-speech cases after *Bellotti* sort by the same step, one sentence each. *National Institute of Family and Life Advocates* and *303 Creative* compel an act of identified persons, the clinics' staff who must post the State's notice and the designer who must write, and they sit in the first set under Section VI.A's source rule; the Court's own words place them there, the notice "targets speakers, not speech," and speakers do not "shed their First Amendment protections" by employing the corporate form, as Section V.E quotes the sentence, though the Court's "speakers" names the covered facilities and the article measures the description and takes the act, which was the staff's.[335] *Consolidated Edison* and *Central Hudson* are the pool's

[335] *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 778 (2018) (the cut, pdf 24; the Court's opinion closes on 778 and Justice Kennedy's concurrence opens at 779); *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023). Section V.E places *303 Creative* among the Court's own grammar; Section IX.E measures the media cases it cites.

political and commercial speech. The Court held that the bill-insert restriction "cannot be upheld on the ground that Consolidated Edison is not entitled to freedom of speech," a sentence that names the body as the holder and that the article measures as Section IV.B measured the standing rule; *Central Hudson* gives the ground the article takes, that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising," which is the hearers' first-set interest in the Court's own words, carrying whatever survives and nothing of the name's.[336] *Sorrell* is the same with data as the speech: "the creation and dissemination of information are speech within the meaning of the First Amendment," the creators' and the hearers' interest, the pool the vehicle.[337] *Pacific Gas & Electric* alone claims a conscience for the name, and it is the one that fails outright. Section IX.A's "measuring" is thereby argued and not asserted: run the test Section VII states, strike the name as a speaker from each of these, and the first-set interests stand where they stood, and the one holding that rested on the name's own mind has nothing under it.

H. The Two Bonds: The Citizen's Standing Is Settled, the Name's Is a Grant, and the Sentence at Page 351 Made Them One

Section VI.A measured page 351 by what the statute reached, and Section VI.G by whose the freedom is. A third measure remains, and it is the oldest in the American vocabulary: the bond between the sovereign and those it taxes. The adversary's reply to that measure should be stated

[336] *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530, 533 (1980) (the Library of Congress bound volume, cut pdf 4), quoting *Bellotti*, 435 U.S. at 777; *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 563 (1980) (the cut, pdf 7), citing *Bellotti* at 783. *Central Hudson*'s footnote on the same page says the Court rules "today in *Consolidated Edison* … that utilities enjoy the full panoply of First Amendment protections for their direct comments on public issues"; the article measures the sentence as it measures the standing rule and the body-named sentences of Section V.E.

[337] *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) (the cut, pdf 19), citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001), *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481 (1995), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (plurality opinion).

before the measure is, because it is the strongest reply the article has had to meet. The colonists' maxim, it runs, cuts the other way. A corporation is taxed; the Court has said so since 1911, describing the federal corporation tax as "an excise upon the particular privilege of doing business in a corporate capacity."[338] It is not represented: it has no vote and no representative, and the article insists on both. If taxation without representation was the wrong that made the Republic, then a taxed name is owed a voice, and the treasury's political spending is the only voice it has. On this reply the two bonds are the article's own argument turned against it.

The answer is that the maxim never had a name for its object. Blackstone stated it of the subject, and the Declaration of "us," in the sentences Section II.E quoted; its object is persons, and the persons behind every corporate treasury are represented already, as the shareholders and employees they are, each a person in the settled bond and most of them citizens with the vote, and nothing a share costs them has reduced either the vote or the voice. What the name bears is not a tax on a person. It is, in the Court's own description of the tax the adversary relies on, a charge on a privilege, laid in *Flint*'s words "upon the privileges which exist in conducting business with the advantages which inhere in the corporate capacity of those taxed," the advantages being the four Section IV.C lists from the same page.[339] The name pays that charge. The classical corporation pays the tax laid "on the taxable income of every corporation," and its shareholders pay again when the income reaches them as dividends; what this section calls an exception is the grantor's further term on that charge, and the word means exactly that

[338] *Flint v. Stone Tracy Co.*, 220 U.S. 107, 151 (1911) (Day, J., for the Court) (the cut, pdf 45): the Corporation Tax Act of 1909 "may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi-corporate organization." Section IV.C places *Flint* beside *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987), as the Court's statement of the second set in the tax cases.

[339] *Id.* at 162 (pdf 56): "It is this distinctive privilege which is the subject of taxation, not the mere buying or selling or handling of goods which may be the same, whether done by corporations or individuals."

throughout.[340] A charge on a grant is a condition of the grant, and a condition of a grant is owed nothing by the grantor beyond the grant's own terms. The Court said that too, in 1908, of a State creating a corporation, in *Berea*'s sentence that the State "is under no obligation to treat both alike," the rule the Court used, in that case, to uphold a State's segregation of a college, as Section IV.B records; the article takes the rule and names the use.[341] So the reply inverts the maxim's object. A name owed a voice for bearing a charge on its privilege would be a grantee owed a right against its grantor for bearing the grant's condition, which is the proposition Part One found nowhere in the law of the grant and Section II.E found impossible under a sovereign of many wills. And what the people granted was never the tax. It was the privilege itself, which the general incorporation laws extended until, in Brandeis's record of them, which Section IV.C quotes, the privilege had been extended to every lawful business,[342] and, where the grantor chose, the exception from the charge upon it. The citizen is taxed on all lawful business as a person; the body formed for any lawful business is taxed on its privilege, at a rate and on a base the grantor sets, and excepted from either where the grantor chooses. That difference is the two bonds, and the rest of this section states them.

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[340] 26 U.S.C. § 11(a)–(b) ("A tax is hereby imposed for each taxable year on the taxable income of every corporation"; "The amount of the tax imposed by subsection (a) shall be 21 percent of taxable income") (Office of the Law Revision Counsel, release point 119-111, leaf 152); § 61(a)(7) (gross income "from whatever source derived" includes "Dividends") (leaf 808). The exceptions this section means are of the kind the Code itself writes on the corporate charge and its holders: the deduction for dividends one corporation receives from another, § 243(a) (leaf 1717); the exclusion of gain on qualified small business stock for "a taxpayer other than a corporation," § 1202(a) (leaf 3913); and the state incentives of the kind *Cuno* declined to hear. The election under § 1363(a) ("an S corporation shall not be subject to the taxes imposed by this chapter") (leaf 4152) is not one of them: it removes the entity-level charge and taxes the income at the shareholders' own rates. Whether any exception is warranted is the three-part question the text puts; the section asserts no particular exception to be unwarranted.

[341] *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908) (Brewer, J., for the Court) (the cut, pdf 10). The article takes the rule and names the use, as Sections IV.B, VI.B and VII.D state.

[342] *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 548 n. 2 (1933) (Brandeis, J., dissenting) (the cut, pdf 32): "By 1850 a general law permitting incorporation for a limited business purpose had become common; and after 1875 extension of the privilege to every lawful business became so." The article's "all lawful business" is the general incorporation acts' "any lawful business" turned on the natural person, who is taxed on all of it.

The citizen's standing in the bond is written, and it is closed. The citizen is taxable as a person, under the power to lay taxes on incomes "from whatever source derived."[343] The citizen is represented in a House the people choose and, since 1913, in a Senate "elected by the people thereof."[344] The citizen votes under four amendments, and each of the four says "citizens": the right "of citizens of the United States to vote" shall not be denied or abridged on account of race, on account of sex, "by reason of failure to pay any poll tax or other tax," or, for those eighteen years of age or older, on account of age.[345] The citizen speaks under a clause that names no holder, and Section VI.G has said whose the freedom is. The citizen holds what is not enumerated, under an amendment that keeps the unenumerated rights "retained by the people."[346] And the citizen's standing changes in one way only, by the amendment Article V describes. The rate and the exceptions are another matter. They are ordinary law, for persons and names alike, set and changed by the deliberation every year, and the article claims nothing else for them. Every term of the standing runs to a person. The bond's two oldest American statements, Blackstone's at page 135 and the Declaration's grievance, are in Section II.E, where they ground the thesis that the sovereign of the United States is the Constitution the people ratified, the people sovereign through it; what this section adds is that the bond they state is a bond of

[343] U.S. Const. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration") (the Literal Print (GPO), p. 22, pdf 17).

[344] U.S. Const. amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years") (Literal Print p. 22, pdf 17).

[345] U.S. Const. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"); amend. XIX ("on account of sex"); amend. XXIV, § 1 ("by reason of failure to pay any poll tax or other tax"); amend. XXVI, § 1 ("The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age") (Literal Print pp. 22–25, pdf 17–20).

[346] U.S. Const. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"); amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people") (Literal Print p. 20, pdf 15). The Tenth is the source of a State's power to make the grant of incorporation, as the text says below.

persons, with the person's standing in it fixed by the text and placed beyond ordinary means. The article calls it the settled bond. Its members are taxable, represented, voting and speaking; the deliberation that sets the rate is theirs; and an exception made to one of them is an exception within the bond, made by the deliberation to a member of it.

The corporation's terms are of another kind. They are a grant on the people's standing terms, as Section II.E stated and Section II.G showed in the people's own words; the grant is conditioned and may be resumed, under the reservations Appendix A collects and the dissolutions Blackstone lists (Section IV.E); and it is bound to the purpose for which it was made (Section II.F). The name is not a citizen, and the Court kept that word from it, in every clause that confers a right, for one hundred and eighty years; the diversity cases gave the name the word's effect for jurisdiction, by the presumption Section VII.C passed through the bounds, and nothing more. The name, Taney wrote for the Court in 1861, restating *Bank of Augusta v. Earle*, "can have no legal existence out of the bounds of the sovereignty by which it is created"; the rest of the passage, and its restatement of *Deveaux* that a corporation is not a citizen, Section III.K quotes.[347] Seven years earlier Grier, for the Court, had granted the premise even as he reached past it: the inference that an artificial entity cannot be a citizen follows from premises he did not deny.[348] The name has no vote and no representative. It is taxed on its privilege and not on its being, as *Flint* said, and it pays that charge; what the grantor excepts from the charge is the grantor's further term on its own product. The privilege carries the exceptions. Scalia named

[347] *Wheeler*, 66 U.S. at 295–296, the passage and its pins as note 164 has them. Section III.K strings *Hope Insurance Co. v. Boardman*, 9 U.S. 57, 61 (1809) (the reporter's note), *Sullivan v. Fulton Steamboat Co.*, 19 U.S. 450, 451–452 (1821), *Breithaupt v. Bank of Georgia*, 26 U.S. 238, 240 (1828), *Commercial & Railroad Bank of Vicksburg v. Slocomb*, 39 U.S. 60, 64 (1840), *Asbury Hospital v. Cass County*, 326 U.S. 207, 210–211 (1945), and *Carden v. Arkoma Associates*, 494 U.S. 185, 197 (1990).

[348] *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327 (1854) (Grier, J., for the Court) (the shelf's star-paged reprint, pdf 16, and the Library of Congress bound volume, pdf 14). Section VII.C runs the three bounds on the presumption the case adopted at 328.

them himself, dissenting in *Austin*, in the passage the Court adopted at page 351: those who form a corporation "are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies."[349] Nothing in the text attaches a vote or a voice to any of it, and the dissent's own words concede the grant. The terms of this bond are the grantor's to set, and they are set in the general laws and the revenue acts, not in the instrument; and where the settled bond's member holds a standing the text fixes, the name holds an existence and incidents the people may withdraw. An exception to a person is made within the bond; an exception to a name is a further term of the grant. The article calls it the unsettled bond. Nothing in it is a fiction held as law: Appendix A is the sovereign disposing, in words, within its power, and the revenue acts are the same.

The Court made the two bonds one in a single paragraph, and the paragraph should be read whole. At page 351 the Court recites *Austin*'s ground, that "[s]tate law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets," and answers, "This does not suffice, however, to allow laws prohibiting speech." It adopts Scalia's sentence: "It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights." It declares it "irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas.'" And then: "All speakers, including individuals and the media, use money amassed from the economic

[349] *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990) (Scalia, J., dissenting) (the cut, pdf 29). The Court quotes the passage's last sentence at *Citizens United*, 558 U.S. at 351, and Section IX.C meets it as the obstacle a legislature's condition would face.

marketplace to fund their speech. The First Amendment protects the resulting speech, even if it was enabled by economic transactions with persons or entities who disagree with the speaker's ideas," with Kennedy's *Austin* dissent in support: "Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary."[350] That sentence is the two bonds made one. The individual's money was earned in the settled bond and taxed as a person's; the treasury's was amassed under the grant and taxed on the privilege at the grantor's rate, less whatever the grantor excepted; the word "speakers" placed them in one class, and the cited dissent shows how. The person who traces their funds to a corporation received them as a dividend, as interest or as salary, which is to say as their own, in the settled bond, taxed as income from whatever source derived. The treasury that holds the rest never crossed into that bond. The paragraph treats the crossing as made.

The "as if" had been written twice before, by a Justice writing separately each time, and Section II.D's terms sort the two. In 1837 Baldwin, concurring in *Charles River Bridge*, took Marshall's sentence of 1830 that incorporation bestows "the character and properties of individuality on a collective and changing body of men," which Section III.C quotes as Marshall's, and added its consequence: "by which their rights become as sacred as if they were held in severalty by natural person."[351] In 1933 Brandeis, dissenting in *Liggett*, wrote that "the

[350] *Citizens United v. FEC*, 558 U.S. 310, 351 (2010) (the bound volume, pdf 512), quoting *Austin*, 494 U.S. at 658–659 (the "special advantages" sentence straddles the leaves; pdf 7–8), *id.* at 680 (Scalia, J., dissenting), and *id.* at 660 (majority opinion) (pdf 9), and citing *id.* at 707 (Kennedy, J., dissenting) for the "dividends, interest, or salary" sentence, which the article quotes as the Court quotes it.

[351] *Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837) (Baldwin, J., concurring): "It bestows the character and properties of individuality on a collective and changing body of men, by which their rights become as sacred as if they were held in severalty by natural person" ("natural person" as printed). The first clause is Marshall's, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 562 (1830), which Baldwin cites in the sentence and Section III.C quotes as Marshall's; the "as if" clause is Baldwin's. Baldwin's opinion, which opens "In this case, I entirely concur in the judgment of the court," was not printed in the official report, which closes with Story's dissent, Thompson's concurrence in it and the decree (the Library of Congress bound volume of vol. 36, read at its last leaves). The shelf's reprint is a star-paged reprint of Peters's volume with a pagination of its own (the case at its pages 341–535, the official pages in star marks) that supplies the opinion on leaves lettered from 583 a, before

prevalence of the corporation in America has led men of this generation to act, at times, as if the privilege of doing business in corporate form were inherent in the citizen," and added that "throughout the greater part of our history a different view prevailed."[352] "As if" is the grammar of a fiction. Baldwin's is a lawful fiction stated as such, the common law's rule of treatment: the members' rights, held through the name, are treated as if held in severalty, and it is the members' rights he names. Brandeis's is a fiction of the impossible named as an error: a privilege cannot be inherent in the citizen, because what is inherent is not granted, and he says the generation acted "as if" it were. At page 351 the "as if" is gone. The privilege is treated as inherent, the exception's product as the citizen's own, and no one is told that anything is being supposed.

I. The Whole People's Promise: What an Exception to the Name Costs and Whom, the Tax Side's Own Census of the Two Bonds, and the Door the People Kept Open

What the treasury holds, the law has also described, and the description is the whole people's. In *Juilliard v. Greenman* the Court read the monetary clauses as a power "to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills," and legal tender as "one of the powers belonging to sovereignty in other civilized nations, and not expressly withheld from Congress by the Constitution."[353] Behind the currency stands the credit of the United States: the power "To borrow Money on the credit of the United States," and the Fourteenth Amendment's command that "the validity of the public debt of the United States,

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Story's dissent; the sentence is on the leaf lettered "583 b" (pdf 118; the opinion opens on the leaf headed 583, pdf 116). The pin is to the reprint, and no official page exists; the reprint's edition and the provenance of the text it prints are to be identified by the shelf hand before assembly. Section IV.E meets the opinion of the Court in the same case.

[352] *Liggett*, 288 U.S. at 548 (Brandeis, J., dissenting) (pdf 32).

[353] *Juilliard v. Greenman*, 110 U.S. 421, 449–450 (1884) (Gray, J., for the Court) (the cut's leaf 30, which is page 450; the sentence opens on 449 and the quoted words are on 450; the page carries no quotation marks around "belonging to sovereignty in other civilized nations," the words being the Court's own).

authorized by law, … shall not be questioned."[354] The notes themselves are, by the statute that created them, "obligations of the United States," receivable "for all taxes, customs, and other public dues."[355] An obligation of the United States is an obligation of the whole people, payable from the taxing power, and the taxing power, in the structure Section II.E quoted from *McCulloch*, "acts upon its constituents": the legislature that imposes the tax answers to those who pay it. So in law each note in any hand is a claim on the whole people's taxed labor, issued under a structure in which the taxed are the represented. The note carries the bond whoever holds it. A dollar in any hand is the same promise, made by the same people and backed by the same tax, and a person spends it on speech under the freedom Section VI.G found to be theirs, needing no grant to do so. What the dollar is does not decide who may spend it. It decides what an exception costs, and whom: an exception to a treasury is paid in the whole people's promise, by the persons who bear the rate the promise rests on.

The rate is set against the whole. The public charge is fixed by what the people have undertaken to pay for, and the base is everything all produce; an exception to one class does not reduce the charge, it moves the burden to the rest. James Otis stated the principle in 1764: "*Qui sentit commodum sentire debet et onus*, has been thought a maxim of equity. But that a man should bear a burthen for other people, as well as himself, without a return, never long found a place in any law-book or decrees, but those of the most despotic princes."[356] None of this makes

[354] U.S. Const. art. I, § 8, cl. 2 (Literal Print p. 8, pdf 5); amend. XIV, § 4 ("The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned") (Literal Print p. 22, pdf 17).

[355] Federal Reserve Act, ch. 6, § 16, 38 Stat. 251, 265 (1913) (pdf 15): "The said notes shall be obligations of the United States and shall be receivable by all national and member banks and Federal reserve banks and for all taxes, customs, and other public dues. They shall be redeemed in gold on demand at the Treasury Department of the United States"; codified as amended at 12 U.S.C. § 411 (Office of the Law Revision Counsel, release point 119-111, pdf leaf 269), the 1934 amendment having struck the redemption in gold and left the obligation.

[356] James Otis, *The Rights of the British Colonies Asserted and Proved* 53–54 (Boston 1764; London, J. Almon reprint 1764) (pdf 61–62; the sentence straddles the leaves at "those / of"; the long s modernized).

differential taxation of the corporate privilege unlawful. It is within the sovereign's power, as *Flint* held of Congress and as Holmes and Brandeis said of the States; the Court has since said that "when it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned," and the Constitution forbids only a classification that is arbitrary rather than "based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."[357] The leeway runs both ways, and that is the point. A heavier charge on the privilege and a lighter one are both within the power; the warrant for either can only be the legislature's judgment of the public welfare, which is the charter's own reason for being, since the people permitted incorporation for any lawful business because they judged the business useful to them. The measure of an exception is therefore the grant's own, and it has three parts: the exception is warranted by the Constitution, by the purpose of the charter, and by the public welfare the grant was made to serve. Where all three fail, the burden shifted to natural persons is Otis's burden without a return, and the note in the excepted treasury is a claim on labor taxed from persons who are represented, held by a name that is not. The article states the devaluation that follows as a matter of representation and not as a prediction: the same promise backed by fewer who pay, and the deliberation that fixed the rate now counting a will that bore none of it. Whether a dollar buys less in consequence is a question of fact the article does not reach; what the law says a dollar is, and whose, is a question of text, and the text answers it.

The measure runs one way, as the article's test does. A treasury taxed without exception has no claim under this section and no reproach from it. That is this section's measure only. Such

[357] *Flint*, 220 U.S. at 151, 162; *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 403 (1928) (Holmes, J., dissenting; Brandeis, J., dissenting); *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 360 (1973) (Douglas, J., for a unanimous Court) (the cut, pdf 5; the vote line at 356, pdf 1); *Quaker City Cab*, 277 U.S. at 400 (Butler, J., for the Court) (pdf 12), quoting *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493 (1927).

a treasury still speaks, when it speaks, with money no member consented to spend on speech, and Sections V.D and VI.A measure that; the two measures are independent, and a general treasury that passes the first fails the second unless its charter contains the speech. The business corporation and the consenting corporation are different bodies by the Court's own criterion. The body whose treasury could speak in *Massachusetts Citizens for Life* had the three features Section VI.A quotes, formed to promote political ideas and not for business, without shareholders or other persons with a claim on its assets, and not established by a business corporation or a union, features the Court called "essential to our holding," and the Court allowed that the class so defined "will be small."[358] A charter that says "any lawful business" is consent to business and to no utterance, and a body whose charter contained a political position would be an advocacy corporation and could not, by the Court's first feature, be a business corporation. The treasury that would pass both measures is therefore the advocacy corporation and no other, which is where Section VI.A placed it.

The treasury's political will is then four things at once, and the article has met each elsewhere. It is unconsented, by members whose charter contains no speech (Section V.D). Where it is excepted, it is paid for in part by the citizen taxpayers, in the whole people's own promise, which is this section's addition. It is beyond the grant's purpose, which the sovereign's oldest writ asks after (Section IX.C), and which the Court itself has recorded as the ban's further interest, the protection of those who paid money into the corporation for other purposes, in the

[358] *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 263–264 (1986) (the Library of Congress print, pdf 26–27): "Some corporations have features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of their incorporated status" (263); "MCFL has three features essential to our holding" (263), the three stated at 264; "It may be that the class of organizations affected by our holding today will be small" (264). Section VI.A quotes the same passage for the pool's formation.

sentence Section VI.C quotes.[359] And it is the political will of one or of some re-entering by the grant: the sovereign of one will that Section II.E named as the presupposition under the census, now in the treasury's hand, which is the thing Independence repudiated.

The argument is not *Austin*'s. *Austin* rested on "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form," and judged the speech by the wealth behind it;[360] the Court overruled it at page 365, "*Austin* … should be and now is overruled," returning to "the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity."[361] The two bonds judge no speech. They sort by the source of the claim, as Section VI.A sorted, and the treasury's claim has its source in the grant. Nor is the argument that the franchise is a precondition of speech. The adversary will say that speech never required the vote, that aliens and minors speak, and that is true: they are persons, inside the settled bond by the word "person" in the Fourteenth Amendment's second sentence (Sections III.E and VII.C), taxable as persons on income from whatever source derived, and the vote they lack is the one term of the standing they do not hold. The name is in neither bond's text. The vote shows that the name has no place in the settled bond at all, and Section VI.G has already found the freedom to be someone's. The Court itself left the governing question open three pages before it overruled *Austin*: "We need not reach the question whether the Government has a compelling interest in preventing foreign individuals or associations from influencing our Nation's political

[359] *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (Souter, J., for the Court) (the cut, pdf 8), quoting *FEC v. National Right to Work Committee*, 459 U.S. 197, 208 (1982). At 153 (pdf 7) the Court restates the rationale the two bonds measure, "Today, as in 1907, the law focuses on the 'special characteristics of the corporate structure' that threaten the integrity of the political process," and at 154 quotes *Austin*, 494 U.S. at 658–659, and the interest in restricting "political war chests funneled through the corporate form": the last statement of the advantages rationale before page 351 set it aside.

[360] *Austin*, 494 U.S. at 660 (pdf 9).

[361] *Citizens United*, 558 U.S. at 365 (the bound volume, pdf 526).

process."[362] The question it did not reach is this section's question put of a name: whether what stands outside the settled bond may be kept from the deliberation that sets the bond's terms. And the test stays one-directional, as Section VII.C states it. The article does not hold § 441b valid. It says that the holding at page 351 rests on the word "speakers," the term Section VI.G identified, and that when the word is struck the sentence "All speakers … use money amassed from the economic marketplace to fund their speech" has no subject that the clause names. What remains is the clause, the persons who speak and hear under it, and the two bonds standing in the text where the sentence had erased them. The test has nothing against the clause. It has the word.

The Court has run the two bonds on the tax side already, in both directions, and the cases are the article's census in a second doctrine. In 1928 *Quaker City Cab Co. v. Pennsylvania* struck a tax on the gross receipts of corporations operating taxicabs because it did not reach "like receipts of natural persons and partnerships": the corporation was "entitled in Pennsylvania to the same protection of equal laws that natural persons within its jurisdiction have a right to demand under like circumstances," and "the character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation."[363] That is the transplant on the tax side: the unsettled bond handed the settled bond's shield against a heavier charge on the privilege, the name claiming against its grantor the equality of persons. The object principle of Section IV.B sorts it. A tax laid, in the Court's own words, "merely because the owner is a corporation" is a charge on the form, the second set, a condition of the grant that the grantor sets, and it reaches the members' property only as the privilege's cost; a tax laid on the property as property would be the members' and would travel

[362] *Id.* at 362 (pdf 523). The Court cited the statutory bar on contributions and expenditures by foreign nationals, 2 U.S.C. § 441e, and went no further; the article cites no decision on that bar.

[363] *Quaker City Cab*, 277 U.S. at 400, 401, 402 (Butler, J., for the Court) (the cut, pdf 12–14).

through the name. Holmes's dissent is that principle in a sentence: "if the State desired to discourage this form of activity in corporate form and expressed its desire by a special tax I think that there is nothing in the Fourteenth Amendment to prevent it." Brandeis dissented from the record: "It has been the consistent policy of Pennsylvania since 1840 to subject businesses conducted by corporations to heavier taxation than like businesses conducted by individuals," Pennsylvania having been the first State to adopt a general corporation tax.[364] His *Liggett* dissent five years later, quoted above, is the same dissent's conclusion.

In 1973 a unanimous Court retreated. *Lehnhausen v. Lake Shore Auto Parts Co.* quoted Holmes, recorded that "each of these dissenters thought *Flint v. Stone Tracy Co.* … should govern *Quaker City Cab*," and quoted its own earlier observation that "the existence, unchallenged, of differences between the taxation of incomes of individuals and of corporations in every federal revenue act since the adoption of the Sixteenth Amendment" shows that there may be just ground for the difference; then: "*Quaker City Cab Co. v. Pennsylvania* is only a relic of a bygone era. We cannot follow it and stay within the narrow confines of judicial review."[365] The two bonds were restored on the tax side, for the same note, without the name. Twelve years later the transplant returned. *Metropolitan Life Insurance Co. v. Ward* held that the Equal Protection Clause "imposes limits upon a State's power to condition the right of a foreign corporation to do business within its borders," and that "promotion of domestic business by discriminating against nonresident competitors is not a legitimate state purpose": equal protection applied between names, foreign insurers against domestic ones, with no person on

[364] *Id.* at 403 (Holmes, J., dissenting; Brandeis, J., dissenting, with n. 1: "Pennsylvania was the first state to adopt a general corporation tax. P. L. 1839-1840, p. 612") (pdf 15). Stone, J., also dissented, as *Lehnhausen*, 410 U.S. at 361, records.

[365] *Lehnhausen*, 410 U.S. at 360–361, 365 (pdf 5, 6, 10), quoting *Lawrence v. State Tax Commission*, 286 U.S. 276, 283–284 (1932).

either side, which presupposes the name as a "person" and so records the transplant's persistence after *Lehnhausen*, and says nothing of persons against names.[366] Section III.J carries the three as one entry. The Court has also said, of the treasury itself, what this section says of it. The resources in a business corporation's treasury, the Court wrote in *Massachusetts Citizens for Life* in the sentence Section V.D quotes, are not an indication of popular support for its political ideas but reflect the economically motivated decisions of investors and customers, whereas a separate fund's in fact reflect popular support.[367] That is the Court's own statement that the treasury's dollars carry no political consent, repeated in *Austin* and *Beaumont*, before page 351 declared the correlation irrelevant.[368] The article adds what the dollars do carry: the taxpayers' bond.

The bond has a second dimension, and the state constitutions supply it. Virginia's people defined a corporation as whatever has powers or privileges that individuals and partnerships lack (Section II.G.4), which concedes the whole of Part One: everything the name has beyond a natural person is the grant's. The Tenth Amendment is the source of a State's power to make that grant, and the article does not call the grant a violation of it. The bound lies elsewhere, where a State's grant stops operating on the State's own constituents and begins operating on the whole people's bond, and Marshall stated the bound in the case Section II.E quoted. "The people of all the states have created the general government, and have conferred upon it the general power of taxation. The people of all the states, and the states themselves, are represented in congress, and,

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[366] *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 875, 882 (1985) (the cut, pdf 7, 14); at 875 the standard is stated through *Western & Southern Life Insurance Co. v. State Board of Equalization*, 451 U.S. 648, 667–668 (1981). The classification was between foreign and domestic insurers, with no natural person on either side. Section VII.C's note on O'Connor's inventory cites the same leaves.

[367] *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 258 (1986) (the Library of Congress print, pdf 21; the running head reads "Opinion of the Court"; the Court's own later citations in *Austin*, 494 U.S. at 659, and *Beaumont*, 539 U.S. at 154, give the page as 257, the leaf's running head reads 258). Section VI.A quotes the three features from the same opinion.

[368] *Citizens United*, 558 U.S. at 351 ("It is irrelevant for purposes of the First Amendment that corporate funds may 'have little or no correlation to the public's support for the corporation's political ideas'").

by their representatives, exercise this power. When they tax the chartered institutions of the states, they tax their constituents; and these taxes must be uniform. But when a state taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control."[369] A government may burden only those it represents. That is the principle Marshall stated of the Union's instruments, and the article extends it, in its own voice and by Marshall's own terms, to a State's exception to a name; the extension is the article's and not his holding. A State's exception inverts the principle twice. Inside the State the burden shifts to the State's own natural persons, who are at least represented there. Outside it, so far as the dollar is the whole people's promise, the exception is paid in that promise by persons the State does not represent. The Court has never put that question, and in *Cuno*, as this section will show, it declined to hear the person who would put it. The cost side is the same sentence read again. The sovereign's goods, the courts that enforce the charter, the credit the notes rest on, the existence the name has "only in contemplation of law, and by force of law," are bought by natural persons at full price and, where the grantor excepts the name, by the name at a discount, and the discount is what the treasury spends on political will. Representation for the untaxed becomes governance at a lesser cost.

Two things the name spends in a federal election, and three grants would be needed for the spending to be its own; the text contains two. The people granted Congress the national instrument: "To lay and collect Taxes, Duties, Imposts and Excises"; "To borrow Money on the credit of the United States"; "To coin Money, regulate the Value thereof"; and *Juilliard* read the grant as a currency "for the whole people."[370] The people of each State granted the name its

[369] *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819) (in the shelf's star-paged reprint, pdf 54: the quoted sentences follow the *435 mark with no later mark intervening). The sentences from 428 and 429 are quoted in Section II.E.

[370] U.S. Const. art. I, § 8, cls. 1, 2, 5 (Literal Print pp. 7–8, pdf 4–5); *Juilliard*, 110 U.S. at 450.

incidents, which Virginia's definition (Section II.G.4) limits to what individuals and partnerships lack, and nothing else. Nowhere is there a third, and the third is not a grant to spend money, which no one needs, since a person spends the same promise on speech under the freedom of speech; it is a grant of a place in the deliberation, which the text gives to persons, by the vote and the voice, and to no name. What the excepted treasury spends in a federal election is therefore the people's twice over: the money, which to the extent of the exception is the whole people's promise paid by persons the exception did not reach, and the deliberation, which is the whole people's vote. For the second it holds a grant from no one; the first the grantor may condition as its own product, as Section VI.A showed. The text that excludes the States from the instrument says so in one sentence: "No State shall … coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any … Law impairing the Obligation of Contracts."[371] The monetary exclusions and the Contract Clause that Section IV.E read as the people's rule about their servants stand in the same breath: the people withdrew from the States both the national instrument and the "boundless" power over the grant at once. *McCulloch* reaches past the letter, the means of the Union "should be subjected to that government only which belongs to all" (Section II.E); a State is not that government, and a corporation is not any government. Grier's sentence closes it: "State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution,"[372] and a State's grant cannot give the name a place in the people's deliberation either. In the law of fictions Section II.D set out, the wrong has a name at each step. It is a grantee acting beyond the grant, in the grantor's own deliberation. It is

[371] U.S. Const. art. I, § 10, cl. 1 (Literal Print p. 9, pdf 6). The same sentence ends "or grant any Title of Nobility," and § 9, cl. 8 forbids the United States the same; Section II.G's note beside Virginia's definition records the functional parallel between the Nobility Clauses and the designation "corporation," stated as the Founders' principle and not as a holding, and the argument of this section does not depend on it.

[372] *Marshall*, 57 U.S. at 327 (the Library of Congress bound volume, pdf 14; the shelf's reprint prints the sentence on the leaf headed 326 after its *327 mark). Section VII.C supplies the converse.

the usurpation Section V.D described, at its widest, since the consent usurped is the whole people's and the deliberation deceived is theirs. And it is a fiction held as law, the one Section VI.G identified: the treasury's money treated as the name's own speech in the people's deliberation, under the word "speakers."

The Court closed the door on the person who bears this burden, in the form Section II.E found in Blackstone. In *DaimlerChrysler Corp. v. Cuno* the Court held that "state taxpayers have no standing under Article III to challenge state tax or spending decisions simply by virtue of their status as taxpayers," because to hold otherwise "would interpose the federal courts as 'virtually continuing monitors of the wisdom and soundness' of state fiscal administration."[373] That is the fiction of no redress at this exact door: a person with the burden and no hearing, the wrong supposed, out of decency, not to exist. The people kept another door open. Of the seventy-three instruments in Appendix A, fifty-two reserve in terms the power to alter, amend or repeal the grant,[374] and the reservation is the people's own statement that the exception, like the existence, is theirs to withdraw.

The remedy is measurement, in the forms Section IX.C states for Congress, for the people of a State and for a court. Section 441b was the people conditioning the political use of a treasury they had excepted; the Court at page 351 asked whether a speaker may be silenced for the wealth behind it, and answered that it may not. The question the two bonds put is a different

[373] *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006) (Roberts, C.J., for the Court) (the cut, pdf 15), quoting *Allen v. Wright*, 468 U.S. 737, 760–761 (1984) (quoting *Laird v. Tatum*, 408 U.S. 1, 15 (1972)). Section II.E: 1 Blackstone, *Commentaries* 237–238.

[374] Appendix A, the reservation column, counted at the cells by the captured-only rule the head note states: fifty-two of the seventy-three instruments carry a reservation in terms (Maryland 1851, Iowa 1857 and Missouri 1875 have the clause uncaptured by the scan and are not counted; Illinois 1848 has none in the section quoted; Illinois 1870's cell carries a voiding clause and not a reservation). Section VII.A's "sixty-one" counts the general-law forms, a different column.

one, and the Court has not reached it: whether a grantee may spend the grantor's instrument, in the grantor's own deliberation, against the terms the grantor set.

VII. The Removal Test: A Holding That Rests on a Coined Term Alone Supersedes Article V

Part Two has so far measured: the census found how each term entered, the two sets found what a corporation can hold, and Section VI found a right conferred on a name. What remains is the instrument that turns those findings into a rule a court can apply. This section derives it from *Marbury*, states it, refines its one qualifying word, names its two forms, and says why the remedy is not an amendment.

A. The Premise, from Marbury: A Constitution "Unchangeable by Ordinary Means," and a Holding Is an Ordinary Means

The Constitution, Chief Justice Marshall wrote in *Marbury v. Madison*, "is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it."[375] Written constitutions, he continued, are "attempts, on the part of the people, to limit a power, in its own nature, illimitable," and "the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void."[376] The sentence is usually read for what it says about legislatures. It says the same thing about courts. A judicial holding is an ordinary means. Article V is the only extraordinary one. If a holding changes what the Constitution grants, it has

[375] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[376] *Id.*

done by ordinary means what *Marbury* says cannot be done by them, and the fact that the means was a court rather than a legislature does not alter the arithmetic.

Why Article V is the only extraordinary means, and why a court cannot be another, is the second claim of this article, stated in Section II.E and applied here. The corporate form the Reports inherited was built for a sovereign of one will, who could grant a right in the name case by case, in his own person, and answer for it, and above whom stood a Parliament whose power over the body Blackstone called "boundless in it's operations."[377] The people of the United States grant nothing in their own person; they consent to a corporation's existence in advance and in general, through their constitutions and general laws (Appendix A; Section IV.E), and a right in the name against themselves they can grant in one way only, by the instrument's own amendment. A holding that gives the name such a right therefore supplies a consent the people have no organ to give, and a court that does so has not interpreted the people's grant but made one, in the king's place. The ordinary means has done the extraordinary thing, and *Marbury*'s sentence is the measure of it.

Two Justices said this in the census's own case, and the test is their complaint made operable: Black's sentence of 1938[378] and Douglas's of 1949,[379] quoted in Section III.E, each say of the corporate "person" that it was an amendment by holding, and each name the people as the only hand that could have made it.

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[377] 1 Blackstone, *Commentaries* 473 (1765) (the first edition in facsimile, pdf 491): a corporation may be dissolved "1. By act of parliament, which is boundless in it's operations; 2. By the natural death of all it's members, in case of an aggregate corporation; 3. By surrender of it's franchises into the hands of the king, which is a kind of suicide; 4. By forfeiture of it's charter, through negligence or abuse of it's franchises." Section II.F (England) on the king's consent and the franchise held of its grantor; Section II.E on the sovereign of one will.

[378] *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 90 (1938) (Black, J., dissenting) (cut pdf 14).

[379] *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 581 (1949) (Douglas, J., dissenting) (cut pdf 20).

The strongest answer to the premise is that a holding is not an ordinary means at all. Article III vests "the judicial Power," and the judge of the seventy-eighth *Federalist*, preferring the Constitution to a statute, exercises a power the people vested; Marshall's sentence contrasts the Constitution with "ordinary legislative acts," not with judgments. And Madison wrote in the thirty-seventh that all new laws "are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications";[380] on that view a century of corporate "persons," acquiesced in by every legislature, is the way the Amendment's meaning was settled, and the test would unsettle every liquidated meaning in the Reports. The article agrees that interpretation is the judicial power. The test is a way of telling interpretation from grant, and a grant is what that judge is forbidden to make, since a judge who grants by a word does what the seventy-eighth essay says the legislature may not. Liquidation fixes meaning among readings the text bears; Madison's sentence is about obscurity, and the claim here is that "person" read to a name is not a reading the Amendment's text bears at all, for the reasons Section III.E gave from the Amendment's own words. A practice cannot liquidate what the words exclude. Nor is acquiescence an act of the people in the sense *McCulloch* names when it locates the Constitution's whole authority in the people's conventions, "the only manner in which they can act safely, effectively and wisely, on such a subject";[381] and *McCulloch* itself

[380] *The Federalist* No. 37 (Madison), in 2 *The Federalist* 6 (J. & A. McLean, New York, 1788), from the McLean edition on the shelf (the two volumes in one scan, pdf 252; the thirty-seventh number opens the second volume). The seventy-eighth (Hamilton) is cited by number.

[381] *McCulloch*, 17 U.S. at *403–*404 (the Banks reprint's leaf headed 402, cut pdf 40; the *403 mark before "It would be difficult to sustain this proposition"): "the instrument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely, on such a subject, by assembling in convention. … From these conventions, the constitution derives its whole authority. The government proceeds directly from the people; is 'ordained and established,' in the name of the people".

allows that "a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this."[382]

So the sentence stands, earned: a holding that grants is an ordinary means, whatever the power under which it was uttered. The same answer reaches stare decisis. A precedent is a holding, and a holding is an ordinary means; a line of precedents cannot supply what no one of them had, and a result that has moved from ground to ground through the Reports is not settled by the length of the line but by whether the last ground is a clause. Section VII.B states that as a rule.

The question is how to tell when a holding has done that, as opposed to interpreting the text, which is what holdings are for. The census in Section III supplies the materials for an answer. Every term on which a corporate constitutional right rests entered the Reports as a figure of speech or a transplant. But so did many terms on which no one would say the Constitution had been amended. "Strict scrutiny" is a coinage. So is "state action," so is "standing," so is "clear and present danger." If every coinage in a holding superseded Article V, there would be no constitutional law, and the claim would prove too much. A test is needed that distinguishes the coinage that interprets from the coinage that grants.

B. The Test: Strike the Term and Look for the Clause

The test is removal. A holding that rests upon a coined term alone supersedes Article V. Article V is the one path the people provided for changing the text, and the Court has read it as the people's grant and as complete. "The Fifth Article is a grant of authority by the people to Congress," and its "language … is plain, and admits of no doubt in its interpretation"; ratification

[382] *Id.* at *401, quoted in Section II.G.2 above.

under it "is not an act of legislation within the proper sense of the word."[383] It "subjects this power to only two restrictions."[384] Marshall had named its machinery in 1833, "procuring a recommendation from two-thirds of congress, and the assent of three-fourths of their sister states," as the mode by which the federal instrument is changed, and set it against a State's own convention.[385] Strike the term and look for the clause. If the result can be restated in the Constitution's own words, the term was a name for an interpretation, and the holding stands on the text. If, with the term struck, there is no path from any clause to the result, the term was the holding, and what it granted was granted by ordinary means. The measure has a name older than the test. The common law annexed to every incorporation the terms of its grant, and when the body exceeded them "the law judges that the body politic has broken the condition upon which it was incorporated"; the sovereign's writ then asked "by what warrant the members now exercise their corporate power."[386] The removal test asks of the holding what the writ asked of the body: by what warrant in the text does the name hold what the holding gave it.

What the test detects can be stated in the common law's own vocabulary, recovered in Section II.D. A coined term is a tool of construction until it is held as law. A tool disposes of nothing: strike it and the holding stands on a clause, so the term carried the court's reasoning and granted nothing. A term held as law disposes of something: strike it and the holding falls, so the

[383] *Hawke v. Smith (No. 1)*, 253 U.S. 221, 227, 229 (1920); at 226, the framers "intended to provide an orderly manner in which these [changes] could be accomplished; to that end they adopted the Fifth Article." The shelf's cut; the quotations are the Court's at 227 and 229, not the syllabus's restatement at 222.

[384] *Dillon v. Gloss*, 256 U.S. 368, 373 (1921); at 374–375, proposal and ratification "are not treated as unrelated acts but as succeeding steps in a single endeavor."

[385] *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833) (the star-paged reprint; *250 carries the sentence). The same page: "These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them."

[386] 1 Blackstone, *Commentaries* 473: "in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring a writ of *quo warranto*, to enquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings." Section IX.C names the writ as the sovereign's own instrument of measurement.

term was the disposition; and a disposition of the law against the truth, in a possible matter and from a just cause, is Godefroy's definition of a fiction, while one against the truth in an impossible matter is what the common law refused to make. The test detects the moment of conversion. Marshall's "considered as" a person "when the general spirit and purpose of the law requires it" is the tool, with its purpose attached;[387] *Santa Clara*'s remark is the same word, said from the bench in 1886 and held as law by citation from *Beckwith* in 1889, the purpose dropped and argument refused, and the census records the conversion before the test measures it, in the next citation that calls the term a holding (Section III.J); and Stone named the conversion when he wrote that to use the fiction's word to decide a constitutional question "is to beg the question to be decided" (Section II.D). What falls with the term was therefore a fiction held as law, and it fails each of Section II.D's three bounds, as that section showed. The common law kept its lawful fictions as fictions, named them, and bounded them. The Court's error was not that it used one but that it stopped calling it one.

This is also why the remedy of Section VII.E is measurement and not proof. The civil law's rule that Blackstone carried into the Commentaries, *contra fictionem non admittitur probatio*, is not a quirk of the law of fictions but its logic: a fiction is a disposition against the truth, so proof of the truth cannot be allowed to reach it, or it would not be a fiction (Section II.D). A fiction held as law is therefore immune to the ordinary argument of a case. Two centuries of argument that a corporation has no conscience, casts no vote and is born of a grant were answered, when they were answered at all, with the term's age and with citation of the term, Jackson in 1949 and the majority in 2010, and never with the clause (Section III.E); the Court declined to hear the argument at the fiction's birth in 1886, and the holding's own law has

[387] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 89 (1809).

excused it from answering since. The only act that reaches a fiction held as law is to set it aside and read the text without it, which is what the test does. It does not prove the term false. It removes the term and asks for the clause.

One more feature of a fiction held as law must be stated here, because it governs how the test is run on a line of cases rather than on one. The maxim says that equity always subsists in a fiction of law; a fiction is equity's instrument, and in a judge-made holding the result is the constant and the ground the variable. Strike the ground and the result looks for another. The census in Section III is the record of that migration in one doctrine: "person" said for the shareholders' property in 1886 and held by citation in 1889, refused for liberty in 1906 and 1907, taken up again as "speaker" and as "associations of citizens," each ground taking the result over from the last; and the Court's path from the civil-rights cases to the treasury, traced in Section IV.B, is the same movement, a description of the NAACP in 1963 cited as a holding in 1978 and again in 2010.[388] Stare decisis then freezes whichever ground the result last reached. The precedent does not hold the ground; the result does. That is the fragility of a line of holdings not grounded in the text, and the test meets it with a rule in three sentences. Respite in a clause is interpretation: if the result, struck from its coined ground, can be restated from a clause argued from its own word, the test has nothing against it and the ordinary question is open, which is the case of *Griswold*'s judgment in Section VIII, where the holding's coinages fall and two concurrences supply the Ninth Amendment and "liberty." Respite in a fiction is the same fiction under another name: if the new ground is another coined term, the test strikes it in turn, and a result that can find respite only in coined terms has, by that fact, no ground in the text at all. And

[388] The census, Section III, and the chain, Section IV.B: *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886); *Northwestern National Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1906); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363 (1907); *NAACP v. Button*, 371 U.S. 415, 428 (1963); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n. 16 (1978); *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

stare decisis cannot supply a ground, because a precedent is itself an ordinary means. The test is run on each ground as the result reaches it, and each re-grounding is a new disposition to be measured.

The word that does the work is *alone*. A holding that rests on the text plus a coined method does not rest on the coinage alone. Strike "strict scrutiny" from a decision voiding a law that abridges a person's speech, and what remains is a law abridging the speech of a person the First Amendment names, judged more or less demandingly; the term organized the analysis and granted nothing. Strike "state action" and what remains is "No State shall," which is in the text. These terms survive removal because the text carries the result without them. The terms the census found carrying a right do not survive it. Strike "person" as extended to the corporation and there is no clause of the Fourteenth Amendment that reaches a corporation; the chain's only argument is *Pembina*'s, that the corporation is "merely associations of individuals,"[389] which reaches the individuals and stops. Strike "corporate democracy" and there is no ground for denying the shareholder the compelled-subsidy protection the Court gives a union member.[390] Strike "speaker" as applied to the name in *Citizens United*, which is where that holding's coinage sits, and the Speech Clause is left restraining Congress from abridging a freedom no natural person lost (Section VI.G). The holding's one respite in a clause is the hearers': the freedom of speech read to the natural persons who would have heard, which the Court's listener cases state, *Virginia Pharmacy* first, and which Section VI.G calls first-set; on that ground the test has nothing against the holding, and whether the hearers lost anything is the ordinary question, which

[389] *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888); Section III.E above.

[390] Section VI.D–E above; *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878, 930 (2018); *Knox v. Service Employees International Union, Local 1000*, 567 U.S. 298, 312, 322 (2012); *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

Section VI.G answers from the statute's own exemptions and not from the test. In each the term is the only path from the text to the name's own right. Without it there is no argument for the name, only the result. The control is *Dartmouth*: strike "artificial being" and its incidents "incidental to its very existence" and the Contract Clause holding loses nothing it needed, because it stands on the trustees' charter and on *Fletcher*'s rule that a grant is a contract; the test has nothing against it, and what the strike removes is the holder the opinion named (Section IV.E).

The test is removal, not novelty, and that matters. It does not ask whether a term is in the Constitution; "strict scrutiny" is not. It does not ask whether the term was coined by a judge; nearly all of them were. It asks what falls when the term is struck. A term that falls alone, leaving the holding standing on a clause, was interpretation. A term that takes the holding down with it was the grant.

C. "Alone," Refined: A Term Naming a Necessary Implication Survives Removal; a Term Supplying an Extension, a Rank or a Combination Does Not

Section VIII runs the test on a case whose judgment the article's author would keep, and the running of it produced a refinement of "alone" that should be stated here. Some coined terms name a *necessary implication* of a clause: the clause cannot mean what it says unless the implied thing is also protected. Those terms survive removal, because the implication can be restated as the clause's own meaning. Other coined terms supply an *extension* of a clause beyond the thing it names, or a *rank* for that extension that gives it constitutional force outside the words, or a *combination* of extensions into a new right the clauses do not separately contain. Those terms do not survive removal, because without them the clause means only what it says and the result has no source.

The distinction is not invented for the occasion. It is Marshall's own, in *Deveaux*, where the name is "considered as" a person "when the general spirit and purpose of the law requires it," as Section VII.B quoted it, and it is the Court's own in *Griswold*, reading *NAACP v. Alabama*: the right of association, "while it is not expressly included in the First Amendment," exists because "its existence is necessary in making the express guarantees fully meaningful."[391] That is a necessity argument. The right to assemble is defeated if the State may punish the membership; the express guarantee entails the unexpressed one; the implication can be stated in the text's own terms with no figure of speech at all. Section VIII shows the same opinion that states this argument abandoning it two pages later.

The refinement has a second part, and it answers the objection the test most invites. "Person" is in the Fourteenth Amendment. When Section VII.B strikes "person" as extended to the corporation, it strikes a reading of a word inside the clause, not a word outside it, and an adversary will say that the test is then deciding what the word bears, which is interpretation, with Article V as rhetoric; and that if every reading past a word's first instances fails removal, "speech" read to film superseded Article V too. The answer is that removal performs two operations, and the article names them. For a coinage, "speaker," "corporate democracy," "strict scrutiny," it strikes a word outside the text and asks whether any clause carries the result. For a transplant, a word carried from one body of law into the text's word of the same spelling, it strikes the imported sense and asks two questions the Court never asked in the chain Section III.E traces. Was the sense argued for? That is a fact about the Reports, and the census answers it: never. Does the text's own structure bear it? That is interpretation, and the article says so without embarrassment; Section III.E's reading of the Amendment's first sentence, "All persons

[391] *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (Douglas, J., for the Court), restating *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 462 (1958) (the right located in the members' "liberty" at 460; "freedom to associate and privacy in one's associations" at 462) (cut pdf 5).

born or naturalized," is the ordinary question, answered. The Article V step follows only when both fail. A sense never argued for, which the text's structure excludes, has nothing under it but the word; that is "alone" in the literal sense, the sentence "corporations are persons within the meaning of the clause" with nothing beneath it in the Reports. The test's work is to force the question the Court assumed. It does not pretend to answer it by striking.

The sense was never argued for because the Court declined to hear argument. The transplant's founding moment is the statement before argument in *Santa Clara*, quoted in Section III.E: counsel's brief had put the point "at length," and the Chief Justice said that the Court did not wish to hear it and that "We are all of opinion that it does."[392] Under the law of fictions recovered in Section II.D that is the maxim enacted at the birth of the fiction held as law: against a fiction no proof is admitted, and here the proof was refused before the fiction had been held at all. The two questions the test asks are the two things the common law's own law required of a fiction, a cause and a possible matter, and the Court omitted both.

The transplant's own history is the proof that the word stood alone. Property travels through the name as the incident of the members' holding (Section IV.B), so *Santa Clara*'s result for the shareholders' property needed no "person" at all; the word was unnecessary where it was first used. The Court then refused the same word for liberty, in *Riggs*, *Western Turf* and *Berea*, and later took it for the treasury not by argument but by citation of the civil-rights cases: *Bellotti*'s sixteenth footnote cited *NAACP v. Alabama* and *Button* against the argument that the Amendment's liberty belongs to natural persons, and *Citizens United* cited *Button* and *Grosjean* as the "explicit holdings" by which First Amendment protection "has been extended" to

[392] *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396 (1886) (statement of the case); Section III.E above.

corporations.[393] Unnecessary, then refused, then inherited: at no point argued from the Amendment's words.

The structure excludes the sense, and the two bonds and the three bounds say how. The Amendment's first sentence defines the settled bond of Section VI.H: born or naturalized, therefore citizens. Its second sentence reaches past them, as Section III.E showed, to any natural person who can be deprived of life and liberty; a name is born of a grant, naturalized by nothing, and has no life or liberty to lose. The transplant moved the name into the bond's word without the bond. And the imported sense fails the three bounds on its face, as Section II.D showed of the corporate "person": not of a possible matter, not necessary, and working an injury. The Court itself stated the Article V step in 1854, in the citizenship line, when it refused to let the corporate name carry a jurisdictional consequence the Constitution did not grant. "State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution," Grier wrote for the Court; he allowed the premise, in the sentences Section III.K quotes, that the corporation is an artificial person and that this is true in a metaphysical sense, but the citizen who sued it dealt with natural persons and not with an abstraction, and to hold otherwise was "a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent."[394] The Court reached that result by a presumption

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[393] *Riggs*, 203 U.S. at 255; *Western Turf*, 204 U.S. at 363; *Berea College v. Kentucky*, 211 U.S. 45, 54 (1908); *Bellotti*, 435 U.S. at 780 n. 16, and *Citizens United*, 558 U.S. at 342, the last two as note 188 has them. Section IV.B carries the chain with its pages.

[394] *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 327–328 (1854) (Grier, J., for the Court) (the official report, the Library of Congress bound volume, pdf 14–15; the shelf's other copy is a star-paged reprint whose leaf headed 326 carries the sentence after its *327 mark, so the pin is 327): "State laws, by combining large masses of men under a corporate name, cannot repeal the Constitution" (327); the artificial-person premise and its answer as note 163 quotes them (327); "a syllogism, or rather sophism, which deals subtly with words and names, without regard to the things or persons they are used to represent" (327–328); and the presumption on which the holding rests, at 328: the persons who use the corporate name "may be justly presumed to be resident in the State which is the necessary habitat of the corporation, and where alone they can be made subject to suit; and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there." Section III.K carries the citizenship line.

of its own, that the members "may be justly presumed to be resident in the State which is the necessary habitat of the corporation," and the presumption passes the three bounds: a possible matter, since the members are citizens of some State; a necessity, since the diversity grant to citizens would otherwise be defeated by the name; and no injury, since it binds the name, which is no one. It is a lawful fiction by the common law's measure, argued from the clause, which is why the article can quote the case; set beside it, 1886 is a fiction of the impossible assumed from the bench, and the two cases are the census in a pair. The article supplies the converse of Grier's sentence: a corporate name cannot enlarge the Constitution either. "Combining large masses of men" is the headcount Section VI.A sets aside, set aside by the Court in 1854.

Speech read to film is answered in a sentence. Nothing was transplanted there. "Speech" was read as its own word, on argument, from the clause's own purpose, and a reading argued from the word is the ordinary question, which the test leaves where it finds it. The line this section draws between implication and extension is drawn, as Section VII.B says, by whether the clause's own word can be restated to carry the result without the coined term, not by whether the result is liked. Film restates as speech; a name does not restate as a person born or naturalized.

The direction, finally, is one. The test does not validate the article's reading of "person" by striking the Court's. It finds that the Court's reading rests on the word alone and so granted by ordinary means; the right reading of the word is Section III.E's business, by interpretation, and whether it is right is the ordinary question the test leaves open.

The Court has a test of its own for which guarantees a corporation may claim, and the article meets it by name. *Bellotti*'s fourteenth footnote says that certain "purely personal" guarantees, "such as the privilege against compulsory self-incrimination, are unavailable to corporations and other organizations because the 'historic function' of the particular guarantee

has been limited to the protection of individuals," and that whether a guarantee is so limited "depends on the nature, history, and purpose of the particular constitutional provision."[395] *Hale v. Henkel* had done the sorting in 1906: the privilege "is purely a personal privilege of the witness," while the corporation's "property cannot be taken without compensation."[396] The Court's test sorts guarantees by their nature and asks whether a guarantee is personal; the removal test sorts claims by their source and asks whether the claimant is one of the people or a name in their rule. The two agree wherever the Court's test says "personal," and they part where the Court's own pages give this article its ground: *Hale* says, two pages apart, that the corporation "receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter," and that it is "but an association of individuals under an assumed name" whose "property cannot be taken without compensation."[397] That is the second set and the first, stated by the Court in 1906, with no third. What the footnote adds is a pair of coined terms, "purely personal" and "historic function," and they do not survive the test: strike them and nothing in the text sorts guarantees, because the text sorts holders, "the people" and "person," and not guarantees. The footnote's warning answers itself. "Otherwise," it says, "corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws."[398] They could not. The members' guarantees travel through the medium in full, as *Hale* says of property, and what is denied is only the name's own, which the name never had.

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[395] *Bellotti*, 435 U.S. at 778–779 n. 14.

[396] *Hale*, 201 U.S. at 69 ("The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness."), 76 (cut pdf 27, 34).

[397] *Id.* at 74, 76.

[398] 435 U.S. at 779 n. 14.

The Court has since stated the whole inventory in a paragraph, and the inventory sorts the same way. O'Connor, writing separately in 1989, began with Marshall's "artificial being" and drew the consequence that a corporation "is not entitled to 'purely personal' guarantees," with no privilege against self-incrimination and no right to privacy; "On the other hand," it has speech, compensation for takings, security against unreasonable searches, former jeopardy, due process and equal protection; and she supplied the criterion the footnote lacks: "The payment of monetary penalties, unlike the ability to remain silent, is something that a corporation can do as an entity."[399] Every entry sorts into the two sets. *Virginia Pharmacy* is the hearers' right to receive, in the Court's own description; *Penn Central* the pool's property; *Barlow's* the members' security in the premises they hold through the name; *Martin Linen* the rule that restrains the prosecutor's second attempt, a rule of the proceeding that runs in the name's case as in any other, and *Helicopteros* the sovereign's own procedure for reaching a defendant, which Section IV.B shows the jury right also to be. Two entries remain, *Bellotti*'s speech and *Metropolitan Life*'s equal protection against a State's tax classification,[400] and they are the two transplants Part Two measures (Sections VI.G and VI.I). The criterion is the first bound of the law of fictions in a Justice's words: a name can pay, hold, sue and be sued; it cannot remain silent, because it has nothing to say, and it cannot have a conscience, cast a vote or be born. The article adopts the criterion and shows where the Court failed its own test.

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[399] *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284–285 (1989) (O'Connor, J., concurring in part and dissenting in part) (the cut, pdf 28–29). The cases in her inventory: *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984); *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985); for the two denials, *Wilson v. United States*, 221 U.S. 361 (1911), and *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). The opinion of the Court did not reach the corporate question; the paragraph is a separate opinion and is cited as one.

[400] *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 875, 882 (1985), as note 366 records; Section VI.I quotes the standard and the holding and measures them as the equal-protection transplant on the tax side.

The collective-entity cases are the Court drawing the same line from the other side, and Section VI.A quotes them: *Wilson* in 1911 on why the name has no privilege for the books its officers hold,[401] *Bellis* in 1974 confining the privilege to the natural individual and refusing headcount for the pool's acts,[402] *Braswell* in 1988 completing the sentence for the custodian's act of production,[403] and the Court's two hedges on the pool's security and privacy.[404] An act of the self, never through the name; a holding of property, through the name as far as the members' interest runs: the Court's practice from *Hale* to *Braswell* tracks the object of the right exactly, and it is the article's rule under the Court's own words.

D. Two Forms: Addition, Which Supplies a Grantee the Text Lacks, and Substitution, Which Answers a Question the Text Already Answers

The census shows the test catching two different things, and the article names them separately because the remedy differs.

The first form is *addition*. The coinage supplies a grantee or a right the text does not contain. "Person" extended to the corporation is the instance. The Fourteenth Amendment's "person" was read, from a remark before argument (Section III.E above), to include a name, and

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[401] *Wilson v. United States*, 221 U.S. 361, 382, 385 (1911) (the cut, pdf 22, 25). At 383–384 the Court quotes *Hale v. Henkel*, 201 U.S. 43, 74–75 (1906), the sentences Section VII.C quotes above from *Hale* itself.

[402] *Bellis v. United States*, 417 U.S. 85, 89–90, 100 (1974) (the cut, pdf 5–6, 16): the privilege "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records" (89–90, quoting *United States v. White*, 322 U.S. 694, 701 (1944)); "the Fifth Amendment privilege is a purely personal one" (90); "It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be" (100).

[403] *Braswell v. United States*, 487 U.S. 99, 102, 110 (1988) (the cut, pdf 4, 12); at 102, "it is well established that such artificial entities are not protected by the Fifth Amendment."

[404] *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946) (the cut, pdf 23): "the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be 'particularly described'"; *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (the cut, pdf 21).

from that reading the whole corporate Fourteenth Amendment line descends. Strike the term and no clause reaches the name. What was added by the holding could have been added only by Article V, and Article V was not used.

The second form is *substitution*. The question was already settled by a term in the text, and the Court answered it with a coinage instead. Section VIII's case is the instance. So is *Berea College*, run by a State and ratified by the Court. The Fourteenth Amendment's "liberty" and "equal protection" answer whether Kentucky may forbid persons to teach and learn together, and the statute's own title, as Harlan's dissent gives it, was "An act to prohibit white and colored persons from attending the same school." The Court did not answer the persons' question with a coinage; it substituted a ground for the clause, confining itself, in the sentence Section IV.B quotes, to "the power of a State over its own corporate creatures," which is substitution in its plainest form, the clause set aside by the name.[405] Strike the substituted ground and what remains is a statute aimed at persons by its own title and a clause that speaks to persons; what the holding granted the State, by addressing a name, was a power over persons the text denies. If the result had another ground in 1908 it was *Plessy*'s reading of equal protection, a construction and not a clause, which the test strikes in turn and which the Court itself struck in 1954; a result that could find respite only in the name or in a coinage had, by Section VII.B's rule, no ground in the text.[406] Section IV.B tells the rest of that case. Substitution does not create a grantee, but it is not harmless. It leaves the text's own word unused, so that the right afterwards rests on the coinage

[405] *Berea College v. Kentucky*, 211 U.S. 45, 54, 58 (1908) (Brewer, J., for the Court), 59 (Harlan, J., dissenting) (the cut, pdf 10, 14, 15; the leaf at 58 carries the Court's close, "Affirmed," and the opening of the dissent under the dissent's running head, so the two sentences on it are Brewer's). "Creatures" is the Court's word. Section IV.B on the case and the Court's own later correction in *Pierce*; Section VI.B at the forfeiture sentence.

[406] *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Brown v. Board of Education*, 347 U.S. 483 (1954). Cited for what they held and not quoted; the shorthand "separate but equal" is not *Plessy*'s phrase and the article does not attribute it to the case. Whether the Day Law would have been sustained against the teachers as persons in 1908 the Court did not say, which is why the sentence is conditional.

and can be attacked as one; and it replaces the text's structure with the Court's, which in the case below inverted the text's burden. The cost of a convenient holding is paid by the texts it bypassed and by the next generation's defense of the right.

E. The Remedy Is Not Article V: To Amend Would Ratify the Bypass

It would be a mistake to conclude that the remedy for a holding that supersedes Article V is an Article V amendment. That conclusion concedes the point in dispute, that the grant exists and must be undone. Article V is what was bypassed. Invoking it afterwards would ratify the bypass by treating the holding as though it were text.

The remedy is measurement, for the reason Section VII.B gave, and Section IX.C states it with its readers.

VIII. The Test Run on a Judgment the Author Would Keep: Griswold v. Connecticut

A. Why This Case: A Test That Catches Only the Other Side's Cases Is Not a Test

A test that catches only the other side's cases is not a test. The article's author would keep the judgment in *Griswold v. Connecticut*, which struck down a statute making it a crime for married couples to use contraceptives.[407] The removal test, run on *Griswold*, catches the opinion of the Court and has nothing against the judgment, and it shows why. That is the result the test should produce on a case worth keeping, and it is the result the article has to show to be entitled to the test at all.

[407] *Griswold*, 381 U.S. at 480.

B. What the Coined Terms Do: "Emanation," "Penumbra" and "Zones of Privacy" as Three Jobs the Text Does Not Do

The question in *Griswold* was where in the Constitution the right came from, because no clause mentions marriage, contraception, or privacy. Justice Douglas, for the Court, answered at page 484:

> The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. … Various guarantees create zones of privacy.[408]

The First Amendment's right of association, the Third Amendment's bar on quartering soldiers, the Fourth's security against searches, the Fifth's privilege against self-incrimination, and the Ninth were listed as the guarantees whose penumbras formed the zone, and marital privacy was placed inside it.

The three coined terms do three jobs, and each is a job the text does not do. The listed clauses each protect one named thing. The Third Amendment forbids quartering soldiers in a house. It does not mention a private sphere. *Emanation* is the move from the named thing to a principle behind it: the quartering clause gives off a principle of household privacy. *Penumbra* is the move from the principle to constitutional force outside the words: the principle governs in the half-shadow beyond the clause, so that a statute reaching there is void though it violates no clause. *Zones of privacy* is the move that adds the penumbras together: each penumbra alone is tied to its clause, and a household-privacy principle from the quartering clause does not reach a doctor's advice, so the zones are merged into a general right of privacy in which the marital relationship sits.

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[408] *Id.* at 484.

Strike the terms. Without "emanation," each clause protects its named thing and nothing more. Without "penumbra," whatever principle lies behind a clause has no force beyond the clause. Without "zones," there is nothing to add together. The chain from the Third Amendment to a Connecticut contraception statute has three links, and all three are coinages. The opinion of the Court does not reach its result by any shorter path. On the Court's opinion alone, the judgment rests on the coinage alone.

C. The Step That Survives, and Where the Argument Stops: Necessity at Page 483, Emanation at Page 484

The opinion contains, two pages before the penumbra, an argument of the kind that survives removal, and the contrast is instructive. At page 483 Douglas derives the right of association from the First Amendment and says why: it is "not expressly included in the First Amendment," but "its existence is necessary in making the express guarantees fully meaningful," and "[w]ithout those peripheral rights the specific rights would be less secure."[409] That is a necessity argument. The express guarantee of assembly entails an unexpressed protection of membership, because the one is defeated without the other, and the entailment can be stated in the text's own terms. Strike "penumbra" from this step and it stands.

Then the opinion moves from association to marital privacy, and the necessity argument is gone. Nothing in the quartering clause is made meaningless by a contraception law. Nothing in the search clause is, since the opinion's own objection to enforcement, that it would require police to "search the sacred precincts of marital bedrooms,"[410] is an objection the Fourth

[409] *Id.* at 483.

[410] *Id.* at 485.

Amendment already states in its own words. At the point where the opinion stops arguing necessity it starts asserting emanation. The word appears exactly where the argument ends.

D. Why the Judgment Survives: Goldberg's Ninth Amendment, Harlan's "Liberty," and Black's Removal Test in His Own Words

The judgment does not rest on the opinion of the Court alone. Two concurrences supply text.

Justice Goldberg, joined by the Chief Justice and Justice Brennan, rested on the Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The clause's whole office is unenumerated rights of natural persons. Goldberg was careful about what it does and does not do: "Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated …."[411] And he answered the objection that the Bill of Rights bound only the federal government: "While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties."[412]

Justice Harlan, concurring in the judgment, rested on the Fourteenth Amendment's word "liberty," and refused the penumbra in terms: the inquiry "is not dependent on [the Bill of Rights] or any of their radiations."[413]

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[411] *Id.* at 488, 492 (Goldberg, J., concurring).

[412] *Id.* at 493 (Goldberg, J., concurring).

[413] *Id.* at 500 (Harlan, J., concurring in the judgment).

Justice Black, dissenting, applied the removal test in his own words and reached the opposite result because he rejected the concurrences' clauses too: "I get nowhere in this case by talk about a constitutional 'right of privacy' as an emanation from one or more constitutional provisions. I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision."[414]

So the test sorts the case. The judgment survives removal because Goldberg supplies the Ninth Amendment and Harlan supplies "liberty," and both are the people's words. The opinion of the Court does not survive, and the article says so about a case whose judgment it would keep. Whether marital privacy is in fact a right "retained by the people," or within "liberty," is a real question, and Black's answer to it is a real position. Whether Douglas's penumbra establishes anything is not a real question. The test tells the two apart, and sends both sides of the first question to the text. And "has nothing against" is said of the judgment on its stated grounds and no further: the test does not insure a holding against its own re-grounding, and if the judgment were one day rested on a coinage again, the rule of respite in Section VII.B would run on the new ground as it ran on the old.

E. The Defense of Griswold in the People's Words: The Ninth Amendment, "Liberty," and the Preamble's "Blessings of Liberty"

What the Court could have said, and what the article says for it, uses no coinage. It uses three texts the opinion of the Court left idle.

The first is the Ninth Amendment, which settles the question the penumbra was invented to answer. The penumbra exists to show that a right can be constitutional without being listed.

[414] *Id.* at 509–510 (Black, J., dissenting).

The Ninth Amendment says so in words. A court that objects "privacy is not in the text" is construing the enumeration to disparage a retained right, which the clause forbids. The Ninth Amendment is the Constitution's own rule against form over matter: the absence of a name is not the absence of the thing.[415]

The second is "liberty," in the Fourteenth Amendment and in the Preamble. Here the argument is one of necessity, which is the form that survives. Liberty is the text's name for freedom from the State's restraint. Privacy, in the sense the case required, is the condition of not being entered by the State through a pathway the people never sanctioned. The ground of the identity between them is the text's own words. The Fourth Amendment states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[416] The people wrote their security against the State's entry into the instrument as a right of their persons and their houses; an entry the text does not sanction violates that security, and a violation of the security of the person is a restraint, which is what liberty is freedom from. Where there is no privacy there is no liberty, by identity rather than by emanation. The period's own usage, in Johnson's and Webster's dictionaries, confirms the identity without being its ground,[417] and neither defines either word by the other; the identity does not ask them to: a

[415] U.S. Const. amend. IX.

[416] U.S. Const. amend. IV, from the text printed in 1 Thorpe, *supra*, at 29 (pdf 69). "The right to be let alone," the phrase Brandeis adopted in *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), older than the opinion and not pinned here to its treatise source, is itself a coinage and is struck with the rest. What survives is "liberty."

[417] Samuel Johnson, *A Dictionary of the English Language* (London: W. Strahan for J. and P. Knapton et al., 1755), vol. II, s.v. "Liberty" (leaf 47, left column, signature 15 K: sense 1, "Freedom, as opposed to slavery"; sense 2, "Freedom, as opposed to necessity," with Locke's sentence; the third sense, "Privilege; exemption; immunity," misnumbered "2." in the print; sense 4, "Relaxation of restraint"; sense 5, "Leave; permission") and s.v. "Privacy" (leaf 424, left column: senses 1 and 2; sense 3, "Privity; joint knowledge; great familiarity," marked "improper"; sense 4, "Taciturnity"); Noah Webster, *An American Dictionary of the English Language* (New York: S. Converse, 1828), vol. II, s.v. "Liberty" (leaf 57, right column, running onto leaf 58: sense 1; sense 2, "Natural liberty … a state of exemption from the control of others, and from positive laws and the institutions of social life"; sense 3, "Civil liberty is an exemption from the arbitrary will of others, which exemption is secured by established laws") and s.v. "Privacy" (leaf 359, middle column: sense 1; sense 2, "A place of seclusion from company or

condition of not being observed or entered and a freedom from restraint are joined where the State's entry is the restraint, and that is what the Fourth Amendment's words say. "Liberty" does not emanate privacy. Privacy is one of the things liberty *is*.

The third is the Preamble, which names the class. The Constitution was ordained to "secure the Blessings of Liberty to ourselves and our Posterity." The Preamble confers no power and no right; the Court has said so and the article does not disagree.[418] But it states what the instrument is for, and it does so in a list whose last item is open: justice, tranquility, "the common defence," the general welfare, and "the Blessings of Liberty," plural and unenumerated. Privacy is a blessing of liberty, an effect of the cause the text names, and the Ninth Amendment protects the unenumerated members of exactly that class. Between them the Preamble says what the class is for and the Ninth says the enumeration does not exhaust it.

Against a State, the Ninth Amendment travels through the Fourteenth's "liberty," as Goldberg said, and the Tenth Amendment must be answered rather than ignored: it reserves to the States the police power Connecticut exercised, "or to the people." The boundary in *Griswold* is therefore between a State's sanctioned pathway and the people's retained right, and the necessity argument is what places marital privacy on the people's side of it. None of this requires a half-shadow. All of it was available in 1965.

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observation; retreat; solitude; retirement"; sense 5, "Secrecy; concealment of what is said or done"). Both volumes are unpaginated; a leaf is cited by its number in the Internet Archive scan on the shelf (Johnson, b30451541_0001–0002; Webster, americandictiona01–02websrich). Neither dictionary defines either word by the other; Johnson's "Freedom" (vol. I, leaf 867) is "Liberty; exemption from servitude; independence" and, at sense 5, "Unrestraint," and Webster's (vol. I, leaf 800) "A state of exemption from the power or control of another; liberty." The law's own usage of the period is the same: 1 William Blackstone, *Commentaries on the Laws of England* 130 (Oxford, Clarendon Press, 1765) (the first edition in facsimile, pdf 148), "This personal liberty consists in the power of loco-motion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law."

[418] *Jacobson v. Massachusetts*, 197 U.S. 11, 22 (1905) (the Preamble "has never been regarded as the source of any substantive power").

F. The Asymmetry: The Same Texts That Save Griswold's Judgment Find Nothing for the Corporation

The same texts that save *Griswold*'s judgment find nothing for the corporation, and the reason is in the texts' own words. The Ninth Amendment reserves rights to "the people," and the Court has read the phrase: in *Heller* it held that "in all six other provisions of the Constitution that mention 'the people,' the term unambiguously refers to all members of the political community, not an unspecified subset," that nowhere in the Constitution does a right attributed to "the people" refer "to anything other than an individual right," and, quoting *Verdugo-Urquidez*, that "the people" is "a term of art employed in select parts of the Constitution" which "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."[419] The Preamble secures the blessings of liberty "to ourselves and our Posterity." *Paul v. Virginia* held that the Constitution's words for persons mean natural persons.[420] A corporation is not one of the people and has no posterity. It has perpetual succession, which is the sovereign's rule standing in the place of posterity for a name, the thing Ulpian described when he wrote that it makes no difference to the body whether all, some, or none of its members remain,[421] and the thing Marshall called immortality, beside the "individuality" he allowed only "if the expression may be allowed."[422] The clause that gives privacy a home gives the name none. The test that has

[419] *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008), quoting *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (the *Heller* cut, pdf 11; the *Verdugo* cut, pdf 7). *Verdugo*'s gloss is a limit on who is among the people and is quoted as written.

[420] *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869).

[421] Dig. 3.4.7.2 (Ulpian, 10 *ad ed.*) (pdf 148): "In decurionibus vel aliis universitatibus nihil refert, utrum omnes idem maneant an pars maneat vel omnes immutati sint."

[422] *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

nothing against *Griswold*'s judgment on the Ninth Amendment finds, under the corporate "person," no clause of any kind, enumerated or retained.

That is the asymmetry the article has been working toward since Section II. The people's unenumerated rights have a textual home because the text was written by and for the people. The name's rights have none because the name is a rule the people made, and a rule does not hold rights against its makers. Run the removal test on the one and it finds the Ninth Amendment and the word "liberty." Run it on the other and it finds a remark before argument, a hedge that its citations dropped, and a presumption called a democracy. The two lines share a root and part at it. *Boyd* in 1886 stated the right in its honest form, a man's "indefeasible right of personal security, personal liberty and private property," the invasion of which "underlies and constitutes the essence of Lord Camden's judgment"; *Hale v. Henkel* in 1906 (Section VII.C) gave it to the name, "the person, be he individual or corporation," under a clause that says "the right of the people"; *Griswold* in 1965 gave it a maker, the emanations by which the Fifth Amendment "enables the citizen to create a zone of privacy," with the Ninth Amendment quoted on the same page. The one is a being supplied with a man's right; the other is the people's own right supplied with a source; and the text that answers both is the same, "retained by the people." The symmetry holds inside the corporate cases too. The holdings that protected a corporation's property survive the test, because the property was the members' and travelled through the name as the incident of their holding (Section IV.B), and the test has nothing against them on that ground; what falls is the name's own right, and only that.[423] The test's one direction is visible on

[423] Section IV.B (the object-and-direction principle: a security right travels through the name as the incident of the members' holding, so the corporate property cases survive as the members' property); Section VI.I for the tax cases, where the same symmetry sorts *Quaker City Cab* from *Flint*. The clause answers the reader who would say the test keeps only the cases its author likes: it keeps every holding whose result restates from a clause for the persons, on whichever side the persons stand. The fork: *Boyd v. United States*, 116 U.S. 616, 630 (1886) (the shelf's cut, pdf 15); *Hale v. Henkel*, 201 U.S. 43, 76 (1906); *Griswold*, 381 U.S. at 484, citing *Boyd* at 630 in the text and quoting it whole in its note.

both sides, and no reader can say the article has kept the cases it likes. The test is the same. The texts are different. That is why it is a test of law and not of a side.

IX. Scope and Remedy: The Test Is General, and the Remedy Is Measurement

The test has been stated and run. Two things remain, and this section supplies both: its scope, which is wider than the corporation, and its remedy, which is not an amendment but a measurement anyone with the text in hand can perform. The section closes by saying what the article has not claimed, and what it has.

A. The Scope of the Test: Applied Holding by Holding, Indifferent to the Result, and Distinguishing Among the Reports' Coinages

The removal test is general. Nothing in it is specific to corporations; the corporation is the word this article runs it on. Any holding that has nothing under it when its coined term is struck has granted by ordinary means, whatever the word and whoever benefited. The article states the scope once, here, and does not pursue it, because the other words are other papers. But the reason it is general must be said first, and then four things about the scope, or the test reads as a preference.

The test is general because the law it applies is general. The common law's law of fictions, recovered in Section II.D, was never a doctrine about corporations; it was a rule about what the law may suppose against the truth, and its three bounds, a possible matter, a necessity, no injury worked, were stated of every fiction the courts would admit. A coined term held as law is, in that vocabulary, a fiction: a disposition against the truth that a court has established among the officers of the law as a truth, so that proof against it is refused and the bounds are never

checked (Section VII.B). The test measures such a term three ways at once, and the three measures are one instrument. The first is the text: strike the term and look for the clause, which is Article V's question, since what no clause carries was granted by ordinary means. The second is the law of fictions itself: a term that falls with the holding was a disposition, and a disposition against the truth is lawful only within the three bounds, so the bounds say why it could not have stood even by the common law's measure. The third is reality, which is the first bound stated by itself: the law imitates nature, Doddridge said from the bench in 1625, and a name is not born or naturalized, has no conscience and casts no vote. Three readings, one answer wherever the holding falls, silence wherever it stands. Nothing in the instrument names the corporation. The author's companion study runs the same test on the two immunities, where the companion finds the fictions held as law to be a sovereign who cannot be wronged and an official whose knowledge is measured, in the Court's phrase, "essentially in objective terms"; the article names that phrase as the companion's example and does not argue the case here.[424]

A reader of the realist literature will answer that the corporate entity was never a fiction in this sense, and the answer deserves its own reply because it is the strongest the literature has. Canfield, writing in the Columbia Law Review in 1917, said that the group's "personality" exists "only as a legal conception," but that the conception is "not a fiction in the sense of a supposition contrary to and having no relation to fact"; it is "a 'fiction' only in the sense of an act of 'imagining,'" and the entity theory "is of precisely the same nature as the doctrine of implied

[424] *Harlow v. Fitzgerald*, 457 U.S. 800, 818–819 (1982) (the Court), from the Library of Congress print (pdf 19–20): the holding at 818, that officials "generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known"; at 819, "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct." The companion is the author's *The Subject's Unanswered Plea: A Restorative and Comparative History of Immunity* (book manuscript, 2026), which runs the removal test on the two immunities and carries the general method's three statements in its own chapters; this article cross-references it and argues neither immunity. Doddridge's and Coke's sentences are quoted in Section II.D from *Sheffeild v. Ratcliffe*, 2 Rolle Rep. 501–502 (K.B. 1625), 81 Eng. Rep. 943, and Coke's reports.

conditions in contracts and the doctrine of relation in the law of agency."[425] The article agrees, and the agreement is the point. A conception founded on fact and bounded by its purpose is what Section II.D called a lawful fiction of the possible, and Part One is the history of that fiction running as far as its purposes ran: persons may hold in one name, succeed one another and sue and be sued, and the law may treat the name as the holder for those purposes because persons in fact hold, succeed and sue. Canfield's own footnote concedes the rest: the term "person," he wrote, "was not used in the Roman Law, and is unnecessary. It is a mere relic of mediaeval scholasticism—a vestige of the 'Realists.'" What the test strikes is not his conception but the word he called unnecessary, carried past every purpose that founded the conception into a clause of the people's instrument, where the name holds a right against its maker that no fact about persons supplies. There the supposition has no relation to fact, which is Canfield's own definition of the fiction he said the entity theory was not.

First, it is applied holding by holding, on the page, by the removal exercise, and never by assertion. The *Santa Clara* chain took seven pins across five opinions to show, and two dissents to say from the bench that nothing had been decided; *Griswold* took the opinion of the Court and three separate opinions. A test that is announced rather than run is a slogan. Every candidate takes the same work.

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[425] George F. Canfield, *The Scope and Limits of the Corporate Entity Theory*, 17 Colum. L. Rev. 128, 128–129 (1917) (signed at 143; the shelf's Internet Archive cut, pdf 1–2). At 128: "The 'personality' of the group exists only as a legal conception. But this conception is, as I pointed out in a previous article in this Review, not a fiction in the sense of a supposition contrary to and having no relation to fact." At 129: "it is misleading to call the theory of a corporate entity a fiction. It is a 'fiction' only in the sense of an act of 'imagining'—it is not an arbitrary assumption without regard to fact, and does not involve a false deduction or conclusion. … The corporate entity theory, therefore, is of precisely the same nature as the doctrine of implied conditions in contracts and the doctrine of relation in the law of agency." Note 1 at 128: "The term 'person' was not used in the Roman Law, and is unnecessary. It is a mere relic of mediaeval scholasticism—a vestige of the 'Realists'. Corporation is the proper term—not 'person', as universitas was the proper term in the Roman Law." Canfield distinguishes the entity conception from "certain legal fictions or presumptions … which have no relation to fact," naming the fiction of a lease in ejectment and the Exchequer's fiction of the King's debtor; those are Section II.D's lawful fictions of the possible as well, and the article's point is that the Court's "person" is neither his conception nor those.

Second, it is indifferent to whether the result is liked. The article has shown the test discarding the opinion of the Court in a case whose judgment its author would keep, and the article's own method requires that. A reader who finds the test catching only the holdings they already opposed should suspect the reader, not the test.

Third, it distinguishes. "state action" very probably survives, because "No State shall" is in the text and the term names the condition those words impose. "Strict scrutiny" survives, because it is a method applied to a person the text already names. "Standing" as a word survives; "injury in fact" as a term may not, and the question whether Article III's "Cases" and "Controversies" contain it is the kind of question the test is for. "Qualified immunity" and "clearly established law" appear in no clause of the Constitution and in no word of the statute they qualify, and a holding resting on them alone is the first candidate the article would name outside its own subject.[426] "Sovereign immunity," asserted by the United States as its own, has no clause; the article's companion study of that word runs the same census under a different name.[427] "Substantive due process" is a coinage that its own proponents call one. The line between the terms that survive and the terms that fall is the one Section VII.B drew between a tool of construction and a term held as law. The article does not run the test on any of these. It names them to show that the test has a field, and that the field is the Reports.

Fourth, it runs on this article's own words first, as a reader who accepts it will run it. Strike "medium" and the holding of *NAACP v. Alabama* stands on the members' "liberty," where the Court put it at page 460 in its own words; the word describes and grants nothing. Strike "the name in the rule" and the state constitutions' own sentence stands, "Corporations may be formed

[426] 42 U.S.C. § 1983; the author's book, *The Subject's Unanswered Plea: A Restorative and Comparative History of Immunity* (book manuscript, 2026), runs the census on these words.

[427] *The Subject's Unanswered Plea*, book manuscript, the sovereign chapters.

under general laws"; the phrase paraphrases the people's text. Strike "the two sets" and the division stands on who can create what, which is a fact about contracts and strangers and not a term. Strike "transplant" and the Reports' own pages remain, a remark before argument and a holding by citation. Strike "fiction" itself, the article's own name for what the test detects, and the three bounds stand as Doddridge's and Coke's sentences in Section II.D, a possible matter, a necessity, no injury worked, which are the common law's and not the article's; strike "fiction held as law" and the test's own statement in Section VII.B remains, strike the term and look for the clause, which needs no theory of fictions to run. The article's terms are names for arguments that can be restated without them, which is all the test asks of a term; a term that failed that restatement would be a grant in this article's hands as surely as in a court's, and the article has looked.[428]

B. The Two Forms, Again: What Measurement Reads in a Case of Addition and in a Case of Substitution

The two forms Section VII.D named differ in what measurement reads. In a case of addition, "person" extended to the corporation, measurement reads the whole of the added grant as the distance between the holding and the text, since nothing short of Article V could have put it there. In a case of substitution, "penumbra," it reads the distance between the Court's word and the text's, and the remedy is to restore the text's word to the right it already protected.

[428] *NAACP v. Alabama*, 357 U.S. at 460; N.Y. Const. of 1846, art. VIII, § 1, in Appendix A; Section II.G.4 above.

C. The Remedy Is Measurement: The Holding Stated Without the Term, the Court Asked for the Clause, the Distance Read as the Whole of the Grant

The remedy is the one the companion study's method supplies and the article has practiced throughout: measurement.[429] A holding that rests on a coined term is stated without the term, and the Court is asked for the clause. If there is a clause, the test has nothing against it: the term was a name for an interpretation, and whether the interpretation is right is the ordinary question, which the test does not answer; for the one word of the Fourteenth Amendment that the census found carried to the name, the right reading is Section III.E's business, by interpretation, and the test's finding is only that the Court's reading rests on the word alone (Section VII.C). If there is none, the holding is a node in the common law that has altered the de jure text rather than interpreted it,[430] and the distance between them is read as the whole of what the node granted. The readers were always there, and the supposition that a holding of the Court can be undone only by the people's amendment is itself a fiction of no redress, in the sense Section II.E gave the phrase; the test strikes it with the rest, because the redress was in the instrument from the start, and each of four reaches its own object: the litigant's case, which reaches the holding; the legislature's power over the grant it made and over the exception it allowed, which reaches the grant and the exception, as the people of the States used it in the sections of their constitutions that make the grant, their answer to *Dartmouth* (Section IV.E); the writ of *quo warranto*, the grantor's instrument, by which the sovereign asks a corporation by what warrant it exercises a power, which reaches the name's exercise of a power beyond its grant and reaches no holding,

[429] *The Subject's Unanswered Plea*, book manuscript, ch. 2.2 § B, 4.1 (de jure law; common law; the node; congruency as the measured distance between them), and Method § C (the source-text audit, the verb test, the strategic paraphrase).

[430] The book's terms: de jure law, the enacted text; common law, the body of decisions interpreting it; a node, one such decision; congruency, the measured distance between them. *The Subject's Unanswered Plea*, book manuscript, ch. 2.2 § B, 4.1.

and which Blackstone states as the "regular course" against a franchise abused, with the Stuart seizure of London's charter beside it as the caution;[431] and the court's power to decline to extend a holding whose only support is a word, and to say so, which reaches the extension. None of these is an amendment. Each is a refusal to treat a figure of speech as a term of art, which is the whole of what the Constitution's supremacy over ordinary means requires.

The legislature's form has two instruments the people already hold, and Section VI.I named both. The first is the grant. Fifty-two of the seventy-three instruments in Appendix A reserve in terms the power to alter, amend or repeal the laws under which a name exists, and a condition on a treasury's political use is an alteration within that reservation and not a new power; the people of a State who wrote the reservation may use it, and the writing is the people's own statement that the existence is theirs to condition.[432] The second is the exception. Where a legislature has excepted a class of names from a tax every natural person pays, the exception is a grant on the people's standing terms, conditioned at its making on the purpose the charter states, and a treasury spent on political will beyond that purpose is spent beyond the exception's warrant (Section V.F; Section VI.I). For Congress the measurement is the exception conditioned on the charter's purpose; for the people of a State it is the reserved power withdrawing an exception the grant does not warrant. Neither needs the Court's leave to be enacted. The Court

[431] 1 William Blackstone, *Commentaries on the Laws of England* 473 (Oxford 1765) (ch. 18), from the first-edition facsimile (pdf 491): the four modes of dissolution, quoted at note 215 (Section IV.E), the fourth by forfeiture, and "the regular course is to bring a writ of *quo warranto*, to enquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings." The same page carries the caution: the exertion of "this act of law, for the purposes of the state," under Charles II and James II, "particularly by seising the charter of the city of London, gave great and just offence; though perhaps, in strictness of law, the proceedings were sufficiently regular," and the statute that followed, 2 W. & M. c. 8 (Blackstone's n. a), by which the City's charter "shall never more be forfeited for any cause whatsoever." The information in the nature of a *quo warranto* is Book III's (ch. 17) and is not this page's. Section IV.E carries the passage. The writ asks the question the article's measurement asks, by what warrant, and asks it of the grantee's exercise of a power; it reaches no holding of a court, and the article does not say that it does.

[432] Appendix A's reservation column, counted by the head note's rule as note 374 states: fifty-two of the seventy-three. Section IV.E for the reservation as the people's answer to *Dartmouth*; Section VI.I for the reservation as the door the people kept open.

has closed one door on the person who would ask, holding in *Cuno* that a State's taxpayers have no standing to question a tax credit to a corporation (Section VI.I), and the people's legislatures are the door it left open. And the Court has itself stated the premise of the measurement, in the opinion that most needed it: the disclosure sentence of *Citizens United*, that transparency lets the electorate "give proper weight to different speakers and messages," which Section V.D reads as the criterion's own premise; a measurement that asks whose consent a treasury's speech carries asks the question the Court said the electorate is entitled to have answered.[433]

The remedy is a proposal addressed to the Court and not a description of present law, and the article says so. A legislature that conditioned its charters today on no treasury electioneering would meet the sentence *Citizens United* adopted from Justice Scalia's dissent in *Austin*, that the State cannot exact the forfeiture of First Amendment rights as the price of the form's special advantages, which Section VI.B quotes.[434] The sentence assumes the holder it names, and a grant by ordinary means is undone by the same means; until it is, the measurement has three concrete forms. For a litigant: a State's charter condition, enacted under the people's reserved power, tested as applied to a treasury funded by objecting shareholders, the question the Court did not reach at page 351 because it assumed the right. For a legislature: the condition itself, which is the measurement in statutory form and the test case. For a court: the refusal to carry "person" or "speaker" to a claim the Reports have not yet granted the name, stated with the reason, and the clause is at hand. It is the due process clause's "liberty" as it carries the First Amendment's freedoms, where the Reports hold the two lines Section VII.C set out, which crossed within three

[433] *Citizens United v. FEC*, 558 U.S. 310, 371 (2010), from the bound volume (pdf 532), quoted in Section V.D as the second half of the Court's own statement of the criterion (the first half *Massachusetts Citizens for Life*, 479 U.S. at 258). *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 346 (2006); Section VI.I quotes the holding. Section V.F states the exception's terms from 26 U.S.C. § 501(c)(3) (leaf 2829) and *Regan v. Taxation With Representation*, 461 U.S. 540 (1983).

[434] 558 U.S. at 351 (quoting *Austin*, 494 U.S. at 680 (Scalia, J., dissenting)) (cut pdf 42).

years, the second built by citing a description and not a holding.[435] A court asked to carry the name's liberty to a new speech claim may follow the first line instead, with the reason, which is a concrete refusal that needs no overruling; under the rule of respite in Section VII.B it is the court declining to let the result migrate to a ground that is not a clause, and holding the term as the tool it was and not as law. That refusal is why the remedy is measurement and not amendment. Measurement is the court's act and amendment the people's, and the article asks the court to stop doing the people's work, not the people to do the court's. Within two months of the decision the other route was open: members of both Houses had introduced or called for amendments to answer it, and a campaign had gathered signatures "calling on Congress to pass and send to the States a Constitutional amendment to restore free speech rights to people, not corporations."[436] The people have taken that route against the Court three times, and the three mark the line. The Eleventh Amendment answered *Chisholm*, where Article III's "between a State and Citizens of another State" had been read as it stands, Iredell dissenting (Section III.B), and the people wrote that the judicial power "shall not be construed to extend" to such a suit; the Sixteenth answered *Pollock*, where the Court had read Article I's "direct" tax to reach taxes on the income of real

[435] The two lines, with their pins and the leaves displayed, are set out in Section III.E's note on Black's "expressly held" and in Section III.J's census entry for "person"; Section IV.B tells the second line's sequence through *NAACP v. Alabama* and *Button*. "Crossed within three years" is *Grosjean* (1936) to *Hague* (1939); the lines themselves run 1906–1939 and 1936–2010.

[436] *We the People? Corporate Spending in American Elections After Citizens United: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 84 (2010) (GPO) (written testimony of Jeffrey D. Clements, Free Speech for People, p. 2 of 14), from the shelf's HathiTrust copy (image-only; pdf 87, the printed page 84 in the running head): "Congresswoman Donna Edwards of Maryland and Congressman John Conyers, Jr. of Michigan (Chair of the House Judiciary Committee) have introduced a Constitutional amendment resolution in the U.S. House of Representatives, and it now has more than a dozen co-sponsors. In the Senate, Senators John Kerry, Christopher Dodd, Arlen Specter, and Tom Udall have led the call for a Constitutional amendment to restore the fundamental premise that in a self-governing democracy, it is people, not corporations, who debate, vote, serve, and, if necessary, die for our nation and the rights that protect our freedom"; the petition "calling on Congress to pass and send to the States a Constitutional amendment to restore free speech rights to people, not corporations." The record also reprints Bradley A. Smith, *The Case for Corporate Political Spending*, Wall St. J., Feb. 27, 2010, at 176 of the hearing (pdf 179): "Sen. Chris Dodd (D., Conn.) announced plans this week to try to amend the Constitution to deal with the decision." The hearing was held March 10, 2010; the decision is of January 21, 2010. The article names the proposals as the record names them and takes no position on any.

and personal property, and the people gave Congress the power to tax incomes "without apportionment"; the Twenty-sixth answered the judgment in *Oregon v. Mitchell*, that Congress could lower the age of voters in federal elections and not in a State's own, and the people set the age at eighteen for both.[437] Each was a reading argued from the text's own words, the ordinary question answered one way by the Court and the other by the people, and amendment is the people's answer to an interpretation they reject. The corporate "person" was argued from no word of the Amendment (Section III.E); it is the addition of Section IX.B, which nothing short of Article V could have made, and an amendment to undo it would ratify a grant made by no reading at all. Each proposal treats the holding as text, which is the concession Section VII.E refused; the article's answer is different in kind, and asks the Court for the clause. As to reliance, the Court has said what it thinks. Overruling *Austin* put "no serious reliance interests" at stake, because "corporations have been banned from making independent expenditures" and legislatures "may have enacted bans on corporate expenditures believing that those bans were

[437] The amendments' texts, from the shelf's Literal Print (GPO; the text, spelling and punctuation of the National Archives' engrossed copies): Amendment XI, p. 20 (pdf 15), "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State"; Amendment XVI, p. 22 (pdf 17), "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration"; Amendment XXVI § 1, p. 25 (pdf 20), quoted at note 345. The words each answered, at the same print: Article III § 2, p. 12 (pdf 9), "between a State and Citizens of another State"; Article I § 9, p. 9 (pdf 6), "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken." The cases: *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), decided seriatim, cited in Section III.B at 448 (Iredell, J., dissenting) and 454 (Wilson, J.); *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 637 (1895) (on rehearing; the opinion of the Court), from the Library of Congress print (pdf 37): "taxes on real estate being indisputably direct taxes, taxes on the rents or income of real estate are equally direct taxes," and "taxes on personal property, or on the income of personal property, are likewise direct taxes"; *Oregon v. Mitchell*, 400 U.S. 112, 117–118 (1970) (Black, J., "announcing the judgments of the Court in an opinion expressing his own view of the cases"), from the shelf's print (pdf 6–7): at 118, "it is the judgment of the Court that the 18-year-old vote provisions of the Voting Rights Act Amendments of 1970 are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections." The line is Section IX.B's: an amendment that answers a reading of the text's own words leaves the text the people's and rejects an interpretation; an amendment that answers a word the text never carried would ratify, by the one instrument that could have made it, the grant it undoes. The article names the three as the people's acts and takes no position on any of the three holdings.

constitutional," which "is not a compelling interest for *stare decisis*."[438] That sentence cuts both ways, and the article quotes it so that it does.

D. What the Article Has Not Claimed: Not That Corporations May Not Exist, Not That the Persons Behind One Lose Their Rights, Not That the Federal Power Is Unconstitutional, Not the Union's Case, and Not Which Rights the Ninth Amendment Retains

The article has not claimed that corporations may not exist. They exist by a rule the people made, through their state constitutions, and the rule is as lawful as any the people have enacted. It has not claimed that the natural persons behind a corporation lose their rights by joining one; they keep every right they had, and the name carries those rights for them as a medium. It has not claimed that the federal incorporation power is unconstitutional; it has stated the Convention's refusal and *McCulloch*'s implication and rested on neither. It has not run the test on § 441b's union provision, because a union is not a name in the people's rule but an unincorporated association whose treasury is its members' dues, and whether a member who paid under an agency-shop statute directed the expenditure is the question of *Abood* and its successors, not this article's.[439] And it has not claimed that any particular right the people hold is or is not retained under the Ninth Amendment; it has claimed only that the question is answered on the text and not in a half-shadow.

[438] 558 U.S. at 365 (cut pdf 56).

[439] *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Janus v. American Federation of State, County, and Municipal Employees, Council 31*, 585 U.S. 878 (2018); Section VI.E above.

E. The Press: The One Clause That Names a Thing, Whose Freedom Is Every Natural Person's to Publish, and the Exemption Written by the Act and Not the Actor

One implication the article does state, because a reader will ask whether its author is willing to. "The freedom … of the press" is the one clause that names a thing rather than a person, and the thing is, in every modern instance, held under a corporate name; *New York Times Co. v. Sullivan* was brought against "petitioner the New York Times Company, a New York corporation which publishes the New York Times," beside "the four individual petitioners, who are Negroes and Alabama clergymen,"[440] and the majority in *Citizens United* leaned on the point: "There is simply no support for the view that the First Amendment, as originally understood, would permit the suppression of political speech by media corporations."[441] On this article's account the New York Times Company holds no First Amendment right as itself, and the article says so. The Court has said the opposite once, in terms, and said it by the transplant. In *Grosjean v. American Press Co.* the corporate publishers' claim against Louisiana's tax on advertising was decided under the "liberty" of the due process clause, and the Court got the name into the clause in two sentences: a corporation, "we have held, is not a 'citizen' within the meaning of the privileges and immunities clause," but "is a 'person' within the meaning of the equal protection and due process of law clauses, which are the clauses involved here," by citation of two rate cases about property; three years later Stone cited *Grosjean* in *Hague* for the liberty of "all persons" and, eight pages on in the same opinion, denied that liberty to a corporation (Section III.E).[442] What

[440] *New York Times Co. v. Sullivan*, 376 U.S. 254, 256 (1964).

[441] 558 U.S. at 353; see *id.* at 351–352 (the media exemption, 2 U.S.C. §§ 431(9)(B)(i), 434(f)(3)(B)(i)).

[442] *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (Sutherland, J., for the Court), from the Library of Congress print (pdf 12): the two sentences, citing *Paul v. Virginia*, 8 Wall. 168, *Covington & Lexington Turnpike Co. v. Sandford*, 164 U.S. 578, 592, and *Smyth v. Ames*, 169 U.S. 466, 522; on the same page, "The tax imposed is designated a 'license tax for the privilege of engaging in such business'—that is to say, the business of selling, or making any charge for, advertising. As applied to appellees, it is a tax of two per cent. on the gross receipts derived from advertisements carried in their newspapers when, and only when, the newspapers of each

Grosjean held survives removal entire; in whose name is the question. The tax was "a tax of two per cent. on the gross receipts derived from advertisements" carried by newspapers with a circulation over twenty thousand, which is the pool's money, and the Court described it as operating "as a restraint in a double sense," on the revenue and on the circulation, which is the readers' and the publishers' own freedom to publish and to read, the right of participation Section IV.B located in the persons. Strike "person" as extended to the name and the holding stands on those persons' rights, which were never in doubt: right in result, wrong in description, as *Dartmouth* was. The Court's own later gloss, in the sentence Section V.E quotes, says so in the article's grammar: "Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form," the right in the speaker and the form the vehicle. The text supplies the reason. "The press" in 1791 was the instrument every person was free to use, which is to say a medium, the article's own word for what a name is;[443] the freedom of the press is every natural person's freedom to publish, and the writers, editors and readers of a newspaper are natural persons whose speech the name carries in the first set, in full. The Court agrees on the institutional point, in a sentence it took from Justice Scalia's dissent in *Austin*: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[444] So the holding in *Sullivan* protected the publication and not the name: the advertisement's words were the signatory Committee's, sixty-four natural

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enjoy a circulation of more than 20,000 copies per week. It thus operates as a restraint in a double sense. First, its effect is to curtail the amount of revenue realized from advertising, and, second, its direct" (the sentence closes on 245 with the tendency to restrict circulation, which the article states without quoting). *Hague*, 307 U.S. at 519 and 527 (Stone, J.) (pdf 24, 32); Section III.E's note. *303 Creative LLC v. Elenis*, 600 U.S. 570, 594 (2023), from the Court's official R-slip (pdf 26): "Nor, this Court has held, do speakers shed their First Amendment protections by employing the corporate form to disseminate their speech," citing *Grosjean* among others.

[443] Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012).

[444] 558 U.S. at 352, quoting *Austin*, 494 U.S. at 691 (Scalia, J., dissenting), and citing *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978).

persons' over their names, placed by the Times for a fee, and the four clergymen sued beside the name, who testified that they "had not authorized the use of" theirs, were relieved because there was "no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard";[445] and when Justice Jackson answered Justices Black and Douglas from their own votes, reminding them that "a newspaper corporation persuaded this Court that a $500 fine assessed against it violated its rights under the Fourteenth Amendment" in *Times-Mirror* and that in *Pennekamp* "a newspaper corporation was convicted along with an individual defendant" and relieved, he added the two sentences that are this article's finding and not its difficulty: "In neither of these cases was the corporation's right to raise the issue questioned," and he did not "consider it necessary for the Court opinion to review the considerations which justify the assumption that these corporations have standing to raise the issues decided."[446] He had opened his statement two pages earlier, writing by assignment for the Court, with the admission Section III.E quotes, that he had assumed without discussion what two citations, the reporter's note at page 396 and the sentence "It was so held" at page 28, were taken to settle.[447] It was not questioned because the words in each case were a natural person's, an editor's, carried under the name; the relief ran to the publication; and the Court did not ask whose right it was. The census of Section III is the record of the Court not asking. A media corporation's treasury spent on a

[445] 376 U.S. at 257 ("The text appeared over the names of 64 persons"), 260 (the signatory Committee's order; the clergymen's names "subsequently added when the first proof of the advertisement was received"; "Each of the individual petitioners testified that he had not authorized the use of his name"), 286 ("Even assuming that they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support.").

[446] *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Jackson, J.) (the leaf's head names the dissent that opens on it, as the Reports head a leaf by the opinion that opens there; Jackson's statement ends and Douglas's dissent opens on 576), citing *Times-Mirror Co. v. Superior Court*, companion to *Bridges v. California*, 314 U.S. 252 (1941), and *Pennekamp v. Florida*, 328 U.S. 331 (1946).

[447] *Id.* at 574 (Jackson, J.); Section III.E above (*Santa Clara* at 396; *Beckwith* at 28).

candidate is the same thing as any corporation's, and its publication is its writers' speech through a medium, protected as theirs.

Congress drew that line itself, and the Court has kept it. The press exemption the majority noted at page 351 is written by the act and not by the actor: it reserves from § 441b "any news story, commentary, or editorial distributed through the facilities of any … newspaper, magazine, or other periodical publication," which is the publication, and in *Massachusetts Citizens for Life* the Court refused to read it wider, because a contrary position "would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, thereby eviscerating § 441b's prohibition."[448] The majority read the exemption as a favor to a class, "media corporations"; its words exempt an act. The publication out and the treasury in is the two sets, enacted. Section V.D's criterion reaches the same line from the members' side: a newspaper's instrument contains publication, so what it publishes is what those who formed it consented to at formation, and its treasury spent on a candidate outside its own publication carries no such consent; the reductio the majority drew, that a limit on the treasury would reach "media corporations," measures the name where the criterion measures the act.[449] The article claims no less for the press than for any association of natural persons, and no more for the name that publishes than for the name that manufactures.

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[448] *Massachusetts Citizens for Life*, 479 U.S. at 250–251 (the statute's words as the Court quoted them, the ellipsis the Court's; the House Report's gloss quoted at 250, H.R. Rep. No. 93-1239, p. 4 (1974): the exemption "assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns"), from the cut (pdf pp. 13–14). The majority's reading of the exemption as a class: *Citizens United*, 558 U.S. at 351 ("Media corporations are now exempt from § 441b's ban on corporate expenditures."), 351–352.

[449] Section V.D (the charter-consent criterion; the media reductio met there in a sentence and measured here); *Citizens United*, 558 U.S. at 362 (the dissenting-shareholder interest "would allow the Government to ban the political speech even of media corporations"), from the bound volume (pdf 523), and at 351–353 (the media exemption), Section IX.E's notes above.

F. What It Has Claimed: A Name in a Rule Holds No Right Against the Rule's Makers, and the Test Finds the Clause for the Members and Nothing for the Name

What it has claimed is narrower and, the article hopes, harder to answer. A name in a rule holds no right against the rule's makers. The holdings that say otherwise rest on words the Court coined, and the test for whether a holding rests on a word alone is to strike the word and look. On the corporation, the test finds the clause for the members and nothing for the name. What the words named was a being that exists, in the Court's own definition, only in contemplation of law, which is Johnson's phantasm, and a thing that so exists holds nothing. The rule stands, and it is the people's. The rest is measurement.

APPENDIX A. THE CREATION OF CORPORATIONS IN THE STATE CONSTITUTIONS, 1831–1907

Head note. Seventy-three constitutions and amendments of forty-two States, from Thorpe, *The Federal and State Constitutions* (7 vols., GPO 1909), each at its printed page. Form A: the special charter fenced by a two-thirds vote. Form B: "may be formed under general laws, but shall not be created by special act." Form C: no special charter; "the legislature shall provide by general laws for the organization of all corporations hereafter to be created." Of the seventy-three, fifty-two reserve in terms a power to alter, amend or repeal the laws or the charters, counted at the reservation column's cells by one rule, that a cell counts only where the scan captured a reservation: three instruments, Maryland 1851, Iowa 1857 and Missouri 1875, have the clause uncaptured and are not counted, Illinois 1848 has none in the section quoted, Illinois 1870's cell carries a clause of another kind (§ 2, voiding charters under which no organization took place) and is not counted, and the remaining sixteen show no clause. Twenty define the term by the same rule, Minnesota 1857 and Colorado 1876 having the definition uncaptured. Six instruments speak to the grant in another form and are marked by it in the Form column: a reservation alone (Pennsylvania, by the amendment of 1857), a general-law power (Rhode Island, 1892), a general-law preference (Alabama 1865), a restricted grant naming the classes the legislature may incorporate (Georgia 1868 and 1877) and a general-law mandate (Florida 1885); three carry both forms B and C (Alabama 1875, Washington 1889, Utah 1895) and are counted with form C. The clause columns give each clause's opening words; an ellipsis marks where the table stops and the page continues. The full clauses, the pdf leaf, the page-source and the read status of every entry are in the census TSV of 13 October 2026, kept beside this article; entries marked ◆ were verified against Thorpe's page.

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Maine	1819 (amdt. 1875)	art. IV, pt. 3, § 14	III 1656	C	Corporations shall be formed under general laws, and shall not be created by special acts of the Legislature, …	and, however formed, they shall forever be subject to the general laws of the State.	—
Delaware ◆	1831	art. II, § 17	I 586	A	No act of incorporation, except for the renewal of existing corporations, shall be hereafter enacted without …	and with a reserved power of revocation by the legislature; and no act of incorporation …	—
Michigan	1835	art. XII, § 2	IV 1940	A	The legislature shall pass no act of incorporation, unless with the assent of at least two-thirds of each …	—	—
Florida	1838	art. XIII, §§ 1–2	II 678	A	§ 1: general law for the incorporation of churches and religious or other societies, "but no special act of …	—	—
Pennsylvania	1838 (amdt. 1857)	art. I, § 26	V 3119	res.	—	The legislature shall have the power to alter, revoke, or annul any charter of …	—
Rhode Island	1842 (amdt. art. IX, 1892)	art. IX, § 1	VI 3237	power	Hereafter the general assembly may provide by general law for the creation and control of corporations: …	—	—
New Jersey	1844 (amdt. 1875)	art. IV, § 7, ¶ 11	V 2605	B	The legislature shall pass no special act conferring corporate powers, but they shall pass general laws under …	subject, nevertheless, to repeal or alteration at the will of the legislature. [The …	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Louisiana ◆	1845	art. 123; art. 124	III 1405	B	Corporations shall not be created in this State by special laws, except for political or municipal purposes, …	art. 124 (pdf 152): from January 1890 the legislature "shall have the power to revoke …	—
Texas	1845	art. VII, § 31	VI 3562	A	No private corporation shall be created, unless the bill creating it shall be passed by two-thirds of both …	and two-thirds of the legislature shall have power to revoke and [repeal all acts of …	—
Iowa	1846	art. VIII, § 2	II 1132	B	Corporations shall not be created in this state by special laws, except for political or municipal purposes; …	—	—
New York ◆	1846	art. VIII, §§ 1, 3	V 2669	B	Corporations may be formed under general laws; but shall not be created by special act, except for municipal …	All general laws and special acts passed pursuant to this section, may be altered from …	yes
Illinois ◆	1848	art. X, § 1	II 1005	B	Corporations, not possessing banking powers or privileges, may be formed under general laws, but shall not be …	— (no reservation sentence in § 1; § 2 secures dues by individual liability)	—
Wisconsin ◆	1848	art. XI, § 1	VII 4093	B	Corporations without banking powers or privileges may be formed under general laws, but shall not be created …	All general laws or special acts, enacted under the provisions of this section, may be …	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
California	1849	art. IV, § 31	I 396	B	Corporations may be formed under general laws, but shall not be created by special act except for municipal …	All general laws and special acts passed pursuant to this section may be altered from …	—
Michigan ◆	1850 (as amended 1862)	art. XV, §§ 1, 8, 11	IV 1964	B	Corporations may be formed under general laws, but shall not be created by special act except for municipal …	All laws passed pursuant to this section may be amended, altered or repealed. [1862: But …	yes
Indiana	1851	art. XI, § 13	II 1089	B	Corporations, other than banking, shall not be created by special act, but may be formed under general laws.	—	—
Maryland	1851	art. III, § 47	III 1726	B	Corporations may be formed under general laws, but shall not be created by special act, except for municipal …	(not captured)	—
Ohio ◆	1851	art. XIII, §§ 1–2	V 2931	B	§ 1: The General Assembly shall pass no special act conferring corporate powers. § 2: Corporations may be …	but all such laws may, from time to time, be altered or repealed.	—
Louisiana	1852	art. 118	III 1424	B	Corporations with banking or discounting privileges may be either created by special acts, or formed under …	—	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Kansas (Topeka)	1855	art. [Corporations], §§ 1–2	II 1191	B	§ 1: The general assembly shall not create corporations by special act except for municipal purposes. § 2: …	but such laws may at any time be altered or repealed.	—
Iowa	1857	art. VIII, § 1	II 1149	C	No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for …	(not captured)	—
Kansas (Lecompton)	1857	art. XII, § 1	II 1213	B	Corporations may be formed under a general law, but the legislature may by special act create bodies-politic …	all general laws or special acts enacted under the provisions of this section may be …	—
Minnesota	1857	art. X, §§ 1–2	IV 2016	B	§ 2: No corporations shall be formed under special acts, except for municipal purposes.	—	(not captured)
Oregon	1857	art. XI, § 2	V 3013	B	Corporations may be formed under general laws, but shall not be created by special laws, except for municipal …	All laws passed pursuant to this section may be altered, amended, or repealed, but n[ot …]	—
Oregon	1857 (amdt. 1906)	art. XI, § 2	V 3020	B	Corporations may be formed under general laws, but shall not be created by the legislative assembly by …	—	—
Kansas (Leavenworth)	1858	art. XIV, § 1	II 1235	B	Corporations may be created under general laws, but shall not be created by special acts, except for …	All general laws and special acts authorizing or creating corporations may be altered …	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Kansas (Wyandotte)	1859	art. XII, § 1	II 1256	B	The legislature shall pass no special act conferring corporate powers. Corporations may be created under …	but all such laws may be amended or repealed.	—
West Virginia	1861–63	art. XI, § 8	VII 4031	B	may become a corporation, on complying with the terms and conditions thereby prescribed; and no special act …	No charter of incorporation shall be granted under such general laws, unless the right be …	—
Louisiana	1864	art. 121	III 1443	B	Corporations shall not be created in this State by special laws except for political or municipal purposes; …	—	—
Maryland	1864	art. III, § 51	III 1758	B	Corporations may be formed under general laws, but shall not be created by special act, except for municipal …	All laws and special acts, pursuant to this section, may be altered from time to time, or …	—
Nevada	1864	art. VIII, § 1	IV 2416	B	The Legislature shall pass no special Act in any matter relating to corporate powers except for municipal …	and all such laws may, from time to time, be altered or repealed.	—
Alabama	1865	art. IV, § 38	I 125	pref.	No special law shall be enacted for the benefit of individuals or corporations, in cases which are provided …	—	—
Florida	1865	art. XIII, § 1; art. IV, § 20	II 700	A	§ 1: no act of incorporation, nor alteration in one, "unless with the assent of at least two-thirds of each …	—	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Missouri	1865	art. VIII, § 4	IV 2212	B	Corporations may be formed under general laws, but shall not be created by special acts, except for municipal …	All general laws and special acts passed pursuant to this section may be altered, …	—
Nebraska	1866–67	art. [Corporations], §§ 1–2	IV 2359	B	§ 1: The legislature shall pass no special act conferring corporate powers. § 2: Corporations may be formed …	—	—
Texas	1866	art. VII, § 31	VI 3585	A	same as 1845	same as 1845	—
Alabama ◆	1867	art. XIII, § 1	I 150	B	Corporations may be formed under general laws, but shall not be created by special act, except for municipal …	All general laws, and special acts passed pursuant to this section, may be altered, …	—
Maryland	1867 (as amended 1891)	art. III, § 48	III 1796	B	Corporations may be formed under general Laws; but shall not be created by special act, except for municipal …	(pdf 543, the 1891 text) all charters granted or adopted in pursuance of this section, …	—
Arkansas ◆	1868	art. V, § 48	I 314	B	The general assembly shall pass no special act conferring corporate powers. Corporations may be formed under …	but all such laws may, from time to time, be altered or repealed.	—
Georgia	1868	art. III, § 6, ¶ 5	II 830	restr.	The general assembly shall have no power to grant corporate powers and privileges to private companies, …	—	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
North Carolina	1868	art. VIII, §§ 1, 3	V 2816	B	Corporations may be formed under general laws, but shall not be created by special act, except for municipal …	All general laws and special acts passed pursuant to this section may be altered, from …	yes
South Carolina	1868	art. XII, § 1	VI 3302	B	Corporations may be formed under general laws,	but all such laws may from time to time be altered or repealed.	—
Illinois ◆	1870	art. XI, §§ 1–2	II 1041	C	No corporation shall be created by special laws, or its charter extended, changed or amended, except those …	§ 2: existing charters not organized within ten days void	—
Tennessee ◆	1870	art. XI, § 8	VI 3468	C	No corporation shall be created, or its powers increased or diminished, by special laws; but the General …	which laws may, at any time, be altered or repealed; and no such alteration or repeal …	—
West Virginia ◆	1872	art. XI, § 1	VII 4058	C	The Legislature shall provide for the organization of all corporations hereafter to be created, by general …	—	—
Pennsylvania ◆	1873	art. III, § 7; art. XVI, §§ 2, 10, 13	V 3145	C	art. III, § 7 (pdf 605): no local or special law "Creating corporations, or amending, renewing or extending …	art. XVI, § 10: The General Assembly shall have the power to alter, revoke or annul any …	yes
Arkansas	1874	art. XII, §§ 2, 6	I 356	C	§ 2: The general assembly shall pass no special act conferring corporate powers, except for charitable, …	§ 6: which laws may, from time to time, be altered or repealed. The general assembly …	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Alabama	1875	art. XIV, §§ 1, 10, 13	I 177	B/C	Corporations may be formed under general laws, but shall not be created by special act, except for municipal, …	All general laws and special acts passed pursuant to this section may be altered, …	yes
Missouri	1875	art. XII, §§ 2, 11	IV 2264	C	No corporation, after the adoption of this Constitution, shall be created by special laws; nor shall any …	§ 3 (power of the General Assembly over charters) not captured by the scan	yes
Nebraska	1875	art. XI(b), § 1	IV 2383	C	remain under the patronage and control of the State, but the legislature shall provide by general laws for …	All general laws passed pursuant to this section may be altered from time to time or …	—
Colorado	1876	art. XV, §§ 2–3	I 504	C	No charter of incorporations shall be granted, extended, changed, or amended by special law, except for such …	§ 3: The general assembly shall have the power to alter, revoke, [or annul any charter …]	(not captured)
North Carolina	1876	art. VIII, §§ 1, 3	V 2837	B	Corporations may be formed under general laws, but shall not be created by special act except for municipal …	All general laws and special acts passed pursuant to this section may be altered from …	yes
Texas ◆	1876	art. XII, §§ 1–2	VI 3652	C	§ 1: No private corporation shall be created except by general laws. § 2: General laws shall be enacted …	—	—
Georgia	1877 (amdt. 1893)	art. III, § 7, ¶ XVIII; art. IV, § 2, ¶ III	II 851	restr.	The General Assembly shall have no power to grant corporate powers and privileges to private companies, …	art. IV, § 2, ¶ III (pdf 214): no remission of forfeiture nor alteration of an existing …	—

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
California	1879	art. XII, §§ 1, 4	I 437	B	Corporations may be formed under general laws, but shall not be created by special Act.	All laws now in force in this State concerning corporations, and all laws that may be …	yes
Louisiana	1879	arts. 46, 234, 247	III 1512	C	art. 46 (pdf 224): no local or special law "Creating corporations, or amending, renewing, extending or …	art. 234 (pdf 257): no remission of forfeiture, renewal, alteration or amendment of an …	—
Florida	1885	art. III, § 25	II 738	mand.	The Legislature shall provide by general law for incorporating such educational, agricultural, mechanical, …	—	—
Idaho	1889	art. XI, §§ 2, 3, 16	II 939	C	No charter of incorporation shall be granted, extended, changed or amended by special law, except for such …	Provided, That any such general law shall be subject to future repeal or alteration by …	yes
Montana	1889	art. XV, §§ 2, 3, 18	IV 2328	C	No charter of incorporations shall be granted, extended, changed or amended by special law, except for such …	Provided, That any such laws shall be subject to future repeal or alterations by the …	yes
North Dakota	1889	art. VII, §§ 131, 133, 144	V 2869	C	No charter of incorporation shall be granted, changed or amended by special law, except in the case of such …	and any such law, so passed, shall be subject to future repeal or alteration. § 133: no …	yes
South Dakota	1889	art. XVII, §§ 1, 3, 9, 19	VI 3385	C	No corporation shall be created or have its charter extended, changed or amended by special laws except those …	§ 9 (pdf 202): The legislature shall have the power to alter, revise or annul any charter …	yes

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Washington	1889	art. XII, §§ 1, 5	VII 3995	B/C	Corporations may be formed under general laws, but shall not be created by special acts.	All laws relating to corporations may be altered, amended or repealed by the legislature …	yes
Wyoming	1889	art. X, § 1	VII 4140	C	The legislature shall provide for the organization of corporations by general law.	All laws relating to corporations may be altered, amended or repealed by the legislature …	—
Kentucky	1890 (Thorpe's date; ratified 1891)	§§ 59 (17th, 19th), 190–192, 205	III 1323	C	§ 59: The General Assembly shall not pass local or special acts concerning … Seventeenth: To grant a charter …	§ 205 (pdf 93): The General Assembly shall, by general laws, provide for the revocation …	—
Mississippi	1890	§§ 88, 178, 179, 199	IV 2110	C	§ 178: Corporations shall be formed under general laws only. § 88 (pdf 183): general laws "under which …	§ 178: The legislature shall have power to alter, amend or repeal any charter of …	yes
New York	1894	art. VIII, §§ 1, 3	V 2725	B	Corporations may be formed under general laws; but shall not be created by special act, except for municipal …	All general [laws and special acts passed pursuant to this section may be altered from …	yes
South Carolina	1895	art. IX, §§ 1, 2, 17	VI 3331	C	§ 2: No charter of incorporation shall be granted, changed or amended by special law, except in the case of …	and any such law so passed, as well as all charters now existing or hereafter created, …	yes
Utah	1895	art. XII, §§ 1, 4	VI 3722	B/C	Corporations may be formed under general laws, but shall not be created by special acts.	All laws relating to corporations may be altered, amended, or repealed by the …	yes

State	**Year**	**Provision**	**Thorpe**	**Form**	**Grant clause (opening)**	**Reservation (opening)**	**Definition**
Delaware	1897	art. IX, §§ 1–2	I 627	C	No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under …	The General Assembly shall, by general law, provide for the revocation or forfeiture of …	—
Louisiana	1898	arts. 48, 262, 275	III 1580	C	art. 48 (pdf 276): no local or special law "Creating corporations, or amending, renewing, extending or …	art. 262 (pdf 324): as 1879 art. 234	—
Alabama ◆	1901	§§ 229, 231, 238, 241	I 223	C	The Legislature shall pass no special act conferring corporate powers, but it shall pass general laws under …	subject, nevertheless, to repeal at the will of the Legislature; and shall pass general …	yes
Virginia ◆	1902	art. IV, § 63 (17); art. XII, §§ 153–154, 158	VII 3936	C	§ 154: The creation of corporations, and the extension and amendment of charters (whether heretofore or …	§ 154 (pdf 161): Such general laws may be amended or repealed by the General Assembly; …	yes
Oklahoma ◆	1907	art. IX, §§ 1, 38, 47	VII 4300	C	§ 38 (pdf 537): No private corporation shall be created nor foreign corporation licensed to conduct business …	§ 47 (pdf 538): The legislature shall have power to alter, amend, annul, revoke, or …	yes

Thirty-three in form B, twenty-eight in form C, six in form A; fifty-two reserve a power over the laws or the charters, counted by the head note's rule; twenty define the term.