

WE THE CORPORATIONS

How American Businesses Won Their Civil Rights

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Introduction
Are Corporations People?

In December 1882, Roscoe Conkling, a former senator and close confidant of President Chester Arthur, appeared before the justices of the Supreme Court of the United States to argue that corporations like his client, the Southern Pacific Railroad Company, were entitled to equal rights under the Fourteenth Amendment. Although that provision of the Constitution said that no state shall “deprive any *person* of life, liberty, or property, without due process of law” or “deny to any *person* within its jurisdiction the equal protection of the laws,” Conkling insisted the amendment’s drafters intended to cover business corporations too. Laws that referred to “persons” have “by long and constant acceptance . . . been held to embrace artificial persons as well as natural persons,” Conkling explained. This long-standing practice was well known to “the men who framed, the Congress which proposed, and the people who through their Legislatures ratified the Fourteenth Amendment.”

Conkling’s claim was remarkable. The Fourteenth Amendment had been adopted after the Civil War to guarantee the rights of the freed slaves, not to protect corporations. Conkling, however, had unusual credibility with the justices. For two decades, he had been a leader of the Republican Party in Congress and was often said to be the most powerful man in Washington. He had twice been nominated to the Supreme Court himself, most recently in the spring of the same year he appeared on behalf of the Southern Pacific Railroad. The Senate voted to confirm him but he declined the position, citing poverty from his career in public service—becoming the last person to turn down a seat on the Supreme Court after having been confirmed. More than most lawyers then, Conkling was considered by the justices to be their peer. And when it came to the history surrounding the drafting of the Fourteenth Amendment, Conkling’s expertise was unparalleled. As a member of Congress during Reconstruction, Conkling had been on the very committee that wrote the amendment. If anyone could testify to the intent of the Fourteenth Amendment’s drafters, it was Conkling, who was one himself.

To back up his improbable story, Conkling produced a musty, never-before-published journal that purported to detail his committee’s deliberations. A close look at the journal, Conkling suggested, would show that while the nation was focused on the rights of the freedmen, he and the other members of Congress had also been worried about laws that unduly burdened business. It was for this very reason that the Fourteenth Amendment used the word *person*. An early draft of

the amendment had guaranteed the rights of “citizens,” Conkling said, but the language was later changed specifically to include corporations, which were often deemed by the law to be persons for various purposes. As a result, Conkling argued, the Fourteenth Amendment guaranteed the Southern Pacific Railroad the same rights of equal protection and due process as the former slaves.

There was just one small problem with Conkling’s account of the drafting of the Fourteenth Amendment: it was not true. The drafters of the Fourteenth Amendment did not try to secret into the Constitution broad new protections for corporations, nor was the wording of the amendment ever altered in the way Conkling suggested. As we will see, one of the preeminent figures in American politics had attempted to deceive the justices of the Supreme Court in an effort to win constitutional protections for the Southern Pacific Railroad.¹

Although a procedural snafu prevented the Supreme Court from issuing a final ruling in Conkling’s case, the justices soon after embraced Conkling’s argument that corporations had rights protected by the Fourteenth Amendment. In the years that followed, the Supreme Court would invoke those corporate rights to invalidate numerous laws governing how businesses were to be run, supervised, and taxed. Between 1868, when the amendment was ratified, and 1912, when a scholar set out to identify every Fourteenth Amendment case heard by the Supreme Court, the justices decided 28 cases dealing with the rights of African Americans—and an astonishing 312 cases dealing with the rights of corporations. At the same time the court was upholding Jim Crow laws in infamous cases like *Plessy v. Ferguson* (1896), the justices were invalidating minimum-wage laws, curtailing collective bargaining efforts, voiding manufacturing restrictions, and even overturning a law regulating the weight of commercial loaves of bread. The Fourteenth Amendment, adopted to shield the former slaves from discrimination, had been transformed into a sword used by corporations to strike at unwanted regulation.

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We the People. Revered by so many, those three words that begin the Constitution have also been criticized for being inaccurate. When the Constitution went into effect in 1789, African Americans were enslaved in eight states, and women were not allowed to vote in any. The Framers used the phrase *We the People* to identify who was responsible for enacting this charter of liberty and self-government, but their description was misleading. More than half the nation’s population was prohibited from participating in the process by which the Constitution was adopted; most were also denied many of the rights the Constitution purported to guarantee. For those left out, the phrase

was not a description but an aspiration, and American history has often pivoted around their struggles to gain equal rights, their fight to finally take their rightful place among *We the People*.

While the civil rights movements for women, racial minorities, and other oppressed groups have been thoroughly studied, there has been another centuries-long push for equal rights that has remained largely unnoticed: the “corporate rights movement.” Roscoe Conkling’s case was neither the first nor the last time corporations asked the Supreme Court to recognize their constitutional rights. Despite the fact that corporations have never been subjected to systemic oppression like women and minorities, they too have pushed to gain constitutional protections since America’s earliest days. Indeed, today corporations have nearly all the same rights as individuals: freedom of speech, freedom of the press, religious liberty, due process, equal protection, freedom from unreasonable searches and seizures, the right to counsel, the right against double jeopardy, and the right to trial by jury, among others. Corporations do not have every right guaranteed by the Constitution; they have no right to vote or right against self-incrimination, and none to date has gone to court asserting a right to keep and bear arms. Yet corporations have won a considerable share of the Constitution’s most fundamental protections. Corporations, too, have fought to become part of *We the People*.

In the past decade, the issue of constitutional rights for corporations was thrust into the public spotlight by the Supreme Court’s controversial 2010 decision in *Citizens United*. By a narrow 5–4 majority, the justices ruled that corporations have a First Amendment right to spend their money to influence elections. The decision was wildly unpopular, with polls showing an overwhelming majority of both Democrats and Republicans opposed. *Citizens United* also helped inspire Occupy Wall Street, where protestors carried signs declaring “Corporations Are NOT People.” “I don’t care how many times you try to explain it,” President Barack Obama said. “Corporations aren’t people. People are people.” As of 2016, sixteen states and hundreds of municipalities had endorsed a constitutional amendment to overturn *Citizens United* and clarify that constitutional rights belong to human beings, not corporations.²

The backlash had little effect on the justices. Four years after *Citizens United*, the Supreme Court expanded the rights of corporations once again in the *Hobby Lobby* case. The court held that Hobby Lobby Stores, a chain of craft stores with 23,000 employees and over \$3 billion in annual revenue, had religious liberty rights under a federal statute. The company, which was founded by a religious family and remains closely held, was allowed an exemption from a federal rule

requiring large employers to include birth control in their employees' health plans. The *Hobby Lobby* decision has since been cited to support the claims of businesses whose owners do not wish to provide wedding services to same-sex couples on grounds of religion.³

These Supreme Court decisions came as a surprise to many people, lawyers included. Law students are taught about civil rights, women's rights, Native Americans' rights, gay rights, even states' rights—but not about corporate rights. Yet, as the corporate transformation of the Fourteenth Amendment in the wake of Conkling's deception suggests, the *Citizens United* and *Hobby Lobby* decisions are just the proverbial tip of the iceberg, the most visible manifestations of a larger, and largely hidden, phenomenon. Over the course of American history, corporations have pushed relentlessly, and with noteworthy success, to gain the same rights as individuals under the Constitution.

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Corporations did not win their constitutional rights in quite the same way as women, racial minorities, or gays and lesbians. Historians of those more familiar civil rights movements emphasize how activists pursued their claims in both courts of law and the court of public opinion. To achieve lasting constitutional change, scholars say, required more than just judicial victories. These movements also had to change public opinion. Lawsuits were backed up by broad-based, popular social movements that demanded rights for those who had been denied the original promise of *We the People*. Activists mobilized the masses, and through protests, marches, and public advocacy persuaded not just judges but the larger society that these excluded groups deserved equal rights. According to one scholar, the Supreme Court “usually pays attention to an actual or emerging moral consensus, certainly with respect to fundamental rights.”⁴

Corporations, in contrast, gained their rights without winning over hearts and minds. Ronald McDonald and the Pillsbury Doughboy never marched on Washington or protested down Main Street with signs demanding equal rights for corporations. Corporations unquestionably benefited from popular mobilizations for states' rights, small government, and free markets. Yet there was never an effort to convince the public that corporations, as such, should have individual rights too. Corporate rights were won in courts of law, by judicial rulings extending fundamental protections to business, even in the absence of any national consensus in favor of corporate rights. As Adolf Berle and Gardiner Means, two especially influential thinkers about the corporation, once wrote, “It is the essence of revolutions of the more silent sort that they are unrecognized until

they are far advanced.” The corporate rights revolution was not exactly silent; in fact, the controversies that led to these important judicial rulings were often well publicized in their day. The larger pattern, however, remained hidden—at least until *Citizens United*.⁵

We the Corporations focuses on one central element of the corporate rights movement: how corporations pursued and won constitutional protections through the courts, especially the Supreme Court. Although Americans often think of the Supreme Court as a bulwark to protect minority rights against the tyranny of the majority, the court’s record of protecting women and racial minorities was dishearteningly bad prior to the 1950s. For most of American history, the Supreme Court failed to protect the dispossessed and the marginalized, with the justices claiming to be powerless in the face of hostile public sentiment. As we will see, however, the court’s record on corporate rights was much different. In 1809, the Supreme Court decided the first case on the constitutional rights of corporations, decades before the first comparable cases for women or racial minorities. And unlike women and minorities, who lost nearly all of their early cases, corporations won that first case—and compiled an impressive list of victories in the years since. For corporations, the court has insisted that broad public sentiment favoring business regulation must bend to the demands of the Constitution. To the extent the Supreme Court is a bulwark against the tyranny of the majority, powerful and wealthy corporations have been among the primary beneficiaries.⁶

In our daily discourse, Supreme Court justices are often labeled “liberal” or “conservative.” Yet what has often united justices across the left/right spectrum is a tendency to side with business. In recent years, scholars have increasingly noticed that even in the ideologically divided Roberts court, the justices regularly find common ground in business cases. This pattern, however, is not unique to the contemporary Supreme Court. For most of American history, the court has been decidedly favorable to business, regardless of whether the majority of justices was liberal or conservative. There are a number of ways this business tilt can be measured, from the number of cases business interests win to the adoption of legal rules that promote free enterprise. One prominent yet understudied illustration is the historic and self-conscious expansion of constitutional rights for corporations.⁷

Corporate constitutional protections were not merely, however, a product of a business-friendly Supreme Court. In many instances, corporations gained constitutional rights when their cases became tangled up in larger political battles or jurisprudential developments. In the early

1800s, for example, the renowned Chief Justice John Marshall sought to protect corporate rights as a way of enhancing the power of the fledgling federal government. After the Civil War, Justice Stephen Field, undoubtedly the most colorful justice to sit on the nation's highest court—he remains the only sitting justice ever arrested, for murder no less—saw corporate rights as necessary to stem the rising tide of socialism. As the Supreme Court embraced new, more libertarian understandings of free speech a century ago, the justices also extended First Amendment rights to newspaper corporations, without which the freedom of the press would be much less meaningful in a modern society.

Indeed, the history of corporate rights sheds new light on, and complicates, our understanding of “liberal” and “conservative” Supreme Courts. Chief Justice Roger Taney, the author of the infamous *Dred Scott* case, whose reactionary views on race have left him one of the most reviled figures in the history of the Supreme Court, was one of the most forceful advocates for limiting the constitutional rights of corporations. In the early twentieth century, the *Lochner* court, which has become notorious for its frequent rulings siding with business against government regulation, was also the first to articulate clear boundaries to corporate constitutional rights. Corporations were entitled to property rights, the *Lochner* court said, but not rights associated with personal liberty, like free speech. Ironically, it was the famously liberal New Deal and Warren courts of the mid-twentieth century that first extended liberty rights to corporations.

This long view also illuminates the nuanced role of corporate personhood in the story of corporate rights. Many critics of *Citizens United* believe that corporations have the same rights as individuals because the Supreme Court defines them as *people*. The proposed constitutional amendment to overturn *Citizens United* is based on this idea, declaring that only human beings are people under the terms of the Constitution. Yet corporate personhood has played only a secondary role in the corporate rights movement. While the Supreme Court has on occasion said that corporations are people, the justices have more often relied upon a very different conception of the corporation, one that views it as an *association* capable of asserting the rights of its members. This alternative way of thinking about the corporation has paved the way for the steady expansion of corporate rights. Indeed, as we will see, corporate personhood has traditionally—and surprisingly—been used to justify limits on the rights of corporations.

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Corporations and the Constitution are more intimately linked than one might imagine. Our story will begin in the colonial era, when even before corporations sought individual rights in the Supreme Court, they nonetheless exerted considerable influence on American ideas of government. It was a corporation, after all, that planted the first seeds of democracy in the colonies, and the goal was to secure profit, not promote liberty. Moreover, the Framers built from what they knew, and the colonies had been originally organized as corporations operating under written charters that, like the Constitution, set the rules for lawmaking and imposed limits on the power of officeholders. As a result, numerous distinctive features of the American Constitution can trace their roots to the nation's corporate origins.

After the Constitution was ratified, corporations quickly sought to gain the rights it guaranteed to individuals. Although there was never a broad-based popular movement for corporate rights, throughout American history the nation's most powerful corporations have persistently mobilized to use the Constitution to fight off unwanted government regulations. The Bank of the United States, the brainchild of Alexander Hamilton and the first great American corporation, brought the first corporate rights case to the Supreme Court in 1809; the Southern Pacific Railroad pushed to win rights of equal protection and due process in Roscoe Conkling's case; tobacco companies sued to gain the Constitution's protections for criminal defendants; and First National Bank fought to win political speech rights for corporations three decades before *Citizens United*. Standard Oil, Ford Motor Company, General Motors, the New York Times Company, and U.S. Steel all played a role in the story of corporate rights—along with insurance companies, brewing companies, mining companies, newspapers, and national chains. Political scientists have shown that large companies tend to be more politically active and show greater sophistication in their political activity than smaller firms, and the pursuit of corporate constitutional rights may be understood as another illustration of the phenomenon.⁸

Although the focus of this book is on business corporations, we will see that several of the Supreme Court's most important corporate rights cases involved other types of organizations that nonetheless took the corporate form: Dartmouth College, the National Association for the Advancement of Colored People, and even Citizens United, a nonprofit advocacy group, were all "corporations" that fought to establish their own rights. Yet because the Supreme Court has rarely

differentiated among the various types of corporations, even these cases resulted in greater constitutional protections for business.*

Corporations have a straightforward motivation to seek constitutional rights: to fight laws and regulations that restrict business autonomy and interfere with the pursuit of profit. The profit motive has long made corporations formidable political actors who exert a strong influence on lawmaking, and indeed the vast majority of lobbyists in Washington work for companies and business-oriented trade associations. Yet as the story of corporate constitutional rights reminds us, business influence is not restricted to the elected branches. Corporate interests have also exerted themselves aggressively in the courts of law, using the Constitution to expand their power. When popular pressures have succeeded in winning laws to restrict corporations—be it in the name of consumers, investors, the environment, or the public at large—constitutional litigation has provided business with another chance to manipulate public policy to increase its own profits. Even if the companies lose in the end, the costs of litigation might still serve to discourage lawmakers from adopting future regulations.⁹

Corporations are all but compelled to seek constitutional rights by American corporate law—the body of legal rules that dictate how corporations are formed and managed. Corporations are required by long-standing corporate law principles to maximize profit for shareholders, at least in the long term. When government regulations impose significant costs on a corporation, this legal requirement directs companies to pursue any lawful, cost-effective means of reducing the cost of compliance. For corporations, filing lawsuits to establish their rights and overturn unwanted regulations is just another cost of doing business.¹⁰

In gaining the protective coverage of the Constitution, corporations have been assisted by the brightest, most able lawyers of the day. Just as the civil rights movement had Thurgood Marshall and the women’s rights movement Ruth Bader Ginsburg, corporate rights had Daniel Webster, widely considered the greatest advocate in the history of the Supreme Court, who argued 223 cases before the justices, many on behalf of the nation’s largest corporations; Horace Binney, a young and creative lawyer who won the first corporate rights cases in the Supreme Court by employing an ingenious argument designed to hide the fact that a corporation was involved; and

* Throughout this book, “corporation” is used to refer to a business corporation unless otherwise specified. Other types of corporations will include a modifier, such as “nonprofit corporation” or “educational corporation.”

Theodore Olson, the lawyer who argued *Citizens United* and the dean of an emergent school of Supreme Court specialists that bolstered the clout of business in the nation's highest tribunal. Even Thurgood Marshall argued for constitutional rights for corporations during the height of the civil rights era, when corporate rights became entangled with issues of race.

As Marshall's example suggests, the fight for corporate rights weaves through some of the most important controversies and turning points in American history: Alexander Hamilton and Thomas Jefferson's battle over the national bank; the fight over slavery before the Civil War; the trust-busting crusades of Theodore Roosevelt and the demagoguery of Huey Long; and from the civil rights revolution to the emergence of the Tea Party. The nature and growth of corporate constitutional rights were shaped by those debates. And in turn, we will see, those debates were influenced by the struggle for corporate rights.

The history of corporate rights reveals that corporations are both adept *constitutional leveragers* and creative *constitutional first movers*. As constitutional leveragers, corporations have successfully exploited constitutional reforms originally designed for progressive causes, transforming them to serve the ends of capital. The Fourteenth Amendment, for example, was designed to protect the rights of the freedmen, but Conkling and the Southern Pacific Railroad pushed the Supreme Court to use it to protect the rights of corporations. In the 1970s, Ralph Nader won a landmark case on behalf of consumers that established a First Amendment right to advertise—a right that corporations, including tobacco and gaming companies, used to overturn laws designed to help consumers.

Yet corporations are also constitutional first movers, and historically have often been innovators at the cutting edge of constitutional litigation. They have not always piggybacked on the rights already held by individuals. In fact, numerous individual rights Americans hold dear today were first secured in lawsuits involving corporations. Businesses often have an unusual appetite for pursuing novel and risky legal claims, stirred by the desire to increase profits and untangle themselves from regulation. They also often have the resources to justify the costs of litigation. As a result, the earliest Supreme Court cases to strike down laws for violating the First Amendment, for example, were spearheaded by corporations, as were some of the earliest search-and-seizure cases under the Fourth Amendment. Corporations were behind the preponderance of early cases that breathed life into the equal protection and due process guarantees of the Fourteenth Amendment—rights that in subsequent years became the basis for *Brown v. Board of Education*,

outlawing racial segregation in schools; *Roe v. Wade*, guaranteeing the right to choose abortion; and *Obergefell v. Hodges*, recognizing the right to same-sex marriage. It is not fanciful to say that on more than one occasion, corporations have been among the unsung heroes of civil rights.

To say that corporations have had a civil rights movement of their own should not trivialize the historic struggles by racial minorities, women, the LGBT community, and others to gain equal citizenship. The people involved in those fights for constitutional protections overcame violence and terror to establish their rights, and some lost their lives in the effort. There is no moral equivalency between the civil rights, women's rights, and gay rights movements on the one hand, and the corporate rights movement on the other. Nor should the recounting of the history of corporate rights be taken as an endorsement of broad protections for corporations—or, for that matter, as an attack on corporate rights. The goal here is simply to show how corporations have pursued a long-standing, strategic effort to establish and expand their constitutional protections, often employing many of the same strategies as other well-known movements: civil disobedience, test cases, and the pursuit of innovative legal claims in a purposeful effort to reshape the law. For better or worse, the corporate rights movement, like its more famous cousins, has also transformed America.

We the Corporations uncovers this lost history of the corporate rights movement and tells the dramatic, surprising, and even shocking stories behind the landmark Supreme Court cases that extended the Constitution's most fundamental protections to corporations.

[Chapter 1 omitted]

Chapter 2

The Origins of Corporate Rights

The Constitution of the United States went into effect in 1789, but it took nearly seventy years before the Supreme Court heard its first case explicitly addressing the constitutional rights of African Americans, *Dred Scott v. Sandford*, in 1857. The court in that case held that African Americans had “no rights which the white man was bound to respect.” The first women’s rights case, *Bradwell v. Illinois*, on whether women had a right to practice law, was not heard until 1873, and the Supreme Court ruled against the woman. Conversely, the first corporate rights case in the Supreme Court was decided decades earlier, in 1809, and the corporation won.

That 1809 case is one of the overlooked landmarks of American constitutional law, and the company behind it was the nation’s first great corporation, the Bank of the United States. The brainchild of Alexander Hamilton, the Bank was chartered by the first Congress in 1791 and carried the name of the new nation, yet was what Americans today would think of as a private business. It was a for-profit corporation with publicly traded stock, managed by executives who were accountable to stockholders. At a time when the handful of existing American corporations were local concerns—operating, say, a toll bridge across the Charles River—the Bank was the first truly national enterprise, with headquarters in Philadelphia and branches from Boston to New Orleans.¹

Like so many of the giant corporations that feature in the history of the corporate rights movement—the Southern Pacific Railroad, Standard Oil, Philip Morris—the Bank of the United States provoked considerable controversy in its day. Opponents accused the Bank of having too much political and economic power. Today’s critics of *Citizens United* who worry about corporate corruption of American democracy would have found an ally in fiery Kentucky Democrat Henry Clay, who complained of the Bank that “our liberties” were in the hands of “a body, who, in derogation of the great principle of all our institutions, responsibility to the people, is amenable only to a few stockholders.” When Georgia passed a law to limit the Bank’s influence in that state, the nation’s most powerful corporation simply refused to comply. The Bank’s civil disobedience led to the earliest Supreme Court case on whether corporations had constitutional protections, two centuries before *Citizens United*.²

The Supreme Court’s decision in *Bank of the United States v. Deveaux* has been largely lost to modern memory as a constitutional law case. Although occasionally cited by courts, the

case is not featured in modern constitutional law books or even in very many of the tomes on American legal history. Yet back in the first decade of the nineteenth century, the drama surrounding the case was well known. It pitted two of the leading Founding Fathers, Alexander Hamilton and Thomas Jefferson, against each other. Their split over the Bank is already justly famous for giving birth to the two-party system. Less well known, however, is how their conflict spilled over into the struggle over constitutional protections for corporations. On this issue, Hamilton and his allies were *corporationalists*—proponents of corporate enterprise who advocated for expansive constitutional rights for business. Jeffersonians, meanwhile, were *populists*—opponents of corporate power who sought to limit corporate rights in the name of the people. The competing views of Hamiltonian corporationalists and Jeffersonian populists would set the terms of debate over constitutional protections for business for much of the next two centuries. Over the course of that history, the corporationalists would prove to be far more successful.

Another issue on which corporationalists and populists disagreed was corporate personhood. From the start, the Supreme Court has wrestled with whether corporations should be considered “people” under the Constitution and what exactly that might mean. Some critics of *Citizens United* argue that the reason corporations have constitutional rights today is that the Supreme Court has said that corporations are people. Indeed, one proposed response to *Citizens United* has been a constitutional amendment to clarify that corporations are not people under the language of the Constitution and do not have the rights of people. Yet, as we will see, corporate personhood has played only a small role in the expansion of constitutional rights to corporations. While the Supreme Court has occasionally said that corporations are people, the justices have more frequently offered other reasons to justify constitutional protections for corporations—often obscuring and hiding the corporate person rather than exalting it.

Beginning with *Bank of the United States v. Deveaux*, and for most of American history, corporate personhood has been deployed in precisely the opposite way from how today’s critics of *Citizens United* imagine. Counterintuitively, it has usually been populist opponents of corporations who have argued in favor of corporate personhood. For them, treating corporations as people was a way to *limit* the rights of corporations. And many of the most important Supreme Court decisions extending rights to corporations did not rely on corporate personhood at all. More commonly, the Supreme Court rejected the idea that a corporation was an independent, legal person with rights and duties all its own, and instead allowed the corporation to claim the rights of its members.

To understand the role of corporate personhood in American constitutional law requires a careful examination of the *Bank of the United States* case, which was the first Supreme Court case on the constitutional rights of corporations and laid the foundation for the many corporate rights cases to come. Oddly enough, the justices would preside over the case not in the usual Supreme Court courtroom but in a working pub, and the charismatic group of lawyers who participated in this mostly forgotten yet profoundly important case included a future president of the United States, a founder of Harvard's Hasty Pudding social club, and a British Loyalist who fought against Independence in the Revolutionary War. They would argue over what might appear to be an esoteric issue: Did corporations have a constitutionally guaranteed right to sue in federal court? For the Bank, however, it was a matter of life or death. If forced to litigate the lawfulness of the Georgia tax in the Georgia courts, the Bank was sure to lose. For the nation, the case was even more significant. *Bank of the United States v. Deveaux* would graft onto the Constitution the first of many constitutional rights for corporations.

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The mission of the Bank of the United States was nothing less than to save America. Hamilton, George Washington's first secretary of the treasury, was the Founding Father most preoccupied with stabilizing the nascent nation's precarious economy. There were already a number of state-created banks, but their notes were unreliable. A federal bank, backed by Congress, would have the resources to guarantee its notes. Hamilton thought the Bank would be a more secure place for the federal government to stash deposits. Indeed, once established the Bank was a tremendous success and, according to historians, helped "to place American finance on a sound footing." Within five years of the Bank's creation, the United States had the highest credit rating in the world. Hamilton, then, was also the Founding Father of surely one of the most important corporations in American history.³

Hamilton had been inspired by the success of an earlier bank, the Bank of North America, founded during the Revolutionary War. Washington's army was short on rations and pay, soldiers were on the verge of mutiny, and the war had depreciated American currency to near worthlessness. The Bank of North America was proposed, like the later Bank of the United States, to create more reliable notes and insure liquidity. The plan worked to the benefit of both the nation and investors, who received annual dividends of 13–14 percent. The Bank of North America was

transformed into a private state bank in 1786, and today, after more than two centuries of mergers and reorganizations, remains a tiny part of Wells Fargo.⁴

Hamilton faced a significant hurdle in setting up his bank: the text of the Constitution. Did Congress have the power to create a corporation under the Constitution? In the vigorous debate over Hamilton's proposal for a bank in 1791, James Madison and Thomas Jefferson argued that Congress did not have that authority. No one would know better than Madison, one of the Constitution's primary authors. During the Constitutional Convention, Madison had proposed to give Congress the authority to charter corporations, but his proposal was rejected. As a result, Madison said Congress could not charter Hamilton's bank. Fortunately for Hamilton, the men who populated Congress at the time did not believe the only appropriate way to interpret the Constitution was by reference to the original intent of the Framers. With strong advocacy by northern commercial interests, which mobilized in favor of the Bank, Hamilton's bill was passed. President George Washington signed the law over the objections of Jefferson, his secretary of state. The law, along with spurring the creation of two separate political parties where once there was none, also breathed life into a uniquely powerful and influential corporation. The Bank of the United States would live only a short life, but its impact on the nation, the economy, and the Constitution was prodigious.⁵

In the early years, the Bank was quite conservative. It showed more interest in public service than in maximizing profit. Hamilton in his original proposal had advised, "Public utility is more truly the object of public banks than private profit." The Bank adhered to this wisdom, forsaking opportunities to make money for stockholders in order to maintain the stability of the nation's finances. "Arguments in favor of a Safe & Prudent Administration are paramount to all considerations of pecuniary interest," the board of directors instructed branch managers. In that spirit, the Bank in the 1790s and early 1800s was cautious in extending loans and maintained a large cash reserve. The Bank was nonetheless quite profitable, earning stockholders 8–10 percent annually.⁶

Still the Bank stoked passions. To Jefferson, the Bank was not just a financial institution; it was a threat to his vision of America. A populist who believed in the cause of the common man over the privileged interests of capital and wealth, Jefferson aspired for America to be a decentralized, agrarian society built upon a foundation of independent, yeoman farmers. The Bank, by contrast, represented the concentration of power in the hands of an unaccountable corporation

based in the North, one that used its effective control over lending to pursue a nationalist agenda. Moreover, its lending policies favored loans to commercial interests, like manufacturing and infrastructure, which threatened to pull more people from the farm. Increasingly, the borrowers on the receiving end of the Bank's loans were corporations—threatening to multiply the very entities Jefferson feared.⁷

The Bank also offended Jeffersonians' notion of states' rights. Jefferson and his emergent opposition party, the Democratic-Republicans, thought states should have broad authority to regulate business within their borders to promote the public interest. Yet the Bank, the nation's largest and most powerful corporation, was seemingly immune to state regulation because of the Constitution's supremacy clause. The Bank was created by Congress, and under Article VI of the Constitution, "the Laws of the United States . . . shall be the supreme law of the land." That meant that state lawmakers, who were used to complete control over the few corporations that might be in their states, had no say over the operations of the Bank. Despite stabilizing the economy, the Bank became "the target of every possible derogatory charge, of every species of vituperation." After Jefferson won the presidency in the bitterly disputed election of 1800, he promptly ordered the sale of all of the government's shares of the company stock. Yet even Jefferson, the archenemy of the Bank, found he could not live without it; when he left the presidency, he was deeply in debt and went to the Bank for a personal loan.⁸

Jefferson, however, was still in office wracking up those debts in 1805 when his allies in Georgia made a daring move against the Bank. Shortly after the Bank opened a new branch in Savannah, lawmakers, frustrated they could not prohibit the federal institution outright, instead imposed a tax on the Bank's locally held capital and notes. If the Bank wanted to do business in Georgia, it would have to pay dearly for the privilege. And if the tax were not enough to persuade the Bank to close up and go home, Georgia could always impose additional taxes.⁹

The usually conservative Bank responded with uncharacteristic brashness. Headquarters in Philadelphia instructed the Savannah branch officials to ignore the law and refuse to pay the tax. A century and a half before African American protestors sat in at lunch counters to force the nation to confront civil rights, the Bank of the United States similarly chose to engage in an act of civil disobedience to defend its rights. Not unlike the civil rights protestors, the Bank frankly admitted that it hoped the refusal to comply with the law would "bring the question before the Supreme Court of the United States."¹⁰

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Angry at the Bank's failure to pay the taxes, Peter Deveaux, a Georgia tax collector, decided to force the issue. Deveaux was known for his brash confidence, which had served him well before. As a soldier in the Revolutionary War, Deveaux once happened upon a group of American soldiers vengefully preparing to hang two ragged-looking spies captured after an American defeat. Deveaux risked his own life to intervene—and saved the lives of the two men, who turned out to be two American soldiers. One of the two was none other than John Milledge, who went on to become a US senator, governor of Georgia, and founder of the University of Georgia. In April 1807, amidst the controversy over the Bank, Deveaux once again stuck his neck out for what he thought was right. With “force and arms,” the tax collector barged into the Savannah branch of the Bank and carted off two boxes of silver coins.¹¹

The Bank wanted to turn to the courts for help. Yet filing a lawsuit in Georgia state court to contest the Georgia tax and the actions of a Georgia tax collector was not an appealing option. State judges were widely perceived at the time to be biased in favor of their home states and local residents. For a controversial out-of-state corporation like the Bank, justice was not likely to be found in the Georgia courts. So the Bank filed suit instead in federal court. It was not so much that the Bank was opposed to biased judges; it just wanted ones more likely to lean in the Bank's favor.

The federal courts might do just that, at least if the case made it up to the Supreme Court. By 1807, the high court bore the strong nationalist imprint of Chief Justice John Marshall. Like Hamilton, Marshall was a Federalist and a supporter of the Bank. Under his leadership, the Supreme Court was already becoming known for nationalist rulings that enhanced federal power and minimized states' rights. Georgia's tax on the Bank was a reaction against federal power and a manifestation of the Jeffersonians' robust view of states' rights. The Bank, created by Congress and operating nationwide, could fairly expect that Marshall's Supreme Court would naturally sympathize with it.

One potential pitfall for the Bank, however, was the text of the Constitution. Under Article III, section 2, the jurisdiction of the federal courts is limited; they can hear only certain types of cases. One type of case they are authorized to hear is a lawsuit “between Citizens of different States.” The Founders had the same worry as the Bank about biased state court judges. If both parties to a lawsuit were from the same state, neither would be disadvantaged by a judge's parochial allegiances and there was little need for a federal forum. If, however, the parties were

from different states, the federal courts should be available to protect the “foreigner” from unfair treatment. This constitutional doctrine is known as diversity jurisdiction, and it effectively creates a constitutional right of access to the federal courts when disputes involve citizens that are diverse—that is, from distinct states. One of the first laws passed by Congress was the Judiciary Act of 1789, which established the lower federal courts and, borrowing the language of Article III, provided explicit statutory authority for federal courts to hear disputes between diverse citizens. Given that Deveaux was a citizen of Georgia and the Bank was headquartered in Pennsylvania, the two parties to the Bank’s lawsuit were from different states and thus could be seen as diverse. The question facing the Bank was whether corporations counted as “Citizens” under the Judiciary Act and Article III of the Constitution—the exact same question *Dred Scott* posed a half-century later about African Americans.

The Framers at the Constitutional Convention who drafted Article III never paused to consider whether corporations, like ordinary people, should be guaranteed any rights under the Constitution, much less whether they enjoyed a right to sue in federal court. This was due in part to the fact that, during the colonial era, England had significantly curtailed the formation of ordinary business corporations after the South Sea Bubble of 1720. Foreshadowing what would happen with the East India Company half a century later, stock prices for the South Sea Company, which held a monopoly on trade with South America, soared in a speculative buying binge, only to tumble precipitously. It was the first international stock market collapse and it led Parliament to adopt the Bubble Act, which prohibited any unincorporated entity from having transferable shares. Coupled with an uncompromising refusal by successive English monarchs to grant charters to any business that had stock, the new law prevented any significant growth in the population of ordinary business corporations. That tradition of hostility to the stock corporation is why the industrial revolution in England was led primarily by businesses organized as partnerships, not by corporations as in the United States.¹²

In the years after the Constitution was ratified, the founding generation, liberated from English control, enthusiastically embraced the corporate form. Joseph Stancliffe Davis, the Stanford historian who discovered there were only a handful of corporations formed in the decade prior to the Constitutional Convention, found over three hundred business corporations chartered in the United States in the decade following ratification of the Constitution. It was a spurt of corporate growth without precedent. Americans formed corporations to produce silk, cotton, iron,

and maps; to construct aqueducts, dig mines, and run waterworks; and to operate ferries, banks, and insurance companies. Most of all, corporations were created to build the scores of turnpikes, bridges, and canals that began to stitch together the independent colonies into one nation with a single, national economy. John Adams, the second president of the United States—and, as we will see, the father of one of the earliest advocates for constitutional rights for corporations—was led to ask, “Are there not more legal corporations,—literary, . . . mercantile, manufactural, marine insurance, fire, bridge, canal, turnpike, &c. &c. &c.,—than are to be found in any known country of the whole world?”¹³

Hamilton’s faith in corporations was such that he was willing to rest the weight of the unsteady American financial system on the shoulders of one. Yet the Bank now faced a serious legal problem. It could not win in state court, yet how could it claim a right to sue in federal court in the absence of any evidence that the Framers intended to protect corporations? Moreover, the text of the Constitution seemed to go against the Bank too. Article III said that “Citizens” could sue in federal court, and citizens are generally thought to be natural people who belong by law to one country. They are members of a political community who owe their allegiance and support to a particular polity. If that was what the Constitution meant by the “Citizens” in Article III, then corporations like the Bank of the United States would not have any right to sue in federal court. And absent this fundamental right, the Bank would find itself, quite literally, regulated to death by Jeffersonians eager to shut it down.

* * *

The idea that a corporation could have legal rights similar to those of ordinary people might seem absurd. Corporations are fictional entities, created by people primarily for economic reasons. Nevertheless, the very reason the corporation was invented was to enable the establishment of a durable, legal entity that could exercise at least some legal rights. To understand why requires turning from the early United States to ancient Rome—and to the celebrated English scholar who first detailed the legal rights of corporations.

The earliest version of the corporation was created in Rome three centuries before the birth of Christ. Called a *societas publicorum*, this prototype was Rome’s answer to a pressing problem: how could a group of people hold property together and make contracts for their common enterprise over time without disruption? The Romans already had business partnerships, called *societas*, but they could be unreliable. The *societas*’s property, like that of a partnership today, was

owned by the partners in the partners' own names; there was no legal separation between the partnership and the partners. Moreover, Roman law required partnerships to be dissolved in any number of circumstances, such as when any one partner became insolvent or died. (Today, by contrast, partners can contractually agree to maintain the business in the event of one partner's departure.) In a time when life spans were short, the Roman partnership was useful as a way of aggregating capital but also created an unwelcome yet constant state of chaos for the businesspeople who tried to use it.¹⁴

The *societas publicoratum* offered much greater stability. It was authorized to own property and form contracts in its own name and did not have to be dissolved if a member died or went bankrupt. Because of these special privileges, the *societas publicoratum* had to be authorized by a decree of the Senate or the emperor. Individuals could form partnerships on their own, but only the sovereign had the authority to create a corporation. From the very beginning, sovereigns believed that corporations needed to be strictly controlled and limited.

Nonetheless, the corporation became quite successful in Rome. *Societas publicoratum* were created for shipbuilding, mining, public works projects, temple construction, and tax collection. Even some of these earliest corporations had a global impact. A 1997 study of ice core samples from Greenland found "unequivocal evidence of early large-scale atmospheric pollution" caused by Roman silver and lead mining corporations operating in southern Spain between 366 BC and AD 36.¹⁵

In the centuries to follow, the corporate form became popular for other sorts of organizations that also had the need to own property or form contracts in their own names, regardless of the shifting identity of their members. For example, beginning in the fourth century, the Catholic Church claimed to be a corporation so that it could receive gifts of land and hold that property in the Church's own name for perpetuity. Oxford University, which was founded sometime in the eleventh century—the precise date has been lost to history—was a corporation, as were the English guilds and even the City of London.¹⁶

In 1758, an English lawyer and Oxford professor named William Blackstone sought to bring some order to English law and, in particular, the legal status of the corporation. Blackstone's first love was not the law but architecture, and while still a teenager he wrote a much-praised treatise on "the art of building." As a lawyer, however, his practice was notable mostly for its lack of distinction. A priggish, ill-tempered man, Blackstone could not keep clients. He may have just

been a lousy lawyer; when he was appointed to the bench later in life, his rulings were reportedly overturned on appeal more than those of any other judge in London. Yet, as a scholar and chronicler of English law, Blackstone was without peer. His scholarly effort to detail, organize, and explain English law, published under the title *Commentaries on the Law of England*, would come to be hailed as the “most influential law book in Anglo-American history.”¹⁷

That influence was immediate, and not just in England. Thousands of copies were sold in the American colonies before the Revolution. Thomas Jefferson called Blackstone’s *Commentaries* “the most elegant and best digested of our law catalogue.” Years later, Abraham Lincoln advised anyone who wanted to be a lawyer to start by reading the *Commentaries*. For decades, lawyers would include Blackstone’s volumes in the background of their portraits. One historian said that “no other book—except the Bible—has played so great a role” in shaping American institutions. Even today, Blackstone’s *Commentaries* is cited about ten times a year by the Supreme Court of the United States.

The corporation was one of the topics that Blackstone tackled in the *Commentaries*: how it was formed, how it operated, and what legal rights and duties it had. He began his explanation by describing the corporation as an “artificial person.” By this Blackstone meant two things. First, the corporation was an independent legal entity in the eyes of the law, separate and distinct from the people who formed it. Second, as an independent legal entity, it had certain legally enforceable rights similar to those of a natural person.

An individual’s “personal rights die with the person,” Blackstone wrote. So “it has been 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.” Called “bodies corporate, or corporations,” these artificial persons “may maintain a perpetual succession, and enjoy a kind of legal immortality.” There were, Blackstone noted, “a great variety” of corporations used for such things as “the advancement of religion, of learning, and of commerce.”¹⁸

Blackstone analogized the corporation to a person because the individual human being was the paradigmatic legal actor in the minds of lawyers. Only people, not objects like tables or shrubs, had standing to make a claim in court seeking the law’s protections; only people had rights. Indeed, this remains a common frame of mind today. When proponents of animal rights go to court seeking legal protections for chimpanzees, for example, they claim the animals are “legal persons.” They do not necessarily mean that chimpanzees are exactly the same as human beings, or that they have

all the same rights as people, including the right to free speech, freedom of religion, or the right to bear arms. They mean only that chimpanzees should have standing before the law, that they have some rights entitling them to the court's attention.¹⁹

Because the corporation was its own independent, identifiable legal person, Blackstone wrote, it had to have a name. "When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all legal acts." The name of the corporation was not just a nicety. The name was "the very being of its constitution" and was essential to enable the entity to "perform its corporate functions." English courts took the corporation's name very seriously, voiding contracts for failing to state a corporation's formal name precisely. The name was so important for corporations for the exact same reason it was important for individuals: it was the signifier of the unique identity of that person. Acts taken in the corporate name were, in the eyes of the law, acts of the corporation—not acts of the members.

Today, corporations are typically thought of as private enterprises, created by private citizens to pursue profit for themselves. In Blackstone's day, however, corporations more clearly straddled the divide between public and private. They had unambiguously private aspects, in that they were financed and managed by private parties. Yet they were also inherently public. They could only be formed by charter granted by the government, and the government would not grant one unless the corporation had a public purpose. "The king's consent is absolutely necessary to the erection of any corporation," Blackstone noted. To be a separate, legally recognized entity required special governmental approval, and it would not be forthcoming if a corporation's mission were not "for the advantage of the public." Corporations had to serve the commonweal, whether it was by building a road, maintaining a bridge, or providing insurance. Individual investors took home profits, but the ultimate mission of the corporations had to be in the service of the public. Corporations, in other words, were both public and private enterprises at the same time.

Corporations were also strictly regulated in Blackstone's day. Today businesses are controlled through labor laws, consumer protection laws, environmental laws, workplace safety laws, and alike, but corporations in the 1700s were regulated primarily through their charters. The charter was both the corporation's birth certificate and the corporation's rulebook. It was the visible manifestation of the king's consent—and a tool for the king to control his creations. Charters were often detailed documents that set forth the corporation's mission, powers, and duties. They might dictate how much the corporation could charge for goods or services, how

much capital it could raise, and how corporate decisions were to be made. A corporation had a measure of autonomy, to be sure; Blackstone recognized that one of the fundamental attributes of the corporation was the power “to make by-laws or private statutes for the better government of the corporation.” Nevertheless, a corporation could only lawfully act in ways permitted by the government-issued charter. Anything else was beyond the power of the corporation—what the law would later term *ultra vires*—and unenforceable. Blackstone also identified another limit on the corporation’s power: its bylaws were “binding upon themselves, unless contrary to the laws of the land, and then they are void.”²⁰

Under English law, corporations nonetheless always possessed certain rights. “After a corporation is so formed and named,” Blackstone wrote, the law gives it “many powers, rights, capacities, and incapacities.” These rights are “necessarily and inseparably incident to every corporation.” As a separate legal entity, the corporation typically enjoyed the right to “purchase lands, and hold them”—in other words, the right of property. This was why the corporate form had been developed in ancient Rome, so that groups of people could own property together without the hassles and inefficiencies of partnerships. Corporations were designed to pull together the property interests of a diverse group of people for consolidated control. Without property rights, corporations could not function.

Another right of corporations was the right to form contracts. They had the legal power to make agreements with others—employees, suppliers, lenders—that would “bind the corporation.” Consistent with the legal requirements of his day, Blackstone noted that corporations could only form binding contracts with the use of a “common seal.” The seal, like the corporation’s name, served to differentiate the entity from the people who comprised it. “For though the particular members may express their private consent to any acts, by words, or signing their names, yet this does not bind the corporation,” he wrote. The corporation as a distinct legal person “acts and speaks only by its common seal.”

Blackstone also recognized that corporations had a third right: the right to “sue or be sued . . . by its corporate name.” Although Americans today may not always think of the right to sue and be sued as a fundamental right, it may in fact be the most vital because it is preservative of all the others. If someone takes your property or restricts your religious freedom, the right to sue enables you to defend your rights and obtain a lawful remedy. Without access to the courts, rights would be just words on paper with little practical significance. Of course, a corporation cannot

appear in court like an ordinary person. It must, Blackstone recognized, “always appear by attorney,” a representative of the corporation. The people who formed or ran the corporation could not appear in their own names. The suit had to be by or against the corporation itself.

These were the three core rights of any corporation: the right to own property, the right to make contracts, and the right of access to the courts. Each of these rights, Blackstone explained, was exercised by the corporation in its own name. The members of the corporation did not own the corporation’s property, the corporation did. The members of the corporation were not personally bound by the corporation’s contracts, the corporation was. The members of the corporation could not sue or be sued for legal controversies involving the corporation, only the corporation could. Corporations were their own independent entities under the law, separate and distinct from their members and with certain rights deserving of protection.

Although corporations were legal persons and had some legal rights, they did not have the exact same rights as individuals. Blackstone highlighted the differences between real people and corporations. “A corporation cannot commit treason, or felony, or other crime, in its corporate capacity: though its members may, in their distinct individual capacities.” With no physical body, the corporation could not “be committed to prison” or “be beaten.” Nor could the corporation swear an oath. Blackstone also wrote that corporations have special duties that individuals did not have. For example, corporations could be “visited” by authorities, who were allowed to “inquire into, and correct all irregularities that arise” should the corporations “deviate from the end of their institution.” Because of the unique features and characteristics of the corporation, the rights and duties of this artificial person were distinct from the rights and duties of ordinary individuals.

Blackstone’s understanding of the corporation is old but hardly outdated. Open any law book on corporations and one of the first things discussed is likely to be the strict separation between the corporate entity and its members. As George Field wrote on the first page of *A Treatise on the Law of Corporations*, published in 1877, a corporation is a “legal person” whose acts “are considered those of the body, and not those of the members composing it.” More than a century later, Harvard Law School dean Robert Charles Clark wrote in the opening pages of his own corporate law treatise, “One of the law’s most economically significant contributions to business life . . . has been the creation of fictional but legally recognized entities or ‘persons’ that are treated as having some of the attributes of natural persons.” And because the “law conceives corporations to be legal persons with certain powers and purposes,” the rights and obligations of corporations

do not transfer to their members, and vice versa. Because of this legal separation, the stockholders of a corporation are not liable for its debts; corporations have their own independent legal standing. According to the Supreme Court, the “basic purpose” of incorporation is “to create a legal entity distinct from those natural individuals who created the corporation, who own it, or whom it employs.” This idea—that a corporation is in the eyes of the law its own, separate legal person—remains “a general principle of corporate law deeply ingrained in our economic and legal systems.” It would not, however, be as successful in shaping American constitutional law.²¹

* * *

Blackstone’s *Commentaries* would be among the sources that Horace Binney, the young lawyer for the Bank of the United States, would use to argue for constitutional rights for corporations. Although the Framers had not set out to protect corporations, Binney was blessed with a creative mind. A precocious child from Philadelphia who grew up surrounded by power—President Washington’s residence was across the street and Hamilton lived next door—he went to Harvard College at the age of 14. To make friends and build camaraderie there, he founded a group he called the “Hasty Pudding Club,” which remains in existence today as the oldest collegiate social club in America. As a budding young lawyer, Binney’s innovative arguments quickly earned him the respect of the Pennsylvania bar, and he was still only in his twenties when he was hired in 1808 to represent the nation’s most preeminent corporation in the fight for its life.²²

Binney and the Bank filed suit in the federal court in Georgia to recover the money taken by Peter Deveaux. Binney was hopeful the Bank could receive a more fair hearing than in the state courts—and, even if not, the Bank would be prepared to appeal to the Supreme Court, whose justices were sure to lean in the Bank’s direction. The two judges who first heard the Bank’s case in the lower federal court in Georgia, however, were William Johnson, a sitting Supreme Court justice who hailed from South Carolina, and William Stephens, the local federal judge. Both had been appointed to the bench by Jefferson after his election to the presidency in 1800, and both shared the Sage of Monticello’s populist opposition to corporations like the Bank. If the philosophical leanings of the presiding judges were not enough of an obstacle, Binney also faced the daunting task of persuading them to give corporations the right of “Citizens” to sue in federal court.²³

Binney could possibly have argued that corporations were citizens because they enjoyed many of the characteristic features of citizenship. A corporation, like a citizen, could have a

nationality, a country to which it belonged. Today, for example, it is commonplace to ascribe a nationality to a corporation—to call General Motors an American company and Renault a French one—and the same was true in Binney’s era. In an 1814 case, Supreme Court justice Joseph Story explained that “where a corporation is established in a foreign country, by a foreign government, it is undoubtedly an alien corporation.” Nor would it have been completely outrageous for Binney to argue that a corporation was a citizen of a particular state—the type of citizenship at issue in diversity cases under the Judiciary Act and Article III. Then and now, a corporation is incorporated in one state and must follow that state’s laws on issues of corporate governance, such as the fiduciary duties of officers and the voting rights of stockholders. As in Binney’s day, Americans today might speak of a Delaware corporation or a New York corporation.²⁴

Even if corporations could arguably be seen as citizens for legal purposes, Binney understood how difficult it would be for him to win with such an argument. As a student of rhetoric and persuasion, he knew that even the most compelling logic falters if it defies common sense. Saying that corporations were “Citizens” under the Constitution was precisely such an argument. Citizenship was a status reserved for actual human beings. Binney nonetheless came up with a clever, even fateful, solution. If he could not persuade the courts that corporations were citizens, perhaps he could persuade them that his case was not really about a corporation.

Binney wanted to focus the court’s attention on the people behind the corporation. The Bank itself might not be a citizen under the Constitution, but what Binney called the Bank’s “members” were. The people who formed, ran, and financed the corporation were ordinary human beings entitled to all the rights provided in the Constitution. They undeniably were citizens, and Article III was written to protect their rights. This was not a case about the rights of a corporation. This was a case about the rights of the corporation’s members.

“A corporation is composed of natural persons,” Binney argued. Although the Bank was the formal party to the lawsuit, the “real parties” were the Bank’s members. If they were citizens of states other than Georgia, where Deveaux was a citizen, then they should have access to federal court to protect them “against fraudulent laws and local prejudices.” The purpose of the constitutional right to access federal court for diverse citizens was to reduce the possibility of local bias, and that same concern was present in the Bank’s case. The members of the locally reviled Bank were not likely to find an impartial judge in Georgia state court.²⁵

Binney's solution was to make the corporation invisible, to make it transparent, and, in effect, to hide its corporate-ness. He did not deny that a corporation was involved, yet he sought to make the corporate form irrelevant. He sought to collapse the distinction between the corporation and its members, suggesting the courts see right through the corporation and focus instead on the people who comprise it.

Corporate lawyers today have a name for this way of thinking about corporations. They call it "piercing the corporate veil." The ordinary rule, ever since the days of Blackstone, is that there is a strict separation between the corporation and the people behind it. Today, for example, if someone slips and falls at Walmart, courts do not impose liability on the individuals who own stock in the company; the corporation is the legally responsible entity. The injured person would have to sue Walmart rather than Walmart's stockholders. In a small number of highly unusual cases, however, the courts will pierce the corporate veil, ignoring the separate legal status of the corporation and imposing liability on the stockholders personally. Piercing the corporate veil in business law cases is very rare, and courts typically only do it when someone uses the corporate form to perpetuate a fraud or commit wrongdoing.²⁶

Binney wanted the courts to pierce the corporate veil, even though there was no fraud or wrongdoing by the Bank. He held that corporations and their members were not separate and distinct entities. Instead, Binney argued, corporations were associations of individuals, and they should be able to assert the same rights as the people who come together within them. This way of thinking about corporations under the Constitution would be repeated often by corporationalists throughout American history and ultimately prove to be profoundly influential in shaping constitutional rights for corporations.

Binney's influence, unlike Blackstone's, was not immediate. Judges Johnson and Stephens ruled against him and the Bank. Johnson authored the court's opinion. First, he rejected the idea that a corporation could be a citizen under Article III of the Constitution. "A corporation cannot with propriety be denominated a citizen of any state, so that the right to sue in this court under the Constitution can only be extended to corporate bodies by a liberality of construction, which we do not feel ourselves at liberty to exercise." Then Johnson rebuffed Binney's creative argument about piercing the corporate veil. "As a suit in right of a corporation can never be maintained by the individuals who compose it, either in their individual capacity or by their individual names, how

is the citizenship of the individuals of the corporate body ever to be brought into question by the pleadings?"²⁷

From Johnson's perspective, the law was clear. It was the Bank's money that was taken, not the money of the Bank's members. The Bank's stockholders were not parties to the case. If any of them had tried to sue Peter Deveaux in their own names, Johnson would have dismissed the case. Similarly, if Deveaux had sued the Bank's stockholders for some wrongdoing committed by the Bank, the corporation's members would have urged dismissal on the very same ground—that there was a strict separation between the rights of the corporation and the rights of those who form, own, or manage it. Johnson recognized, in other words, the same long-standing principle of law that Blackstone had explained in his *Commentaries*: corporations were their own independent legal entities, separate and apart from their members.

For Johnson, however, corporate personhood did not mean that corporations had the same constitutional rights as individuals. It meant the opposite. Corporations only had those rights appropriate for such a unique, specialized type of legal entity. So while corporations might have a right to own property or form contracts as appropriate for a business, they still had *fewer* rights than natural people: individuals had the right to sue in federal court on diversity grounds but corporations did not.

* * *

In 1790, when the justices of the Supreme Court convened for the very first time, they met not in Washington but in New York City, at the Royal Exchange Building. Located on Broad Street, near the current home of the New York Stock Exchange, the commercial building, which also housed an open-air market, was nonetheless an appropriate locale for the court. Over the following two centuries, the Supreme Court would frequently side with business interests. One measure of the court's business-friendly attitude was the gradual expansion of numerous constitutional rights to corporations—a phenomenon that began with Horace Binney's case on behalf of the Bank of the United States.²⁸

Oral argument in *Bank of the United States v. Deveaux* took place in February of 1809, and the justices were no longer holding court in the Royal Exchange but in, of all places, a pub. When the court first moved to Washington, the justices were given a committee room in the Capitol Building to hear cases. Beginning in 1808, however, renovations were undertaken on the building and the justices were forced to move into a drafty, frigid library on the second floor. The justices

decided to hear their cases instead across the street in the cozier confines of Long's Tavern. Although one envisions the justices hearing cases while tipsy on port, this location too was appropriate in its own way: by some accounts, Long's Tavern was located on the same plot of land where the majestic neoclassical Cass Gilbert–designed Supreme Court Building sits today.²⁹

Binney told the justices they should pierce the corporate veil. To decide this case, they ought to look right through the corporate form and allow the Bank to sue in federal court because the Bank's *members* were "Citizens." "A corporation is a mere collection of men," Binney insisted. The "spirit of the constitution," he insisted, required the "residence and inhabitancy [of] the particular members" ought to control. The Framers guaranteed the right to sue in federal court to protect people from the biases of local judges, and denying the corporation's members such access "would be a result clearly contrary to the intention and spirit of the constitution."³⁰

Another lawyer who appeared before the Supreme Court at the same time as Binney was John Quincy Adams. At 44, the son of the second president of the United States had already been a US senator and a professor at Harvard, and was about to be named minister to Prussia. Just months after the Bank case, Adams would be nominated and confirmed to the nation's highest court himself. He declined, thinking the Supreme Court position somewhat of an insult; after all, he was by then busy negotiating the fate of the world with the tsar. Yet back in February, Adams was still practicing law, which was what brought one of the most legendary figures in American history to Long's Tavern at the same time as Binney. Adams's case, *Hope Insurance v. Boardman*, would be his last appearance in the Supreme Court for thirty-two years, when he returned in 1841 as the former president to argue in the famous *Amistad* case for the rights of Africans held in slavery.³¹

Historians have written off the *Hope Insurance* case as "of little consequence." Yet, along with the *Bank of the United States* case, it was part of the first set of corporate rights cases. And much as he would later argue for the constitutional rights of slaves, Adams argued here for the constitutional rights of corporations. Adams was representing two Boston men whose case against the Hope Insurance Company, a Rhode Island insurance corporation, raised the same issue of corporate citizenship under the Judiciary Act and Article III. Adams, however, was seeking to vindicate the other side of the corporation's right to sue: the right to *be* sued. Recall that Blackstone described the corporation as typically having the right to sue and to be sued. The corporation's legal standing could be used by the corporation when it sued someone, as in the Bank's case, or

by others when they sued the corporation. The latter was the type of case Adams had. His clients wanted to sue in federal court because they thought the judiciary of Rhode Island, where Hope Insurance was located, would be biased in favor of the company. Although Binney and Adams were coming at the problem from different angles, they ended in the same place: corporations, both argued, should have the right to sue and be sued in federal court.³²

Rounding out the all-star cast of lawyers was Jared Ingersoll, a former member of the Constitutional Convention of 1787 who was appearing on behalf of Hope Insurance, and Philip Barton Key, who represented Peter Deveaux, the Georgia tax collector. Key, the uncle of “The Star-Spangled Banner” lyricist Francis Scott Key, was perhaps in some ways the most extraordinary of the remarkable figures who gathered in Long’s Tavern. Key had fought in the Revolutionary War on the side of the British, but he became the rare Loyalist welcomed back into the upper echelons of American society after Independence. He was elected to Congress, served for a short time as a federal judge, and then returned to private practice, where he represented powerful clients. In 1805, for instance, four years before the Bank case, Key successfully defended Supreme Court justice Samuel Chase in his impeachment trial, establishing a precedent—still adhered to today—that federal judges could not be impeached for political reasons. So when Key appeared before the justices in the corporate rights case, he could count on the personal gratitude of one justice and the warm appreciation of all the others.³³

Key’s argument for limiting corporate rights was centered on corporate personhood. “But it is said that you may raise the veil which the corporate name interposes, and see who stand behind it,” said Key, in response to Binney’s argument. The Bank’s lawsuit, however, “is brought in the corporate name.” The members “expressly averred themselves to be a body corporate, and to sue in that capacity.” The Bank itself, “not the individual stockholders,” was the plaintiff. Using an argument that populists would make often in the two hundred-plus years of corporate rights cases, Key insisted that the corporation and its members must be deemed separate and distinct under the law. “No corporation . . . can derive aid from the personal character of its members; nor does it incur any disability from [their] disabilities,” Key told the justices. The purpose of the corporation was to be an independent legal actor, separate and apart from the people who create it. The court, Key argued, was without the “power to examine the character of the individuals to ascertain whether the corporation has a right to sue in a certain court.” The question was whether

corporations were “Citizens” under the Judiciary Act and Article III, not whether their members were.

When Adams rose to address the justices, he was forced to admit Key’s point, that under the law a corporation was traditionally deemed a person with its own separate legal identity. A corporation’s “powers, its duties and capacities are different from those of the individuals of whom it is composed,” Adams recognized. “It can neither derive benefit from the privileges, nor suffer injury by the capacities, of any of those individuals.” Nonetheless, he argued, the court should still ignore the corporate form. The justices, he advised, should rule that corporations were citizens under Article III because that would serve the basic purposes of diversity jurisdiction—perhaps even more so in the case of a corporation than in one involving an individual. “If there was a probability that an individual citizen of a state could influence the state courts in his favor, how much stronger is the probability that [the courts] could be influenced in favor of a powerful moneyed institution which might be composed of the most influential characters in the state?” In determining whether corporations had constitutional rights, Adams argued, the justices should not be “limited by the letter of the constitution” but should instead promote the broad purposes of the text.

Bank of the United States v. Deveaux and its companion case, *Hope Insurance*, thus presented the Supreme Court with two different ways of thinking about the constitutional rights of corporations. Like the populist Justice Johnson, Key argued that corporations were people— independent entities with legal rights and obligations separate and apart from the people who make them up. Due to that legal separation, the rights and duties of the members did not transfer to the corporation, or vice versa. The question facing the court was whether corporations, as such, were citizens guaranteed the right to sue in federal court. Horace Binney and John Quincy Adams argued conversely that corporations were associations—collectivities that enjoyed the same rights and obligations as their members. According to this more corporationalist perspective, the courts should pierce the corporate veil and ask whether the corporation’s members were citizens guaranteed the right to sue in federal court.³⁴

These two contrasting ways of thinking about corporations were first introduced to American law in the *Bank of the United States* and *Hope Insurance* cases. Ever since, the history of corporate rights has largely been a struggle between the disparate poles of personhood and piercing, between populists and corporationalists. Today’s critics of *Citizens United* often blame

corporate personhood for the Supreme Court’s expansive protection of corporate rights. Yet historically, the logic of personhood has usually been employed by populists seeking to narrow or limit the rights of corporations. By contrast, expansive constitutional rights for corporations have frequently been a product of the corporationalist logic of piercing. When the Supreme Court has ignored the corporate form and looked to the rights of the individuals who made up the corporation, the rulings naturally tended to give corporations nearly all the same rights as individuals. Expansive constitutional rights for corporations were built into the logic of piercing.

After the hearing, Adams confided in his diary that his presentation to the justices had not gone well. “The ground which I was obliged to take appeared to the court untenable, and I shortened my argument, from the manifest inefficacy of all that I said to produce conviction upon the minds of any of the Judges.” He need not have been so worried. For despite Jefferson’s appointment of justices like Johnson to the Supreme Court, Hamiltonian justices like Chief Justice John Marshall and Samuel Chase, who favored corporate rights, remained in control.³⁵

* * *

In the *Bank of the United States* case, Hoarce Binney was asking the Supreme Court to exercise its fundamental power of judicial review—its authority to determine the constitutionality of laws and strike them down. Binney and the Bank hoped to have Georgia’s tax on the Bank declared unconstitutional and void. The origins of this power of courts to invalidate duly passed laws have long been obscure. At the time of the Revolution, English courts did not have this ability to review acts of the legislature. For many years, Chief Justice Marshall was credited with inventing judicial review “out of the constitutional vapors” (in one historian’s memorable description) in the celebrated 1803 case of *Marbury v. Madison*. In truth, however, judicial review is another of the distinctive features of American constitutionalism that can be traced back to the corporation.³⁶

Recall that Blackstone wrote that corporate bylaws “contrary to the laws of the land . . . are void.” As an earlier treaty from 1659 phrased it, bylaws must not be “repugnant to the Laws of the Nation.” In England, where there was no written constitution, the “laws of the land” were those adopted by Parliament. Colonial corporate charters explicitly referenced this principle of repugnancy. The Virginia Company’s revised charter of 1611, for example, provided that the corporation could enact bylaws for its own governance if they “be not contrary to the laws and statutes of this our realm of England.” The principle of repugnancy grew to serve as a restriction on colonial legislatures, the bodies empowered by the charters to adopt bylaws for the colonies.

The Privy Council in England reviewed over 8,500 acts of the colonial legislatures for repugnancy before the Revolution. That practice of repugnancy review was gradually transformed from a limit on English corporations into a limit on colonial lawmaking.³⁷

In England, the laws passed by Parliament were the supreme law of the land. In nascent America, however, the supreme law of the land was found in the Constitution of the United States. Hamilton referred to this in *Federalist 78*, where he famously described the duty of the judicial branch “to declare all acts contrary to the manifest tenor of the Constitution void.” Hamilton dismissed the worry that “courts, on the pretense of a repugnancy, may substitute their own pleasure” for that of the legislature. The repugnancy principle also appeared in the Judiciary Act of 1789, which authorized the Supreme Court to review state laws alleged to be “repugnant to the constitution, treaties or laws of the United States.” Marshall’s opinion in *Marbury* referred to this key principle that grew out of corporate law too. The question in that case, Marshall wrote, was “whether an act, repugnant to the Constitution, can become the law of the land.” A “law repugnant to the Constitution is void,” Marshall explained, and therefore the courts were obliged to invalidate it.³⁸

Over the course of American history, the power of judicial review would be used by the Supreme Court to transform the nation. Most famously, the court would employ this authority in the civil rights era to tear down Jim Crow in cases like *Brown v. Board of Education*, voiding laws requiring racially segregated schools, and *Loving v. Virginia*, holding prohibitions on interracial marriage to be contrary to the Constitution. The court used the power of judicial review to vindicate the rights of women in the 1970s, the rights of the disabled in the 1980s, and the rights of sexual-orientation minorities at the turn of the twenty-first century. For most of American history, though, the Supreme Court more often used judicial review to benefit business. And one of the earliest examples was the Bank case of 1809, in which Chief Justice Marshall and the Supreme Court invoked that power to establish the first constitutional right for corporations.

* * *

Like Alexander Hamilton, John Marshall favored the growth of corporate enterprise and supported the Bank of the United States in particular. In his opinion for the court in *Bank of the United States v. Deveaux*, Marshall enthusiastically embraced Horace Binney and John Quincy Adams’s theory about how to think about corporations under the Constitution. (Despite Adams’s poor performance, the future president won his case too. Although there was no separate opinion in

Hope Insurance, the Supreme Court reporter directed readers to see the opinion in *Bank of the United States*, which decided the same issue, “the right of a corporation to litigate in the courts of the United States.”)³⁹

Marshall’s opinion admitted that the question involved in the case was “one of much . . . difficulty.” First he examined the Bank’s charter of incorporation to see if Congress, in creating the Bank, had explicitly conferred upon it the right to sue and be sued in federal court. Although the charter did explicitly grant the Bank “a capacity to make contracts and acquire property, and enables it ‘to sue and be sued’”—the three core rights identified by Blackstone—Marshall said that was insufficient. Congress could have meant only to grant the Bank the right to sue and be sued in *state* court. To extend to corporations the right of access to *federal* court, however, would have required Congress to say so explicitly.⁴⁰

The question, then, turned not on the meaning of the Bank’s charter but on the meaning of the Constitution. Although Marshall recognized that the law often deemed a corporation to be a legal person—“for the general purposes and objects of a law,” the corporation was often “included within terms of description appropriated to real persons”—a corporation was “certainly not a citizen.” That title was reserved to human beings, and there was no evidence from the founding period that the citizens referred to in Article III included corporations.

Yet that still did not answer the question conclusively, Marshall explained, because constitutions were to be read expansively. “A Constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.” The purpose of diversity jurisdiction under Article III was to protect people against potentially parochial and biased state courts. The court was obliged to read Article III to fulfill that promise, which in Marshall’s view meant extending the right to sue and be sued in federal court to corporations—regardless of the fact that corporations were not citizens.

While Marshall embraced John Quincy Adams’s argument about the purposes of Article III, he also pierced the corporate veil as Horace Binney had suggested. Corporations might not be citizens, but their members were. Marshall described the corporation as an “invisible, intangible, and artificial being,” employing a phrase he would use again in another corporate rights case, *Dartmouth College v. Woodward*, decided a decade later. What Marshall meant was that corporations were too ethereal to be the basis for constitutional rights and that, instead, the court

should focus on the corporation's members. "Substantially and essentially, the parties in such a case" are the "members of the corporation." The corporation was just a stand-in for a group of "individuals who, in transacting their joint concerns, may use a legal name." Because the people who associated together within the corporation were the real parties to the case, Marshall held, *their* citizenship should control. According to Elizabeth Pollman and Margaret Blair, two of the few scholars to have carefully studied the *Bank of the United States* case, Marshall "looked to the natural persons composing a corporation." As Marshall himself stated in the opinion, the court was obliged to "look beyond the corporate name and notice the character of the individual."⁴¹

An astute legal craftsman, Marshall knew that his reasoning ran counter to the traditional way the law had treated corporations—as independent legal entities with rights and obligations separate and distinct from those of their members. His opinion surveyed a series of English cases dealing with the ability of corporations to sue and be sued more generally, admitting sheepishly that they provided "more strong" support for treating a corporation as its own legal person rather than "to consider the character of the individuals who compose it." Nevertheless, Marshall insisted, "this technical definition of a corporation" should be set aside to protect the rights of the corporation's members, who undoubtedly were citizens.

Although Marshall based a corporation's ability to sue in federal court on the citizenship of its members, the esteemed jurist never identified who exactly counted as a member of a corporation. Was it the stockholders? The employees? The directors? *Bank of the United States v. Deveaux* offered no answer, even though the logic of piercing made this question vitally important. In 1806, three years prior to the *Bank of the United States* case, the Supreme Court held in another case involving diversity jurisdiction that the parties must be completely diverse; all of the plaintiffs must be from different states than all of the defendants. Even today, the requirement of complete diversity remains the law of the land. Yet because Marshall did not specify who counted as a member of the corporation, he never bothered to ask whether, in fact, all of the Bank's members were diverse from Peter Deveaux. Given the Bank's relatively large class of stockholders, it was likely that at least one hailed from Deveaux's home state of Georgia, which meant there would not be complete diversity. In Marshall's rush to extend corporations the right to sue in federal court, he skipped right over this issue and declared that the Bank had the right to sue the tax collector in federal court. He declared the rights of the members paramount, but the actual membership remained abstract and undefined.

Chief Justice Marshall's embrace of piercing was nevertheless so complete that *Bank of the United States*, though mostly overlooked today as a constitutional law case, is from time to time still cited for establishing the business law doctrine of veil piercing. As previously noted, however, piercing the veil in business law cases is limited to rare cases involving fraud or abuse; it is the exception, not the rule. In constitutional law, by contrast, the exception would become the rule. And although modern corporate rights cases like *Citizens United* do not cite *Bank of the United States*, the court's approach in that ancient case nonetheless features prominently throughout the two centuries of corporate rights jurisprudence that followed in its wake. Piercing the veil, and allowing a corporation to claim the rights of its members, would be the conceptual tool the court would use to justify the extension of a wide variety of constitutional rights to corporations.

* * *

The Bank of the United States was a constitutional first mover. Although the text of the Constitution did not explicitly grant any protections to corporations, the Bank set out to secure an authoritative ruling by the Supreme Court recognizing the Bank's rights. In time, other movements would follow a similar pathway to secure their civil rights. Yet the Bank's victory was both long-lasting and short-lived. It was durable in that the general principle established by the decision—that corporations have constitutional protections—remains firmly embedded in American law. The triumph was temporary in that the Bank would not survive long enough to exercise its newfound constitutional freedom.

When Chief Justice Marshall handed down the court's ruling in March of 1809, the Bank of the United States faced the threat of imminent closure. While modern corporations typically enjoy perpetual life, Congress had only chartered the Bank for twenty years as a compromise to attract the votes necessary to pass Hamilton's controversial law. That meant the Bank would need to obtain a new charter from Congress in 1811 if it were to carry on. Hamiltonian backers of the Bank had already begun lobbying Congress to renew the charter when *Bank of the United States v. Deveaux* was argued before the Supreme Court. Jeffersonians remained firmly opposed, and the bitter partisanship of the first Bank debate manifested itself once again.

That larger context explains why an important question in the *Bank of the United States* case was left unanswered by the court. Marshall's opinion said nothing about the legal issue that led the Bank to sue in the first place: Did the Constitution permit a state like Georgia to tax a

federal corporation like the Bank? Students of constitutional law will recognize that to be the same question at issue in *McCulloch v. Maryland*, a landmark Supreme Court case from 1819 that held states could *not* impose such taxes on federal entities. *McCulloch* remained to be decided only because Marshall had ducked that same question a decade earlier in the first corporate rights case. Marshall's opinion avoided the issue entirely, returning the case to the lower court for consideration instead. It was not an oversight. Marshall was trying to protect the Bank. A Supreme Court ruling prohibiting states from taxing the Bank would only inflame populists opposed to reissuing the Bank's charter.⁴²

In the congressional deliberations over extending the charter, the Bank's prospects appeared at first quite dim. Then the Bank received unexpected support from two of its most vociferous and abiding critics, James Madison and Thomas Jefferson. Although both men had opposed the original creation of the Bank, their views ultimately changed, likely due to having subsequently seen the issue from the vantage point of the White House. Madison, who was president during the debate over renewal of the charter, and Jefferson, who had just finished his two terms in office, came to recognize how the Bank strengthened the economy, stabilized the nation's finances, and eased credit—everything Hamilton, the father of the Bank, had said it would. By endorsing the renewal of the Bank's charter, Madison, who had once insisted that the Framers never gave Congress the power to create corporations, revealed that not even the author of the Constitution believed it truly necessary to adhere to the original understanding. Jefferson, meanwhile, simply abandoned his Jeffersonianism.⁴³

Madison and Jefferson's support buoyed the northern commercial interests who favored extending the life of the Bank, but it was not enough. In Congress, the Bank's renewal lost by a single vote and the charter expired. The Bank of the United States was shut down. The Bank died an early death, but its impact on the Constitution and corporate rights would be profound. The Bank had fought and won the first case affording corporations rights under the Constitution, and many corporations to come would build on that foundation in seeking additional protections. Frequently, those cases would present the court with the same choice between two different ways of conceptualizing the corporation—as a person or as an association. Is a corporation, as Blackstone said, a legal person with rights of its own? Or is a corporation, as Binney and Marshall said in *Bank of the United States*, best understood to be an association of people whose rights are derived from the members?

One of the corporations to carry on the Bank's fight would be its younger sibling, the Second Bank of the United States. In 1812, a year after the first Bank's renewal vote, America went to war with Britain, and the absence of a national bank made financing the military effort difficult. President Madison finally succeeded in pushing Congress to charter a new bank in 1816. Like the original Bank, the Second Bank would also pursue constitutional rights in the Supreme Court. But the Second Bank would be represented by perhaps the most famous lawyer ever to practice before the high court, Daniel Webster. Corporate rights would help make Webster's name legendary—but would also lead, in his own lifetime, to despair.

NOTES

Introduction

¹ Conkling and his fraudulent account of the drafting of the Fourteenth Amendment are discussed in more detail in chapter 4, *infra*.

² See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010); Richard McGregor, “Obama Launches Re-Election Campaign,” *Financial Times*, May 6, 2012; Greg Stohr, “Bloomberg Poll: Americans Want Supreme Court to Turn Off Political Spending Spigot,” *Bloomberg News*, September 28, 2015, available at <https://www.bloomberg.com/politics/articles/2015-09-28/bloomberg-poll-americans-want-supreme-court-to-turn-off-political-spending-spigot>; Allegra Pocinki, “16 States Call to Overturn ‘Citizens United,’” July 8, 2013, available at <http://www.publiccampaign.org/blog/2013/07/08/16-states-call-overturn-%E2%80%98citizens-united%E2%80%99>.

³ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014).

⁴ Cass R. Sunstein, “The Supreme Court Follows Public Opinion,” in *Legal Change: Lessons From America’s Social Movements*, ed. Jennifer Weiss-Wolf and Jeanine Plant-Chirlin (2015), 21. On social movements and the Constitution, see Jack M. Balkin and Reva B. Siegel, “Principles, Practices, and Social Movements,” 154 *University of Pennsylvania Law Review* 927 (2006); William N. Eskridge Jr., “Channeling: Identity-Based Social Movements and Public Law,” 150 *University of Pennsylvania Law Review* 419 (2001).

⁵ See Adolf A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (1948), liii. Among those who noticed and wrote about the constitutional rights of corporations before *Citizens United* were Carl J. Mayer, “Personalizing the Impersonal: Corporations and the Bill of Rights,” 41 *Hastings Law Journal* 577 (1990); Susanna K. Ripken, “Corporations Are People Too,” 15 *Fordham Journal of Corporate & Finance Law* 97, 118 (2009); Henry N. Butler and Larry E. Ribstein, *The Corporation and the Constitution* (1995); Peter J. Henning, “The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions,” 63 *Tennessee Law Review* 793 (1996); Gregory A. Mark, “The Personification of the Business Corporation in American Law,” 54 *University of Chicago Law Review* 1441 (1987); Ted Nace, *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy* (2003); Thom Hartmann, *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights* (2002); Scott R. Bowman, *The Modern Corporation and American Political Thought: Law, Power, and Ideology* (1995).

Only the freedom of speech for corporations had been subject to extensive study before *Citizens United*, mostly in the area of campaign finance law. See, e.g., Daniel J. H. Greenwood, “Essential Speech: Why Corporate Speech Is Not Free,” 83 *Iowa Law Review* 995 (1998); Richard L. Hasen, “Campaign Finance Laws and the Rupert Murdoch Problem,” 77 *Texas Law Review* 1627 (1999); Thomas W. Joo, “The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence,” 79 *Washington University Law Quarterly* 1 (2001); Martin H. Redish and Howard M. Wasserman, “What’s Good for General Motors: Corporate Speech and the Theory of Free Expression,” 66 *George Washington Law Review* 235 (1998); Jill E. Fisch, “Frankenstein’s Monster Hits the Campaign Trail: An Approach

to Regulation of Corporate Political Expenditures,” 32 *William & Mary Law Review* 587 (1991); Victor Brudney, “Business Corporations and Stockholders’ Rights Under the First Amendment,” 91 *Yale Law Journal* 235 (1981); Mark Tushnet, “Corporations and Free Speech,” in *The Politics of Law*, ed. David Kairys (1982), 253.

Since *Citizens United*, scholarly attention to corporate constitutional rights has increased dramatically. See, e.g., Margaret M. Blair and Elizabeth Pollman, “The Derivative Nature of Corporate Constitutional Rights,” 56 *William & Mary Law Review* 1673 (2015); Elizabeth Pollman, “Reconceiving Corporate Personhood,” 2011 *Utah Law Review* 1629; Reuven S. Avi-Yonah, “Citizens United and the Corporate Form,” 2010 *Wisconsin Law Review* 999; Darrell A. H. Miller, “Guns, Inc.: *Citizens United*, *McDonald*, and the Future of Corporate Constitutional Rights,” 86 *New York University Law Review* 887 (2011); Lucian A. Bebchuk and Robert J. Jackson Jr., “Corporate Political Speech: Who Decides?,” 124 *Harvard Law Review* 83 (2010); Ryan Azad, “Can a Tailor Mend the Analytical Hole? A Framework for Understanding Corporate Constitutional Rights,” 64 *UCLA Law Review* 452 (2017); Anne Tucker, “Flawed Assumptions: A Corporate Law Analysis of Free Speech and Corporate Personhood in *Citizens United*,” 61 *Case Western Reserve Law Review* 497 (2010); Monica Youn, “First Amendment Fault Lines and the *Citizens United* Decision,” 5 *Harvard Law & Policy Review* 135 (2011); Robert Post, *Citizens Divided: Campaign Finance Reform and the Constitution* (2014); Lucian A. Bebchuk and Robert J. Jackson Jr., “Shining Light on Corporate Political Spending,” 101 *Georgetown Law Journal* 923 (2013); Ilya Shapiro and Caitlyn W. McCarthy, “So What if Corporations Aren’t People?,” 44 *John Marshall Law Review* 701 (2011); Sonja R. West, “The Media Exemption Puzzle of Campaign Finance Laws,” 164 *University of Pennsylvania Law Review Online* 253 (2016); Richard L. Hasen, *Plutocrats United: Campaign Money, The Supreme Court, and the Distortion of American Elections* (2016); Michael W. McConnell, “Reconsidering *Citizens United* as a Press Clause Case,” 123 *Yale Law Journal* 412 (2013); Kent Greenfield, “In Defense of Corporate Persons,” 30 *Constitutional Commentary* 309 (2015); Ciara Torres-Spelliscy, *Corporate Citizen? An Argument for the Separation of Corporation and State* (2016); Burt Neuborne, “Of ‘Singles’ Without Baseball: Corporations as Frozen Relational Moments,” 64 *Rutgers Law Review* 769 (2012); Thomas Wuil Joo, “Corporate Speech and the Rights of Others,” 30 *Constitutional Commentary* 335 (2015); David H. Gans and Douglas T. Kendall, “A Capitalist Joker: The Strange Origins, Disturbing Past, and Uncertain Future of Corporate Personhood in American Law,” 44 *John Marshall Law Review* 643 (2010); Jeff Clements, *Corporations Are Not People: Reclaiming Democracy From Big Money and Global Corporations* (2d ed., 2014). On the longer history of corporate constitutional rights cases in the Supreme Court, see Blair and Pollman, “The Derivative Nature of Corporate Constitutional Rights,” and Ruth H. Bloch and Naomi Lamoreaux, “Corporations and the Fourteenth Amendment,” in *Corporations and American Democracy*, ed. Naomi R. Lamoreaux and William J. Novak (2017), 286.

⁶ On the Supreme Court’s repeated failure to rule on the side of women, racial minorities, and the common people more generally, see Ian Millhiser, *Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted* (2016).

⁷ See Lee Epstein et al., “How Business Fares in the Supreme Court,” 97 *Minnesota Law Review* 1431 (2013); Jeffrey Rosen, “Supreme Court Inc.,” *New York Times*, March 16, 2008. See also Adam Liptak, “Corporations Find a Friend in the Supreme Court,” *New York Times*, May 4, 2013. For a fuller analysis of, and some skepticism about, the business leanings of the recent Supreme Court, see Jonathan H. Adler, ed., *Business in the Roberts Court* (2016).

⁸ On the political activity of large firms, see David Vogel, *Fluctuating Fortunes: The Political Power of Business in America* (1989); Wendy L. Hansen and Neil J. Mitchell, “Disaggregating and Explaining Corporate Political Activity: Domestic and Foreign Corporations in National Politics,” 94 *American Political Science Review* 891 (2000); Amy J. Hillman, “Determinants of Political Strategies in US Multinationals,” 42 *Business & Society* 455 (2003); Martin B. Meznar and Douglas Nigh, “Buffer or Bridge? Environmental and Organizational Determinants of Public Affairs Activities in American Firms,” 38 *Academy of Management Journal* 975 (1995).

⁹ See Ganesh Sitaraman, “The Puzzling Absence of Economic Power in Constitutional Theory,” 101 *Cornell Law Review* 1445, 1448, 1455–1465 (2016); Benjamin I. Page et al., “Democracy and the Policy Preferences of Wealthy Americans,” 11 *Perspectives on Politics* 51 (2013); Kay Lehman Schlozman et al., *The Unheavenly Chorus* (2012); Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012). On the ties between regulated industry and business political activity, see Kevin Grier et al., “The Determinants of Industrial Political Activity, 1978–1986,” 88 *American Political Science Review* 911 (1994); Amy J. Hillman and Michael A. Hitt, “Corporate Political Strategy Formation: A Model of Approach, Participation, and Strategy Decisions,” 24 *Academy of Management Review* 825 (1999). On the profit motive for corporate political activity, see Neil J. Mitchell et al., “The Determinants of Domestic and Foreign Corporate Political Activity,” 59 *Journal of Politics* 1096 (1997). See also Amy J. Hillman et al., “Corporate Political Activity: A Review and Research Agenda,” 30 *Journal of Management* 837 (2004).

¹⁰ On the shareholder wealth maximization norm, see Stephen M. Bainbridge, “In Defense of the Shareholder Wealth Maximization Norm,” 50 *Washington & Lee Law Review* 1423 (1993).

Chapter 2

¹ On the Bank of the United States, see Edward S. Kaplan, *The Bank of the United States and the American Economy* (1999); James O. Wettereau, “New Light on the First Bank of the United States,” 61 *Pennsylvania Magazine of History and Biography* 263 (1937); John H. Wood, *A History of Central Banking in Great Britain and the United States* (2005); James Stuart Olson, “Bank of the United States,” in *Encyclopedia of the Industrial Revolution in America* (2002), 21.

² See Henry Clay, “On a National Bank” (1811), in *The Life and Speeches of Henry Clay*, ed. James Barrett Swain (1843), 1:80.

³ See Jerry W. Markham, *A Financial History of the United States: From Christopher Columbus to the Robber Barons* (2002), 1:126.

⁴ On the Bank of North America, see Kaplan, *The Bank of the United States*, ix; Simeon E. Baldwin, “American Business Corporations Before 1789,” 8 *American Historical Review* 449, 458–459 (1903); Lawrence Lewis, *A History of the Bank of North America* (1882); Todd Wallack, “Which Bank is the Oldest? Accounts Vary,” *Boston Globe*, December 20, 2011, available at <http://www.bostonglobe.com/business/2011/12/20/oldest-bank-america-accounts-vary/WAqvIlmipfFhyKsx8bhgAJ/story.html>.

⁵ See Wood, *A History of Central Banking*, 124–125.

⁶ See Wettereau, “New Light on the First Bank,” 272, 284.

⁷ See Markham, *A Financial History of the United States*, 1:124–126; *ibid.*, 281.

⁸ See Markham, *A Financial History of the United States*, 1:126; Charles W. Calomiris, “Banking: Modern Period,” in Joel Mokyr, *Oxford Encyclopedia of Economic History* (2003), 1:227–228.

⁹ See W. Calvin Smith, “Banks, Law, and Politics: The Origins, Outcome and Significance of the Deveaux Case,” *Proceedings of the South Carolina Historical Association*, Spring 1991, 9, 11; Wettereau, “New Light on the First Bank,” 276–277.

¹⁰ See Smith, “Banks, Law, and Politics,” 11.

¹¹ On Peter Deveaux, see Lucian Lamar Knight, *Georgia’s Landmarks, Memorials, and Legends* (1914), 539; Wm. Overton Harris, “A Corporation as a Citizen in Connection With the Jurisdiction of the United States Courts,” 1 *Virginia Law Review* 507 (1914); Georgia Historical Society, “Deveaux, Peter, 1752–1826,” available at <http://georgiahistory.pastperfect-online.com/37659cgi/mweb.exe?request=record;id=Deveaux,%20Peter,%201752-1826;type=702>; George White, *Historical Collections of Georgia* (1855), 219. For a detailed history of the Deveaux litigation, see Smith, “Banks, Law, and Politics,” 9.

¹² See Stuart Banner, *Anglo-American Securities Regulation: Cultural and Political Roots, 1690–1860* (2002), 75–80; Ron Harris, “The Bubble Act: Its Passage and Its Effects on Business Organization,” 54 *Journal of Economic History* 610 (1994); see Pauline Maier, “The Revolutionary Origins of the American Business Corporation,” 50 *William and Mary Quarterly* 51 (1993).

¹³ James Stancliffe Davis, *Essays in the Earlier History of American Corporations* (1917), 332 et seq.; John Adams, Letters to John Taylor, of Caroline, Virginia, in Reply to His Strictures on Some Parts of the Defence of the American Constitutions, in *The Works of John Adams, Second President of the United States*, ed. Charles Francis Adams (1856), 510.

¹⁴ On Roman *societas* and *societas publicorum*, see Ulrike Malmendier, “Law and Finance ‘at the Origin,’” 47 *Journal of Economic Literature* 1076 (2009); Ulrike Malmendier, “Roman Shares,” in William N. Goetzmann and K. Geert Rouwenhorst, eds., *The Origins of Value: The Financial Innovations that Created Modern Capital Markets* (2005), 31. For a somewhat contrary view, see Andreas M. Fleckner, “Roman Business Associations” (unpublished manuscript, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2472598. For earlier studies of Roman corporations, see Andrew Stephenson, *A History of Roman Law* (1912), 371–74; William Livesey Burdick, *The Principles of Roman Law and Their Relation to Modern Law* (1938), 282 et seq.

¹⁵ See Kevin J. R. Rosman et al., “Lead from Carthaginian and Roman Spanish Mines Isotopically Identified in Greenland Ice Dated from 600 B.C. to 300 A.D.,” 31 *Environmental Science and Technology* 3413 (1997).

¹⁶ On the many different kinds of late medieval corporations, see Eric Enlow, “The Corporate Conception of the State and the Origins of Limited Constitutional Government,” 6 *Washington University Journal of Law & Policy* 1, 3–8 (2001); John Micklethwait and Adrian Wooldridge, *The Company: A Short History of a Revolutionary Idea* (2003), chapter 1. Even the monarchy was seen as a corporation; see Frederic Maitland, “The Crown as a Corporation,” 17 *Law Quarterly Review* 131, 134–135 (1901).

¹⁷ On Blackstone, see Lewis C. Warden, *The Life of Blackstone* (1938), 13–14; David A. Lockmiller, *Sir William Blackstone* (1938), 10. On his influence, see Albert W. Alschuler, “Rediscovering Blackstone,” 145 *University of Pennsylvania Law Review* 1 (1996); Ian Williams,

“Book Review: Blackstone and His Commentaries: Biography, Law, History,” 71 *Cambridge Law Journal* 223 (2012); Wilfred Prest, “Blackstone as Architect: Constructing the Commentaries,” 15 *Yale Journal of Law & the Humanities* 103 (2003).

¹⁸ See William Blackstone, *Commentaries on the Laws of England*, ed. Robert Malcolm Kerr (1876), 1:446.

¹⁹ On the human individual as the “paradigmatic legal actor,” see Meir Dan-Cohen, *Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society* (1986), 13.

²⁰ In time, the principle that corporate acts beyond the charter were void came to be known as *ultra vires*. See H. Kent Greenfield, “*Ultra Vires* Lives!: A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms),” 87 *Virginia Law Review* 1279 (2001); Stephen Griffin, “The Rise and Fall of the *Ultra Vires* Rule in Corporate Law,” 2 *Mountbatten Journal of Legal Studies* 1 (1998).

²¹ See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001).

²² On Binney, see William Strong, *An Eulogium on the Life and Character of Horace Binney* (1876), 5–21; Robert R. Bell, *The Philadelphia Lawyer: A History, 1735–1945* (1992), 145–155; John Hays Gardiner, *Harvard* (1914), 161.

²³ See Smith, “Banks, Law, and Politics,” 12–13.

²⁴ On corporate nationality, see Linda A. Mabry, “Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality,” 87 *Georgetown Law Journal* 563, 581 (1999). See also *Society for the Propagation of the Gospel v. Wheeler*, 22 F. 49 (C.C.D. New Hampshire 1814).

²⁵ See *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

²⁶ On veil piercing in corporate law, see Maurice Wormser, “Piercing the Veil of Corporate Entity,” 12 *Columbia Law Review* 496, 500, 501 (1912); Peter B. Oh, “Veil Piercing,” 89 *Texas Law Review* 81, 83 (2010–2011); Lorraine Talbot, *Critical Company Law* (2015), 24. For a comprehensive study of piercing-the-veil cases in corporate law, see Robert B. Thompson, “Piercing the Corporate Veil: An Empirical Study,” 76 *Cornell Law Review* 1036 (1991).

²⁷ See *Bank of the United States v. Deveaux*, 2 Fed. Cas. 692, 692–693 (Cir. Ct. GA 1808).

²⁸ See Justin Crowe, *Building the Judiciary: Law, Courts, and the Politics of Institutional Development* (2012), 1; Robert G. McCloskey, *The American Supreme Court* (5th ed., 2010), 1. On the business-friendly tendency of the Supreme Court, see Ian Millhiser, *Injustices: The Supreme Court’s History of Comforting the Comfortable and Afflicting the Afflicted* (2015).

²⁹ See Anon., “The Supreme Court—Its Homes Past and Present,” 27 *American Bar Association Journal* 283 (1941); William C. Allen, *History of the United States Capitol: A Chronicle of Design, Construction, and Politics* (2001), 89, 107. There is some disagreement about whether Long’s Tavern was located where the current Supreme Court sits or across the street to the south, where the Library of Congress sits. According to Allen, Long’s Tavern was renovated and renamed the “Brick Capitol.” According to Kenneth Jost, *The Supreme Court A–Z* (2013), 212, the Supreme Court Building is located where the Brick Capitol used to be. Yet Jost also says that Long’s Tavern is where the Library of Congress is currently located. Suffice to say the exact location of the pub remains uncertain.

³⁰ See *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

³¹ See *Hope Insurance Company v. Boardman*, 9 U.S. 57 (1809). On Adams, see Harlow G. Unger, *John Quincy Adams: A Life* (2012); Fred Kaplan, *John Quincy Adams: American Visionary* (2014). See also William G. Ross, “John Quincy Adams,” in *Great American Lawyers: An Encyclopedia*, ed. John R. Vile (2001), 1:9; Charles Warren, *The Supreme Court in United States History, 1821–1855* (1922), 2:347; Charles Warren, *The Supreme Court in United States History* (1922), 1:390. Adams is also credited with winning a later 1810 case, *Fletcher v. Peck*, 10 U.S. 87 (1810), but that case was in fact argued prior to the *Hope Insurance* case.

³² See Allen Sharp, “Presidents as Supreme Court Advocates: Before and After the White House,” 28 *Journal of Supreme Court History* 116, 118 (2003).

³³ See Marc Leepson, *What So Proudly We Hailed: Francis Scott Key, A Life* (2014); Smith, “Banks, Law, and Politics.”

³⁴ For a discussion of competing theories of the corporation, see Eric W. Orts, *Business Persons: A Legal Theory of the Firm* (2013), 9–51. Some scholars argue that corporate rights discussions should avoid metaphysical abstractions like personhood or associationalism. See, e.g., Richard Schragger and Micah Schwartzman, “Some Realism about Corporate Rights,” in Micah Schwartzman et al., *The Rise of Corporate Religious Liberty* (2016), 345.

³⁵ See John Quincy Adams, *Memoirs of John Quincy Adams*, ed. Charles Francis Adams (1874), 546.

³⁶ See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962), 1. See generally Jack Rakove, *Revolutionaries: A New History of the Invention of America* (2010), 377.

³⁷ Mary Sarah Bilder, “The Corporate Origins of Judicial Review,” 116 *Yale Law Journal* 502 (2006).

³⁸ See *Marbury v. Madison*, 5 U.S. 137 (1803).

³⁹ See *Hope Insurance Company v. Boardman*, 9 U.S. 57 (1809).

⁴⁰ See *Bank of the United States v. Deveaux*, 9 U.S. 61 (1809).

⁴¹ See Margaret M. Blair and Elizabeth Pollman, “The Derivative Nature of Corporate Constitutional Rights,” 56 *William & Mary Law Review* 1673, 1680 (2015).

⁴² See Smith, “Banks, Law, and Politics,” 13; *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁴³ See Richard S. Grossman, *Unsettled Account: The Evolution of Banking in the Industrialized World Since 1800* (2010), 225; Murray N. Rothbard, *History of Money and Banking in the United States: The Colonial Era to World War II* (2002), 69–72.