The Constitution of the United States extends the federal judicial power to suits between "citizens" of different states; entitles "citizens" of each state to the privileges and immunities of citizens in the several states; gives "the people" security against unreasonable federal searches and seizures; and provides that no "person" shall be deprived of life, liberty, or property without due process of law or denied the equal protection of the laws. How far do these provisions apply to corporations, state and federal? That question has troubled judges, and some of the judges' decisions have troubled commentators. A main difficulty has been a difference of ideas about what a corporation really is. A corporation has various aspects. Conceptions, and consequently definitions, of it may vary according to the aspect which is relevant to the purpose in hand, and yet each conception may accord with the facts.

We may say with Chief Justice Marshall that a corporation is an artificial being which exists only in contemplation of law, and so think of it, even when it is a city or a state, as something imaginary and fictitious. We might think and speak in the same way of the United States Supreme Court, because, though the Court is an assemblage of able and learned gentlemen, the legal power they have is solely that with which the law has clothed them. We may say with equal truth that a corporation or a supreme court is a really existing thing, consisting of a group of persons endowed, for limited purposes, with a capacity for acting with legal effect collectively through a majority. Or we may adopt the civil law view, inherited from the law of Rome, which conceives of a business corporation as a mass of corporate property, capable of accretion and diminution through the acts of its business agents, and existing for the benefit of its stockholders, who, being entitled to draw off its profits in dividends, stand in relation to it, not as its constitutive body, but rather as fleas to a dog.

Each of such descriptions singles out some characteristic feature, and provides a true definition in the sense in which it is a true definition of a man to say that he is a two-legged animal without feathers. That will do for a definition if all we need to know about men is how to tell

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I. 2 Girard, Droit Romain (1911) c. 6.
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one of them when we see him. At least it would do if amended to distinguish between a man and a plucked chicken. Man has been defined by an anatomist as an animal with a thumb that can be opposed to any of its fingers, by a sociologist as an animal that cooks its food, and by a theologian as a creature with a soul. This illustrates the thesis of the pragmatists that the proper definition of a thing is that which points out those of its characteristics that are essential to the purpose at hand.

CORPORATIONS AS PERSONS

That a corporation is composed of members is a fact which it is frequently necessary to bear in mind. Its interests are theirs. It acts under their ultimate control to carry out their purposes with an effect like that which their collective action as individuals would have. For such reasons, it is held that the word "person" in statutes relating to business transactions generally includes a business corporation. And it is held that a corporation is a person as that word is used in the clauses of the Constitution which entitle every person to due process and to the equal protection of the laws. Moreover, in its primary legal sense, the word "person" applies to a corporation as literally and as fully as to an individual. The Latin word persona denoted an assumed character as distinguished from a natural one, and hence, derivatively, the possession of rights and duties as distinguished from the individual who possessed them. A curate of the Church of England is a parson, which is to say a "person," by virtue of his ecclesiastical office.

Professor John Chipman Gray, in his notable book "The Nature and Sources of the Law," denied that a corporation could truthfully be called a person. "Even if a corporation be a real thing," he said, "it is yet a fictitious person for it has no real will." On this theory, a baby just born, or a man asleep, is a person only because he has a potenti-


4. 1 Austin, JURISPRUDENCE (3d ed. 1869) 362-4; 2 Girard, Droit Romain (1911) Introduction, in which the author states: "La personalité... est l'aptitude à être le sujet de droits et devoirs légaux..." The word persona meant originally an actor's mask. The dramatis personae of a Roman play were the distinctive masks worn by the actors, each indicating the sort of person its wearer was to represent, the character he played. The playbill, posted in view of the spectators, pictured opposite the name of each of the parts to be played the mask its actor was to wear. Used to express a combination of man and mask, persona came to signify either a man regarded as playing a part, or the part a man played. So we use the word when we speak of a man's personality or of the offense of impersonating an officer.

The word was adopted by Roman lawyers to signify an individual regarded in some legal relation as the possessor of the rights and duties incident to that relation. A Roman citizen was ordinarily a possessor of several legal persons, according to the several parts he played on the stage of affairs.

ality of willing in the future. The statement only means that a corporation is not a person in the popular sense in which Professor Gray chose to use the word. Professor Arthur E. Murphy, writing of the word "person" as used in relation to morals, has said: "The word 'person' has all sorts of meanings in a variety of contexts. . . . In the context of moral behavior, however, a 'person' is an individual with rights and duties, one who can properly be held responsible for what he does because he is capable of assuming or bearing responsibility, of acting in the name and for the sake of interests that are his, not merely as a biological organism, but as a member of a moral order." 6 A corporation, when it acts with legal effect and subject to legal responsibility, has the characteristics of a legal personality distinct from that of its members. It may have a power of eminent domain that they are incapable of having. As Professor John Dewey has suggested, a corporation all of whose members came to be married women unable to bind themselves by contract would retain its own capacity to contract. 7 It has often been remarked that it was only the jealousy felt by the Roman and later governments toward group power that required a license from government, actual or fictitiously presumed, before a group would be treated as itself a member of the political community, or, in other words, could become a person or a citizen. If, instead of calling individuals natural persons and corporations artificial persons, we called them both legal units, it might help us to realize that the common interests of a group, domestic, governmental, or business, are as real as the separate interests of the men and women who compose it. Love of country may be as real as love of parents.

The United States can put criminals to death and make war on its enemies. It is too plainly an existing and formidable power for us to think of it as Marshall thought of the bank it had created in its image when he called the Bank of the United States "that invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate." 8 Every association for purposes of action is an embodiment of real interests, and to help the advancement of those interests by incorporating the association is to confer on the incorporated body in its own right the character of personality before the law. A corporation, municipal or private, created by the corporate state for reasons of public concern and endowed with rights and duties of its own and agents to exercise and perform them, is not a mendicant for legal favor on which a bounty

6. Murphy, The Uses of Reason (1943) 116. This quotation is published here with the courteous consent of The Macmillan Co., New York, publisher.
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has been bestowed by artifice and pretense. It is that to which the state has seen fit to give the standing of an individual, and there is no theoretical or practical obstacle to the full accomplishment of that result. Hence, the word "person," when used with reference to the protection of rights in general, is reasonably to be construed in its proper legal sense as including every possessor of legal rights. And so are the decisions. For though a corporation is not a person eligible to the Senate when thirty years old, it is probably a person immune from double jeopardy, and it is held to be a person entitled to the equal protection of the laws, and not to be deprived of property without due process.

CORPORATIONS AS CITIZENS WITHIN THE FEDERAL JUDICIAL POWER

Citizenship is generally thought of as something arising from the relation of a person to his state. Many of the reasons for holding that a corporation brought into being by the act of a state becomes for most purposes a person of the state are reasons for holding that it becomes its citizen. The word "citizen" signifies a person subject to the duties of membership in a governmental unit, and entitled to corresponding privileges. Citizenship involves a moral or political obligation on the part of the state to look after the interests of the citizen at home and, so far as it can, abroad. The obligation to protect the interests of a state corporation is acknowledged on the part of the United States as well as of its states, and the corporation owes allegiance to both. Corporations have all the powers essential to citizenship, for there are citizens without power to vote, hold office, make wills, or bind themselves by contract. Municipal corporations are essentially holders of public office for they have governing power. Nothing prevents giving corporations power to vote, for a vote may be given to every landowner, or to hold public office, for banks are made custodians of public funds and might be made receivers of taxes. The United States Bank was, in effect, an officer of the United States. The question is not whether those who framed or ratified the Constitution had in mind the thought that the word "citizens" included corporations. As to each grant of power the question is whether corporations possess the charac-

9. To the effect that the common law treats a corporation as a real and not as a fictitious or pretended person, see Pollock, Has the Common Law Received the Fiction Theory of Corporations? (1911) 27 L. Q. Rev. 219.


teristics that bring them within the purposes which the terms of the
grant manifest intent to accomplish. That a corporation is neither a
person nor a citizen within the meaning of a statute about making wills,
voting at elections, or being naturalized, has little bearing on the ques-
tion whether it is a person or a citizen within the meaning of a provision
prescribing the jurisdiction of courts for the enforcement of rights which
the corporation possesses and of duties which it owes.

Unfortunately, the course of the decisions and the language used
by judges, in trying to harmonize in phraseology doctrines that con-
flicted in substance, have wrapped the subject in a fog and have created
a belief that when federal jurisdiction rests on diverse citizenship a cor-
poration is allowed to sue only on a confessedly false pretense that all
its members reside in the state whose corporation it is. It has been
vehemently urged that this is an arrant fiction, trumped up to effect a
usurpation of power by a Court whose preeminent function is to check
the usurpation of power by others, and that the time has come for a new
deal in constitutional law that shall repudiate it.3

If corporations are not to be allowed to sue and be sued in federal
courts as being themselves citizens of the state or country by virtue of
whose laws they exist, the purposes, whatever they may have been, for
which federal courts were given jurisdiction in cases of diverse citizen-
ship will largely be defeated. For on no other theory can jurisdiction
effectively be sustained when a corporation is a party. As Justice
Curtis said in his lectures at the Harvard Law School: "It became very
early apparent that unless the courts of the United States could in some
way hold jurisdiction over this class of persons they would answer
extremely ill some of the purposes which the Constitution had in view
when it created the judicial power of the United States."13 When the
Constitution was framed, private corporations were few. Now that
the corporate form has become an everyday contrivance for the conve-
nient transaction of business, suits to which corporations are parties
correspond precisely in character to suits between individuals and far
exceed them in aggregate economic importance. The reason for the
grant of federal jurisdiction in cases of diverse citizenship may have
been a fear which the framers felt, or anticipated that litigants might
feel, lest state courts should be prejudiced against nonresidents, as was
Deveaux, and by Justice Wayne in Dodge v. Woolsey. Or it may have been an apprehension that state judges might be incompetent and a desire to secure a qualified court for those who had to come into a state court to sue, as has been suggested by others. But, whatever its basis, there was no reason to think such prejudice or incompetence less likely or less damaging if one of the parties were a corporation.

In Number 80 of the Federalist, Hamilton urged that it was a purpose of the grant to secure federal enforcement of the constitutional right of a citizen of one state to the privileges and immunities of citizens in another. As to this right, Justice Moody said, in Chambers v. Baltimore & Ohio R. R.: "The right to sue . . . must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens." If a state refuses to open its courts to a suit against its corporations by citizens of other states, there can be no remedy by appeal from mere inaction. And until 1875 the federal courts had no general statutory original jurisdiction over cases arising under the Constitution and laws of the United States, and so ordinarily could give no relief unless they could take jurisdiction under the citizenship clause. Whenever a state unduly burdens the prosecution of a suit in its courts, or, as by denial of equitable remedies, gives inadequate relief, the simple and effective remedy where the parties, whether individuals or corporations, are of different states is to permit suit in a federal court. In short, there was abundant reason why the diversity jurisdiction was intended to include cases in which corporations were parties. When Congress set up the lower federal courts almost the only civil jurisdiction given them was in cases of maritime law and in cases of diverse citizenship. Maritime jurisdiction was admittedly given to insure uniform and correct decisions in that branch of the law merchant known as law maritime. It was long believed that one of the reasons for giving jurisdiction in cases of diverse citizenship was similarly to insure uniform and correct decisions in the nonmaritime law merchant.

Cases of both these classes generally involved the interests of citizens of states other than that where suit was brought, and depended on acts either done outside of the state or done under such circumstances that the parties could not justly be charged with liability under peculiar rulings of local courts. For these reasons, maritime law was enforced without regard to peculiarities of admiralty doctrine or jurisdiction existing in the several states when admiralty jurisdiction was taken over from state courts by the federal courts. And for the same reasons it was long considered that in cases of diverse citizenship federal courts should likewise apply the nonmaritime law mer-
jurisdiction should include cases where corporations are parties, and no reason why it should not, except a notion now discredited by repeated decisions to the contrary made in construing statutes,\textsuperscript{20} that lawmakers who say "citizens" cannot possibly intend corporations.\textsuperscript{21}

No other basis for denying such jurisdiction over corporations remains, for the early cases which in other respects than citizenship denied corporate capacity on the ground of a corporation's lack of a physical body and supposed consequent unreality have been overruled. Ever since, as Justice Frankfurter stated in \textit{Nierbo Co. v. Bethlehem Shipbuilding Corp.}, "the opinion of Chief Justice Waite in \textit{Ex parte Schollenberger}, 96 U. S. 369, displaced metaphor with common sense,"\textsuperscript{22} it has been held that a foreign corporation (at least in causes of action arising out of business done within the state) may be served without regard to the vagaries of state courts. To make effective the principle of a uniform law merchant in transactions between parties of different states, it was necessary that corporations as well as partnerships should fall within the jurisdiction as being citizens.

Professor Gray, in his book called \textit{The Nature and Sources of the Law} (2d ed. 1927) 253, suggested that the doctrine of a so-called federal law merchant was founded on an erratic notion of Justice Story. But the doctrine did not originate with Story or with \textit{Swift v. Tyson}, 16 Pet. 1 (U. S. 1842), which put it into effect. Thirty-three years before, Harper, counsel, said in argument in Bank of United States v. Deveaux: "One great object in allowing citizens of different states to sue in the federal courts, was to obtain uniformity of decision in cases of a commercial nature."\textsuperscript{23} It has been held that a foreign corporation (at least in causes of action arising out of business done within the state) may be served without regard to the vagaries of state courts. To make effective the principle of a uniform law merchant in transactions between parties of different states, it was necessary that corporations as well as partnerships should fall within the jurisdiction as being citizens.

Whether or not \textit{Swift v. Tyson} was sound, the soundness of the theory on which it was overruled is questionable. That theory is that by some logical necessity the law in a state can only be what the courts of the state are willing to enforce. Consequently, rights and duties with which the legislature or the constitution of a state have expressly clothed its inhabitants can have no existence, and should therefore be given no recognition in any federal court, if the judges of the state do not enforce them. If the judges of a state fail from ignorance or perversity to enforce the law so ordained, they may be subject to impeachment. But federal judges, it seems, are on the contrary subject to impeachment, if after the decision in the \textit{Tompkins} case they wilfully refuse to imitate the impeachable conduct of the state judges.

The rule that binds a lower court to follow decisions of its appellate court is only a rule of practice. It is law for the court, but not for the parties, for it does not fix their rights. The highest state court may reverse a decision that follows, or affirm one that refuses to follow its precedents. If its decisions were really law it could not overrule them. It is submitted that \textit{Erie R. R. v. Tompkins} only lays down a rule of practice for federal courts, including itself, based on the general expediency of following state decisions in the interest of uniformity and certainty. But on the reasoning of the majority opinion in that case, if what the judges of a state decide to be its law is all there is to its law, nothing inconsistent with their decisions can be an actual right of its people. I have discussed this subject at length in an article entitled \textit{The Law as Precedent, Prophecy, and Principle: State Decisions in Federal Courts} (1924) 19 Ill. L. Rev. 217.

\textsuperscript{20} See cases cited in notes 31-7 infra.


\textsuperscript{22} 308 U. S. 165, 169 (1930).
with process by service on a person whom it has designated for the purpose, or may be served without its consent by service on a local manager in a state where it carries on regular business. It was held some centuries ago that, irrespective of the residence of its members, a corporation is liable, as an "inhabitant" of a locality where it occupies land and conducts its affairs, for repairing bridges, and for poor rates. In speaking of these cases, Chief Justice Marshall said: "This ideal existence is considered an inhabitant, when the general spirit and purpose of the law requires it." Within the meaning of federal statutes about venue, a corporation is an "inhabitant" of the district where it has its principal office, keeps its books, and transacts the business relating to its corporate organization, and is a "resident" of the state by which it was incorporated. It is a "resident" of the county in which it has its principal office within a statute fixing a place for the recording of chattel mortgages. It is one of "the people" whose right to be secure against unreasonable searches and seizures is guaranteed by the Fourth Amendment. The same principle holds true as to a corporation's citizenship. A state corporation, though it has alien members, is a citizen of the United States within the meaning of treaties protecting the interests of citizens of the United States, and of the acts of Congress giving citizens of the United States a right to sue in the Court of Claims, or to purchase mineral deposits in public lands, or to perfect defective titles to public land. In Petri v. Commercial Nat'l Bank of Chicago, Chief Justice Fuller said that a national bank was a citizen of the state where by authority of law it carried on its business, and that when Congress, in taking away by Section 24 (16) of the Judicial Code the jurisdiction of federal courts in suits to which national banks were parties so far as founded merely on their federal

24. Railroad Company v. Harris, 12 Wall. 65, 83 (U. S. 1871); St. Clair v. Cox, 106 U. S. 350, 359 (1883); Pennsylvania Lumbermen's Mutual Fire Ins. Co. v. Meyer, 197 U. S. 407 (1905); International Harvester Co. v. Kentucky, 234 U. S. 579, 589 (1914) ("when it appears that the corporation is there carrying on business in such sense as to manifest its presence within the state").
34. 142 U. S. 644, 650 (1892).
incorporation, provided that for purposes of suing and being sued national banks should be deemed citizens of the state in which they are located, it acted "out of abundant caution." Congress has provided that only vessels being "wholly owned by a citizen or citizens" and no others may be registered, and has conditioned registration on an oath that no alien has an interest in the vessel. Yet it is considered that a state corporation having alien shareholders is entitled to have its vessel registered as wholly owned by citizens of the United States. In *United States v. Northwestern Express Stage & Transportation Co.*, Justice White said: "Congress has frequently in its legislation, as also the treaty-making power, used the words 'citizens of the United States' in the broadest sense, as embracing corporations created by state law." He added that while in a technical sense state citizenship may not always include citizenship of the United States (thus assuming that a corporation may be a citizen of its state) the ambiguity must be solved "by that cardinal rule which commands that we seek out and apply the evident purpose intended to be accomplished by the law-making power."

These cases establish that members of a corporation in their corporate, as distinguished from their individual, capacity are not only creatures and persons of the state by which they are incorporated, but come within the meaning of legislation about citizens of the state or nation when the reasons that motivate the legislation apply to them. Those reasons do apply to the constitutional privilege given to citizens of suing in federal courts a citizen of another state or country. But though the Court struggled to give corporations the benefit of the federal jurisdiction, it took a long time to disentangle that truth from the complex of fiction that shrouded the reality of corporate existence and caused a corporation to be spoken of as if its being and its doings were dependent in some sort upon a fairy tale. Nobody thinks that Congress, the Supreme Court, and the United States of America are figments of the imagination, or mere names for groups of individuals, for the characteristic powers of those bodies are powers that the individuals who compose them do not separately possess. But a private corporation has in the main only such powers and carries on only such activities as a private person or voluntary group of persons might have or carry on. Hence, as a duplicate of an individual on a narrower

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36. 29 Ops. Atty Gen. 188 (1911). It was held in *Queen v. Arnaud*, 9 Ad. & Ell. (N. S.) 806 (Q. B. 1846) that a vessel owned by a British corporation having alien shareholders was entitled to British registry because wholly owned by a British subject.
37. 164 U. S. 686, 688 (1897).
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scale, it is easy to think and speak of a corporation as if its separate being were a fiction.

All this raises the question whether the phrase "citizens of different states" and the phrase "foreign citizens or subjects" as they occur in the Constitution and statutes in relation to the jurisdiction of federal courts should be construed to include as citizens of a state or country the bodies of persons that compose its corporations. Every practical consideration is in favor of it, because the need for and effect of the provision is the same for corporations as for individuals. The way in which the United States Supreme Court has managed to work its way through adverse precedents to reach the proper result presents an interesting illustration of the judicial process.

In early suits to which corporations were parties it was taken for granted that within the meaning of the jurisdictional clauses a corporation was a citizen of the state that made it. Jurisdiction was not challenged, and judgments were entered on the merits. That a corporation was not a citizen was suggested, perhaps for the first time, in Bank of United States v. Deveaux, in the trial court. In that case, "The President, Directors and Company of the Bank of the United States," a corporation created under that name by Congress to carry on a banking business from a principal office in Philadelphia, sued citizens of Georgia in trespass in the federal circuit court for the District of Georgia, alleging that they, the corporation, were citizens of Pennsylvania. On a plea to the jurisdiction, Justice William Johnson, of the Supreme Court, and Stephens, District Judge, held that a corporation "cannot with propriety be denominated a citizen of any state," and dismissed the suit. On appeal, the Supreme Court, somewhat curiously, in an opinion by Chief Justice Marshall, construed the allegation that the petitioners were citizens of Pennsylvania, not as meaning that the members in their corporate capacity constituted a corporate citizen of the state in which by authority of law their headquarters were established, as in view of the previous decisions the pleader probably intended, and as the court below had understood it, but as meaning that all the members happened individually to be citizens of that state.


42. 5 Cranch 61 (U. S. 1809).
So construed, the allegation was notoriously false. Key repeated for the defense the arguments that had been successful in the court below. He said that the suit by the bank was a suit by the corporation and not by its members, and that a corporation was not a citizen because, as Blackstone had written, a corporation could not commit crime, serve as trustee, or act except by agent. The argument seems strange in these days of corporate trust companies and of fines for corporate violations of the anti-trust act, and when it is recognized that persons non compos mentis are citizens though they can act only by representatives. But to Chief Justice Marshall it seemed self-evident that government could not bestow on a body of individuals a corporate citizenship. He said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name." He then remarked that fear of prejudice was likely to exist in corporate suits when members were citizens of other states, and that the interests at stake were those of the members, and concluded that where diversity of citizenship exists between the members of a corporation and a person it is suing "substantially and essentially the parties . . . come within the spirit and terms of the jurisdiction conferred . . . ."

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43. The United States had subscribed for one-fifth of the stock; counsel had stated that some shareholders were citizens of Georgia as were the defendants; and counsel arguing in Hope Ins. Co. v. Boardman, 5 Cranch 57 (U.S. 1809) heard at the same time, told the Court that a majority of the shares had passed to aliens.

44. Marshall was echoing phrases of Coke and of Blackstone. Blackstone had well said that a main purpose of incorporation is that all members shall be "but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant." 1 Bl. Comm. 468. Blackstone did not think that the river was an artificial thing. But Blackstone had also paraphrased expressions found in Coke's report of the case of Sutton's Hospital, 10 Co. 1 (K. B. 1612). Coke wrote that "a corporation aggregate of many is invisible, immortal, and rests only in intendment and consideration of the law." Id. at 32. But Coke did not think that corporations are unreal. The question in the case of Sutton's Hospital was whether persons incorporated as governors of an intended hospital could in their corporate capacity acquire land on which to build the hospital. Francis Bacon argued that a board of governors did not come into existence as a corporation until there was a hospital for them to govern. Coke's answer was in effect that a hospital that as yet existed only in imagination was sufficient to support the existence of a corporation in imagination, and that the corporation's power to act with legal effect was sufficient to make it an existing legal entity. "A child as soon as he is born is called rationalis, because he hath potestatem, although he hath not, and perhaps never will have rationem actu." Ibid. Coke's point was not that a corporation is lacking in reality or in legal capacity, but that in spite of factual incapacity a corporation has the full legal status of an individual, when the reasons for giving legal status to an individual are applicable to it. Coke did not think, as Marshall did, that a suit by a corporation was equivalent to a suit by its members, because he was one of the governors who constituted the corporation, and he acted as a judge to decide in its favor. Since it was incorporated for charity he had no pecuniary interest in the decision.

45. 5 Cranch 61, 87-8 (U.S. 1809).
When the Deveaux case was decided there was no statute expressly permitting federal corporations to sue in federal courts, nor had the doctrine of Osborn v. Bank of United States 46 been as yet devised to make such a statute constitutional on the strained theory that a suit by a federal corporation on a right arising under state law constitutes a case arising under federal law because it arises over a transaction by a person whose capacity to enter into the transaction was created by federal law. Hence, unless the Court was prepared to hold that a corporation became a citizen of a state by carrying on under federal authority its principal business at headquarters in the state, the only way to extend to the Bank of the United States the protection of the federal courts was to treat the citizenship of a corporation as a composite of the citizenship of its members, and to deny, at least by implication, any separate citizenship of the corporation itself. The denial was expressly made; it necessitated the simultaneous holding in Hope Insurance Co. v. Boardman 47 that a state which creates a corporation does not thereby make it its citizen, and it resulted in the dismissal of that case for want of jurisdiction because the citizenship of its members was not alleged.

A controversy with a corporation is not in any ordinary sense a controversy with its members, for they do not sue nor are they sued as individuals subject to disabilities of infancy, insanity, or coverture, nor to recover a judgment to which they shall individually be parties. If it were such a controversy any member might sue or be sued, and the absence of other members waived unless pleaded in abatement. A suit by a corporation is a suit by its members only in the sense in which a debt owed to the corporation might be said to be owed to its members. A suit against a corporation is a suit against its members only in that it seeks a judgment against property or business in which they have an interest. In the same sense it is a suit against any creditor of the corporation whose available assets will be diminished by the amount of the recovery. The members are not parties on the record nor entitled to notice or hearing. If corporations are not what the Constitution means by citizens, a suit by or against a corporation is not what the Constitution means by a suit by or against citizens. In Puerto Rico v. Russell Co., 48 it was held, inconsistently with the decision of the

46. 9 Wheat. 738 (U. S. 1824).
47. 5 Cranch 57 (U. S. 1809).
48. 288 U. S. 476 (1933). The far-fetched character of the opinion in the Deveaux case is illustrated by its treating the English case of City of London v. Wood, 12 Mod. 669 (1700) as directly in point and as its sole authority. That case only held that a grant of jurisdiction in general terms to a court to be composed of the Mayor and Aldermen of London was not intended to include jurisdiction over a suit brought by direction of the Mayor and Aldermen for the benefit of the city, since that would make them judges in their own case. There was no intimation that a jurisdiction over suit by citizens of London would have extended to suit by any corporation whose members
Deveaux case, that an act of Congress giving jurisdiction of suits in which the parties were nonresidents of Puerto Rico did not give jurisdiction of a suit between nonresidents and a resident corporation though all of its members were nonresident.

After all, the jurisdiction gained by treating a suit to which a corporation was a party as a suit by or against its members was precarious, if not illusory. For Strawbridge v. Curtiss had held that to make a controversy between citizens of different states every necessary party on one side must be a citizen of a different state from that of any necessary party on the other. So a corporation whose shares were widely held could rarely gain the protection of a federal court, and no person who wanted to sue a corporation could be sure that a federal court would have jurisdiction. Further, all that would be necessary to oust the federal court from jurisdiction would be for the expected defendant, if a corporation, to cause a share of its stock to be sold or given to a citizen of the same state as the expected plaintiff, or, if an individual, to buy, or induce a fellow citizen to buy, a share in a plaintiff corporation before suit was begun. Nor is the theory satisfactory that a corporation cannot be what the Constitution means by a citizen of a state because, like the state itself, it is intangible. Incorporation is an enactment by the state that the incorporated “body” shall be treated as if it had a corpus. The state thereby adopts it as its created citizen. Or, if we prefer to think of a corporation as a group of individuals rather than as an artificial entity, the state adopts those persons as its citizens so far as concerns their incorporated capacity. Whether we say that the corporation is itself a citizen, or say that its members so far as concerns their corporate capacity are citizens, of the incorporating state we say the same thing in different words. A corporation is popularly regarded as belonging to the state that chartered it. The Deveaux case interpreted the citizenship clause in a sense inconsistent with popular under-
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standing and previous holdings of the Court, and so as practically to shut the doors of federal courts to corporation suits founded on diverse citizenship, however great future experience might show the need for that jurisdiction to have become.\footnote{51}

It may be that a corporation is not a citizen within the meaning of a given constitutional or statutory provision, but the matter cannot be disposed of by denying that the corporation exists.\footnote{52} We may regard a chain of mountains as a unit—an existing and single thing—though it consists of a series of inert and separated peaks. Its continuity and similarity in physical character make it convenient so to regard it. A tree is more than a physical combination of roots, branches, and leaves. It is also a unit in action for it grows and bears fruit. Its parts work together like a piece of machinery for the accomplishment of results. The mines and foundries of a steel company, the various vessels that make up the United States Navy, together with the personnel that operate them, may be units of an organized whole. To say, as

\footnote{51. Compare Justice Taney's remark, in Bank of Augusta v. Earle, that a corporation could have no “legal existence” outside of the state which created it, because, as it existed only by force of law of that state, it could not exist where that law had no force. 13 Pet. 519, 584 (U. S. 1839). Yet Taney said that a corporation may act through agents or nonexistent, and enforce rights so created. Were a corporation nonexistent in a state to which it is foreign, a corporation could not be guilty of violating the anti-trust laws by any unauthorized thing its agents did outside the state of its creation. It is true that a corporation exists only by force of the law of its locality. But any legal right that arises in a state is, like a corporation, intangible and exists in that state only by force of its law. That is no reason why the right should not be enforced in another state. States generally enforce rights acquired by foreign corporations because legitimate interests of human beings are at stake.}

\footnote{52. It has been suggested that a corporation cannot be what is meant in the Constitution by the word “citizen” because a corporation has no mind or will. For that reason, Professor Gray would not concede that a corporation could truthfully be called a person. THE NATURE AND SOURCES OF THE LAW (2d ed. 1927) 53-5. There is nothing irrational or fictitious in giving an idiot or a baby such rights as its needs require and permitting someone interested to enforce them in its behalf. It would not be irrational to check cruelty to dogs by empowering a dog to sue by next friend or guardian a man who had kicked it. Dogs are not so treated as persons only because society is not sufficiently interested in their welfare, or thinks that they can be well enough protected by other means such as punishment for cruelty to animals.}

As for the notion that a corporation is a fictitious person or citizen “for it has no real will,” nobody has a real will. Neither mind nor will is an existing thing—an entity. Thoughts, resolves, desires, and acts are entities. But mind and will are only characteristics of behavior. To say that a man has a clear mind is to say his thoughts are clear. To say he has a resolute will is to say he acts with resolution. He thinks and acts with his brain and nerves and not with real but invisible instruments called a mind and a will. Whatever thinking and willing a corporation needs to do, it can do through the thoughts and resolves of its agents. The doctrine rests on common sense. \textit{Qui facit per alium facit per se} has ceased to be a fiction, if it ever was one. A doctrine that one thing should be treated as if it were another is explanatory, not fictitious. A fiction is something “made up,” but the construction may be genuine. Treating zero as if it were a number has given us a tremendous advantage in arithmetic over the Romans. See Fuller, \textit{Legal Fictions} (1930) 25 Ill. L. Rev. 363, 377, 877. It is legitimate to speak of a corporation as a group of human beings endowed collectively with corporate rights when emphasis on the fact that the corporation includes such a group rather than supplies a rationale for the judicial treatment that is deemed appropriate. But it is not legitimate to infer that a corporation is nothing more, and that it cannot sue in its own name or possess a right or a citizenship of its own.
Marshall said in substance in the *Deveaux* case and repeated in the *Dartmouth College* case, 53 that “a corporation is an artificial being, invisible, intangible, and existing only in contemplation of law” is to say that the United States of America, its Army, its churches, its universities and all the other institutions in the land exist only in the imagination except so far as they are to be regarded as fortuitous assemblages of mind and matter.

It is small cause for wonder that Marshall became dissatisfied with the reasoning of the *Deveaux* case; 54 with its assumption that the word citizen is incapable of including a corporation; with its holding that a suit by a corporation is a suit by its members—so that a statute requiring the appointment of a guardian ad litem for an infant plaintiff should logically have applied to an infant stockholder; with the chameleonic character of the citizenship which resulted, changing as shares changed hands—so that a court might have jurisdiction of a suit brought one day and not of a suit brought the next; and with the consequences of excluding large corporations from federal jurisdiction 55 and enabling smaller ones readily to evade it. And it is not strange that, a generation after the *Deveaux* case, the decisions which had applied its doctrine to state corporations, 56 though seeming to be settled law, were on full consideration overruled, and that in *Louisville, Cincinnati & Charleston R. R. v. Letson*, 57 it was held without dissent that when the jurisdictional clauses of the Constitution and the Judiciary Act spoke of citizens

53. 4 Wheat. 518, 636 (U. S. 1819).

54. In *Louisville, Cincinnati & Charleston R. R. v. Letson*, 2 How. 497 (U. S. 1844) Justice Wayne said that Marshall had expressed regret for his holding in the *Deveaux* case and thought it wrong. 2 How. 497 (U. S. 1844). Justice Story in his correspondence said the same thing. Professor McGovney expresses distrust of these statements in *The Supreme Court Fiction* (1943) 56 Harv. L. Rev. 853, 876, 877, and urges that Story was in error when in *New York v. Miln*, 11 Pet. 102, 101 (U. S. 1837) he said that Marshall believed that power to regulate interstate commerce was exclusively in Congress. But that seems to be exactly what Marshall did believe. Marshall was devoted to a jurisprudence of conceptions. He conceived of a corporation as “an invisible, intangible, and artificial being,” and concluded that it could not be what was meant by a citizen. Instead of regarding Congress as having an undivided legislative power, to be used for the accomplishment of specified purposes, he spoke of various separate “powers” granted to Congress, as if Congress were armed with so many separate weapons, like arrows in a quiver. Powers not granted to Congress were arrows that remained in the quivers of the states. If a state could hit a legislative object with an arrow left in its quiver, well and good. “Power” to regulate interstate commerce was lodged exclusively with Congress, but a state retained the “power” to protect the health of its people, and it was not an obstacle to the exercise of that power in damming a river to drain a marsh that it resulted in restraint of interstate commerce. Marshall’s doctrine was overruled in *Cooley v. Board of Wardens*, 12 How. 299 (1851) and is inconsistent with *Escanaba Co. v. Chicago*, 107 U. S. 678 (1882).


57. 2 How. 497 (U. S. 1844).
they meant to include corporations. This holding, never overruled, has been repeatedly cited as sound law, and it has ever since been the doctrine of the courts that a corporation may sue or be sued in a federal court as a citizen of the state by which it is incorporated, whatever may be the citizenship of its individual members.

A state which calls a corporation into being endows its members with corporate existence and capacities. It holds them responsible as a corporation for the abuse of their corporate privileges. It exercises a control in some respects greater than it has over its human residents. The fulfillment of the legitimate purposes of incorporation requires that if the corporation is looked upon as a body of members it be also recognized that the members in their organized capacity are the adopted citizens of the state that has made them into a body. To that state the incorporated group stands in a relation which for the purposes of the jurisdictional clauses of the Constitution seems identical with that of an individual citizen to his state.

The Letson case and all later cases agree with the Deveaux case that a state corporation is capable of and has citizenship, because it is made of human beings who are capable of citizenship, but differ from the Deveaux case in holding that its citizenship is independent of, and not a conglomerate of, the citizenship of its several members. There is no self-contradiction in double citizenship. It exists when an American woman marries a British husband, and thereby acquires a British citizenship without losing her American citizenship. It exists when a man whose native country does not permit expatriation is naturalized in another country. A court should recognize each citizenship as a fact and act as the situation requires.

Granted that a corporation is a citizen of the incorporating state, it makes no substantial difference whether we regard the corporation as an abstract person and say that it is itself a citizen of its state, as the Court did in the Letson case, or keeping closer to the conceptions of the Deveaux case regard it, as in other cases judges have done, as a group of members, but say that, regardless of their individual residence and

58. Wayne, J., for the Court, said: The ground upon which "we altogether rest our present judgment . . . is, that a corporation created by and doing business in a particular state . . . is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued . . . We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality, with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought." Id. at 558-9.

In truth the Court had abandoned the Deveaux case and adopted the principle of the Letson case five years earlier, when in Bank of Augusta v. Earle, 13 Pet. 519 (U.S. 1839) it held that a corporation did not lose its state citizenship because the state itself was a member, but that the state acquired a character as a citizen of the state by becoming a member of its own corporation.
citizenship, their citizenship in their corporate personality is that of the state which by a quasi-naturalization has constituted them its corporation, and at whose hands they have accepted and hold their corporate being. And if we like to think and speak of a corporation as a group of members, it makes no difference at all whether we say that in their corporate capacity they are in truth citizens of the state that has incorporated them, or that they are to be treated as if they were its citizens, or that they must conclusively be presumed to be its citizens. Judges sometimes say one of these things and sometimes another. If one of them is true the others are. It is like the difference between saying that my shoes are on my feet and saying that my feet are in my shoes. A body regarded as made up of limbs or members is the same thing as those limbs and members regarded as making up the body. The so-called presumption of citizenship is not a fictitious presumption as to what the facts are, but a characterization of the actual facts. It is not a presumption about persons, who happen to be members of a corporation, to the effect that they are individually citizens of the state of incorporation; it is a doctrine about corporations, to the effect that their members, as members, are citizens of the corporation's state. Indeed it seems, when first used, to have been meant as a statement that, though a corporation's capacity for citizenship depended on the capacity of its members for being citizens, it was not necessary to allege the fact that the members were (in corporate capacity) citizens of the state of incorporation because that followed from the averment that the corporation was a corporation of the state. To say that members of a corporation are presumed to be citizens of the incorporating state means that the corporation is to be treated as if its members were individually citizens of the state. It is the citizenship of the corporation, not of its members, that is in issue. The question whether or not it is an appropriate use of language to call them citizens of the state is the question whether it would express a truth or only a fiction if charters were to recite that state citizenship in corporate capacity was conferred on the members as incorporated citizens of the state. The sole legal question is whether incorporation makes the corporate body, in view of its relation in fact to the state of incorporation, a citizen or citizens of that state within the meaning of the word "citizens" as used in the jurisdictional clauses of the Constitution and of the statutes. The answer of the Letson case and of all later cases is that it does. If the so-called presumption, instead of being a figure of speech, were really a presumption, even though not open to contradiction, it would be necessary in

pleading to allege the fact presumed. It would be necessary to plead that the party was a corporation whose members were citizens of a named state and to prove on the trial, if the fact were put in issue, that the state named was the state of incorporation, relying on the presumption as being the equivalent of proof that the members were citizens of that state.  

Yet the doctrine that corporations may sue or be sued as citizens of the state of incorporation has been so vigorously denounced by competent critics as an unjustifiable fiction that it is worth while to review the language and reasoning of the cases that have given rise to the belief that it is a fiction. The Letson case did not say a word about presumption. Justice Wayne rested the decision upon the ground that a corporation "is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued." He referred to American and English cases in which corporations had been said or held to be individuals, residents, and inhabitants, and stated: "We confess our inability to reconcile these qualities of a corporation—residence, habitancy, and individuality—with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States, unless in consequence of a residence of all the corporators being of the state in which the suit is brought." It is to be regretted that the Court, having by "toil of heart and knees and hands" won its way upward from the morass of the Deveaux decision to "the shining table lands" of the Letson case, should have descended again into the valley of shadows by introducing talk about a conclusive presumption of the citizenship of corporate members, though this was only a figure of speech designed to effect a verbal correspondence between those divergent cases.

That talk originated with the case of Marshall v. Baltimore & Ohio R. R., which held an allegation that the defendant was a body corporate by act of the legislature of Maryland to be an allegation that it was a citizen of Maryland. Justice Grier, perhaps in the hope of writing an opinion in which the whole Court would concur, seems to have attempted to adjust his language as closely as possible to that which Marshall had used. For a difference of opinion had developed about the ground on which the Letson case was decided and about its sound-
ness. Speaking for the majority, Justice Grier said (as Hamilton had written in the Federalist) that jurisdiction in cases of diverse citizenship was given to federal courts to make sure that citizens of one state should be able by suing in those courts to enforce their constitutional right to the privileges of citizens in another. This, he said, involved securing to citizens of one state the rights against a corporation of another that citizens of its own state had; so that it was essential, if the purposes of the grant of jurisdiction were to be fulfilled, that a corporation should be subject to suit in a federal court as a citizen of the state whose corporation it was. A corporation, he continued, is neither a mere legal entity nor a mere group of persons, but a group which in its character as incorporated has its "necessary habitat" in the state of incorporation where only it can be sued, and therefore as a group it "may be justly presumed to be resident [there] . . . and should be estopped in equity from averring a different domicil as against those who are compelled to seek them there, and can find them there and nowhere else. . . . The presumption arising from the habitat of a corporation in the place of its creation being conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, the allegation that the 'defendants are a body corporate by the act of the General Assembly of Maryland,' is a sufficient averment that the real defendants are citizens of that state.”

This was no statement of an arbitrary presumption to be made regardless of its truth. It meant that while the Deveaux case was right in treating a corporation, not as a mere abstraction, but as a group of citizens, it was wrong in considering the group to be in their corporate capacity only citizens of the state where they individually resided, and was wrong because when they act as a corporation they act in a capacity created, and conferred on them, by the state of incorporation, and consequently as its citizens. It also meant that it was not necessary specifically to allege the truth that they were in their corporate capacity citizens of Maryland, because it followed from the fact, which was alleged, that the corporation was a corporation of Maryland. So, far from conceding that a corporation is not a citizen, the opinion asserts with the Letson case that it is a citizen. It uses the language of presumption only to meet the objection that citizenship cannot reside in a being that lacks humanity because it is a mere abstraction, and asserts that it does reside in that being, regarded as a group of human beings who in their incorporated capacity have a single, undivided, and col-

66. 16 How. 314, 328-9 (U. S. 1854).
lective citizenship in the state whose corporation they are. We may think, as the dissenting justices did, that that is a misinterpretation of the citizenship clause, but we are gravely in error if we believe that the Court determined to shut its eyes to the truth. It is obvious that the judges had no intention, while professing to ascertain the meaning of the Constitution, openly to pervert its meaning by a self-confessed false pretense. Justice Daniel dissented, earnestly and with abundance of rhetoric. He said the Court was following an *ignis fatuus* in interpreting the Constitution according to its supposed spirit. Justices Campbell and Catron also dissented. But none of them suggested then, or it is believed, at any other time, that the Court was making a false presumption of fact.

In *Lafayette Insurance Co. v. French*, the Court followed the *Letson* case and the case of *Rundle v. Delaware & Raritan Canal Co.* in holding that an averment that a party was a corporation of a named state was an averment that it was a citizen of that state. But there were other allegations that the party was a corporation, and, without specifying the state or country of incorporation, that it was a citizen of Indiana. These allegations, without more, said Justice Curtis, who gave the opinion for the Court, were insufficient to show citizenship, because a corporation, since it is an artificial creation, cannot of itself be a citizen. Probably Justice Curtis meant, and was understood by the other justices to mean, that corporate citizenship should not be attributed to the abstract corporation itself but only to the group of members who compose it and give it its human quality, and that a corporation cannot like an individual become a citizen of any state in which it chooses to make its home and carry on its business.

Two years later, after it had been held in the *Dred Scott* case that a Negro could not be a citizen of a state, and Curtis had resigned from the bench, Justice Taney (who because of illness had taken no part in the *Letson* case, but had concurred in the decisions which followed it) delivered the majority opinion in *Covington Drawbridge Co. v. Shepherd*. He approved the dictum of Justice Curtis that as a citizen is not a figment of the imagination, so a figment of the imagination is not, as such, a citizen. But this was only the pouring of the customary libation to appease the ghost of corporate unreality in the abstract. He based his decision on the ground that a corporation, regarded as a group of members, is a reality in its home state because of the real existence of the members, and in like manner is a citizen of the

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67. 18 How. 404 (U. S. 1856).
68. 14 How. 80, 94 (U. S. 1853).
70. 20 How. 227 (U. S. 1858).
state in the sense of the Constitution, its citizenship like its existence consisting in that of its members, who so far as concerns their corporate capacity are, within the meaning of the Constitution, not citizens of the state of their residence but citizens of the state by whose authority their corporate capacity exists. This he expressed by saying that the Letson case "has ever since been adhered to, and must now be regarded as the settled law of the court," and that its doctrine was "that inasmuch as the corporators were not parties to the suit in their individual characters, but merely as members and component parts of the body or legal entity which the charter created, the members who composed it ought to be presumed, so far as its contracts and liabilities are concerned, to reside where the domicil of the body was fixed by law, and where alone they could act as one person; and to the same extent, and for the same purposes, be also regarded as citizens of the State from which this legal being derived its existence, and its faculties and powers." He said that in the Letson case "the citizenship of the corporators was regarded as the necessary and legal consequence of the facts stated in the pleadings [that the party was a corporation of a named state], without any positive and direct averment" that the members were in corporate capacity citizens, in the constitutional sense, of the state of incorporation. And this, said Taney, was also the ground of decision in the cases subsequent to the Letson case.

It is plain that the Court intended here, as it had intended in Marshall v. Baltimore & Ohio R. R., to affirm the doctrine of the Letson case that members of a corporation are in respect to their corporate capacity the adopted citizens of the state at whose hands they accept incorporation. It is certain that in saying that the Letson case held that the members must be "presumed" to be as to their corporate liability citizens of the state whose corporation they are, the Court did not mean to misrepresent the doctrine of that case, in which the word "presumption" was not used, nor to depart from its doctrine while professing to follow it. We may say that the members of a corporation are, or that they are to be treated as being, or that they are to be considered, deemed, inferred, presumed, adjudged, held, or decided to be citizens of the state of incorporation, and so far as appears the meaning is all one. The different expressions are variations of style used to express the truth that when the Constitution says "citizens of different states" it means to include corporations.

If the decision in the Covington Drawbridge case really rested on an artificial presumption about the individual citizenship of members, then, since the Court had recently held that a Negro could not be a cit-
izen of a state within the jurisdictional clause, and since by the rule of *Strawbridge v. Curtiss* the Court has been in another presumption, to wit, that any Negro who might have bought a share in the corporation was white. The Court meant that incorporation by Indiana conferred Indiana corporate citizenship on the members. It did not mean that the members conferred on the corporation a pretended Indiana citizenship which they did not possess. Nor did it mean, as the overruled theory of the *Deveaux* case would have it, that the members in their individual capacity supply a corporation with a composite citizenship of the states of their respective domiciles.

In *Ohio & Mississippi R. R. v. Wheeler*, the *Letson* case was again affirmed and followed. The question was whether the fact that an Indiana corporation, also incorporated in Ohio, had its principal office in Ohio entitled it to sue in Indiana as a citizen of Ohio. The Court held no, because according to the *Letson* case it was in Indiana a citizen of Indiana. Justice Taney stated that the doctrine of the *Letson* case had been "fully maintained" in the *Covington* case, and that "after these successive decisions, the law upon this subject must be regarded as settled; and a suit by or against a corporation in its corporate name, as a suit by or against citizens of the State which created it." When Taney said that the law must be regarded as settled, he meant it was settled; and when he said a suit against a corporation must be regarded as a suit against citizens of its state, he meant it was such a suit. He said that the *Letson* case decided "that where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States." It was natural to express this rule in terms of presumption, for it means that members who are individual citizens of one state may be in their corporate capacity the citizens of another, or in other words that the Constitution and statutes require that such persons, though they must be treated individually as citizens of one state, must be treated as being in their corporate relations citizens of another.

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72. 3 Cranch 267 (U.S. 1806).
73. 1 Black 286 (U.S. 1862).
74. Id. at 296-7.
75. Id. at 296.
The words last quoted were made by the reporter a major part of the headnote to the reported case, and that, aided perhaps by the picturesque eloquence with which Justice Daniel had repeatedly denied that a corporation was a citizen, may have helped to give currency to a belief that the doctrine of corporate citizenship is a benevolent but conscious usurpation, and not an interpretation in good faith of the relevant legislation. Moreover, Justice Curtis, in the lectures he delivered at the Harvard Law School, in speaking of the jurisdiction of federal courts over corporations, took the headnote as his text and treated the doctrine that it was sufficient for jurisdiction truly to aver, and to prove if denied, that a corporation was a corporation of a named state, as if it were a fiction about the citizenship of its members. This put it on a footing with doctrines of Roman and of English law which, to facilitate the doing of justice, required a plaintiff falsely to aver the existence of jurisdictional facts of which no proof was required and no denial permitted. Yet Justice Curtis had concurred in decisions upholding jurisdiction over corporations without intimating that he was shutting his eyes to a violation of the Constitution. The theory that federal jurisdiction over suits to which corporations are parties is, when grounded on diversity of citizenship, a usurpation that rests on a fiction finds support from commentators, but hardly from decisions.

The degree to which shareholders in a foreign corporation subject themselves to foreign control, or in other words become in their corporate capacity subjects or citizens of the state of incorporation, is shown by the fact that it is the law of the state of incorporation and not that of the state of their residence which fixes the rights and duties between shareholder and corporation that grow out of the corporate relation, and which also fixes the obligation of shareholders to those to whom the corporation is under obligation. If by that law a shareholder is liable for corporate debts, a creditor may enforce the liability wherever the debt was contracted and wherever the shareholder resides, although neither of them knew of the law until after the debt had been contracted and the shares acquired. The cases show that a state may control

76. See note 12 supra.
77. Flash v. Connecticut, 109 U. S. 371 (1883); Whiteman v. Oxford Nat'l Bank, 176 U. S. 559 (1900); Nashua Savings Bank v. Anglo-American Oil Co., 189 U. S. 221 (1903). Restatement, Conflict of Laws (1934) § 191. And see Hawkins v. Glenn, 137 U. S. 319, 329 (1890) ("a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member"). "Every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. . . . He is conclusively presumed [so] to have contracted . . . because the corporation must of necessity be controlled by them. . . ." Canada Southern Ry. v. Gebhard, 109 U. S. 527, 537-8 (1883). See also Cooley, C. J., in Chicago & Northwestern Ry. v. Auditor General, 53 Mich. 79, 92, 18 N. W. 586, 592 (1884) to the effect that when corporations of two
rights connected with its corporations as it may control rights connected
with its land. It may control rights connected with its business cor-
porations as it may control rights connected with its municipal corpo-
ration. A state might admit to membership in its towns and cities,
with right to vote, all owners of land within them, though resident in
other states. They would be its citizens so far as concerned their mem-
bership in its cities. And if an inhabitant of such a city leased his land
and moved to another state, the municipal citizenship he retained as
owner of land, would remain a citizenship of that state though in other
respects he had become a citizen of the state to which he had moved.
So as to a business corporation. Though all its members move to
another state, the corporation remains a corporation of the state that
chartered it, and their membership, with right to vote for directors and
receive dividends, continues to be a citizenship in that state, as their resi-
dence in the city of their new domicile is a citizenship in it. It is as
true of a private as of a municipal corporation that membership in it in a
membership or citizenship of the state whose corporation it is.
Whether such citizenship makes corporations and their members citi-
zens within the meaning of the jurisdictional clauses, or whether, on
the other hand, the word “citizens” as there used refers only to indi-
viduals who sue or are sued in their individual capacity, is a distinct
question. It is on this question only that dissent occurred in the earlier
cases. That dissent ceased long-ago to exist. The Letson case said
that the corporation—while Marshall v. Baltimore & Ohio R. R. said
that the members of the corporation—had a corporate citizenship in the
incorporating state.

The Supreme Court has never repudiated the holding of the Letson
case that the phrase “citizens of different states” includes state cor-
porations. It has often cited that case along with cases that have used
the language of presumption as cases that are identical in doctrine.78

78. Covington Drawbridge Co. v. Shepherd, 20 How. 227, 233 (U. S. 1858); Ohio & Mississippi R. R. v. Wheeler, 1 Black 286 (U. S. 1862); Paul v. Virginia, 8 Wall. 168, 178 (U. S. 1869); St. Louis & San Francisco R. R. v. James, 161 U. S. 545 (1896); Barrow S. S. Co. v. Kane, 170 U. S. 100, 106 (1898). And see Insurance Co. v. Francis, 11 Wall. 210, 216 (U. S. 1870). In the James case it was held (perhaps questionably on principle) that though a state purports to make a corporation of another state its own corporation (and not merely to confer on it as a foreign corporation privileges similar to those which it gives its own corporations), yet if it does so by adopting it as it already exists under its charter from the other state, instead of uniting its members under a new, though perhaps identical, charter of its own, the corporation is not, in the sense of the Constitution, a citizen of the adopting state. Accord, Louisville, New Albany & Chicago R. R. v. Louisville Trust Co., 174 U. S. 552 (1899); Southern Ry. v. Allison, 190 U. S. 326 (1903); Missouri Pacific Ry. v. Castle, 224 U. S. 541 (1912). Cf. Memphis & Charleston R. R. v. Alabama, 107 U. S. 581 (1882).
It is true that judges have often seen fit, while going counter to the overruled doctrine of the Deveaux case, to preserve in form its language and its treatment of a corporation as a group of individuals by speaking of the citizenship of the corporation as resulting from the citizenship of its members, while at the same time they attributed the citizenship of its members in their corporate capacity to the state of their incorporation and not to the state of their residence. But it is also true that the Court has kept on saying that a state corporation is itself a citizen of its state, and the latter form of expression, simple and accurate, is now the approved and usual one. Thus, in Wisconsin v. Pelican Insurance Co., Justice Gray said: "It is well settled that a corporation created by a State is a citizen of the State, within the meaning of those provisions of the Constitution and statutes of the United States which define the jurisdiction of the federal courts." And such seems to be the settled understanding of the bar, as well as of the bench.

79. 127 U. S. 265 (1888).
80. Id. at 287.
81. Moody, J., in Martinez v. La Asociacion de Senoras, 213 U. S. 20, 22, 23 (1909): "It is assumed that Congress in employing the word citizen in this connection intended to include corporations, in view of the decisions of this court that the word has that meaning when used in the definition of the Circuit Courts of the United States." Also Stone, J., in Puerto Rico v. Russell & Co., 288 U. S. 476, 479 (1933) to the effect that because a corporation is created for the purpose of being on a plane with an individual citizen, it was intended to treat it as a citizen when federal jurisdiction was given in cases of diverse citizenship. "Whatever may be said in support of the original adoption of a different rule, it has been the law for a century that, as respects the jurisdiction of the federal courts over a corporation in diversity of citizenship cases, the corporation is a citizen and resident of the state of incorporation and of no other state." Roberts, J. (dissenting on another point) in Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U. S. 165, 176 (1939). That a national bank is a citizen, see Petri v. Commercial Bank, 142 U. S. 644 (1892).

In the following cases the Court has distinctly said that a state corporation is itself a citizen of its state within the meaning of the jurisdictional clause: Cowles v. Mercer County, 7 Wall. 118 (U. S. 1868); Insurance Co. v. Francis, 11 Wall. 210, 216 (U. S. 1871); Railway Co. v. Whitton's Adm'r, 13 Wall. 270, 283 (U. S. 1872); Case of the Sewing Machine Cos., 18 Wall. 553, 575 (U. S. 1873); Insurance Co. v. Morse, 20 Wall. 445, 453 (U. S. 1874); Boom Co. v. Patterson, 68 U. S. 403, 407 (1868); Railroad Co. v. Koontz, 104 U. S. 5, 12 (1881); Shaw v. Quincy Mining Co., 145 U. S. 444, 450-3 (1892); Barrow S. S. Co. v. Kane, 170 U. S. 100, 106 (1898); Southern Ry. v. Allison, 190 U. S. 326, 338 (1903); Bankers Trust Co. v. Texas & Pacific R. R., 241 U. S. 295, 309 (1916).


Conclusive presumptions have a fascination for some minds. A figure of speech appeals to the fancy, especially when it purports to dispense with the necessity for thought. But the decision seldom, if ever, depends on the presumption. The presumption is derived from the decision and puts its results into shorthand. So, when it is said that a man and his wife are one, that he who acts by another acts himself, or that a man is presumed to have known the law he has broken. It seems also to be so when it is said that members of a corporation are presumed to be citizens of the state whose corporation they compose. By using the language of presumption the Deveaux case is not disavowed, but in appearance only extended. Practically, it makes little difference whether we say that, for corporate purposes, it is the corporation or its members that are citizens. The former expression is simpler, less confusing, and of late generally used.

The doctrine that members in their corporate capacity are citizens of the corporation's state has nothing to do with their citizenship as individuals. Hence, in Doctor v. Harrington, where citizens of New Jersey sued a New York corporation in an action founded on their rights as shareholders, it was held that although, if the corporation were regarded as a congeries of shareholders, the plaintiffs must be considered to be in their corporate character citizens of New York, still that did not affect them as claimants against the corporation in their individual rights. They were not dependent upon New York for their capacity to sue upon an individual right the corporation which New York had created. That they were a part of the incorporated group obviously did not make the action a suit by them against themselves. So in Nashua & Lowell R. R. v. Boston & Lowell R. R., where the same persons were separately incorporated in New Hampshire and in Massachusetts, it was held that one corporation could sue the other in a federal court. No presumption about the members, that they were citizens of both states, was entertained. Each corporation was a citizen of its own state, as a group of human beings who, whether native or alien, had been incorporated by that state. Justice Field wrote: "A corporation will be treated as a citizen of the State where created, within the clause extending the judicial power of the United States to controversies between citizens of different states." If a suit against a corporation were really a suit against its members, a member could not sue his corporation at common law even in a state court. He would be in a position of a partner trying to sue his firm. The essence of incorporation is that

83. 196 U. S. 579 (1905).
84. 136 U. S. 356 (1890).
85. Id. at 370.
it makes the corporation a separate legal person from its members. It was the Deveaux case and not the later cases that was founded on fiction, for a suit by or against a corporation is not a suit by or against its members.

Corporations as Citizens Entitled to Privileges and Immunities

The judges who said that a corporation could not be a citizen within the meaning of the jurisdictional clause were apparently influenced, as Henderson has remarked, by believing first, that if the word “citizens” in that clause were interpreted so as to include corporations, it ought also for consistency so to be interpreted in the clause which provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states;” and, secondly, that if so interpreted, this clause would entitle a corporation of one state to do business in another as freely as an individual citizen, so that the state could neither exclude it nor subject it to any of the restrictions imposed on its own corporations. Such a result could not have been intended. At any rate, in Bank of Augusta v. Earle, Chief Justice Taney said that a corporation was not what the privileges clause meant by citizen. He based the statement on the theory that a corporation is a purely imaginary creation of its own state and can have no existence in another except as the other in its generosity sees fit to accord it privileges. That theory is obsolete. Yet in Paul v. Virginia, Justice Field, speaking for a unanimous court, made Justice Taney’s statement the basis of a ruling that the clause refers only to individuals, and that consequently a state may accord a foreign corporation only such privileges as it sees fit. The ruling was supported by a statement of consequences which, it was thought, a contrary decision would entail. These were, that a state would be obliged to permit every corporation of another state to engage in any lawful business for which it was chartered, or at least in any business in which its own corporations could engage, yet free of such supervision and control as the state might think it requisite to exercise over its own corporations.

The decision denies to individuals as incorporated a protection deemed necessary for individuals not incorporated. And the reason given for it is hardly satisfactory. To be sure, when the case was de-

87. 13 Pet. 519 (U. S. 1839).
88. See cases cited in notes supra. 29-31
89. 8 Wall. 168 (U. S. 1869).
cided the Fourteenth Amendment had just gone into effect, and its provisions regarding due process and the equal protection of the laws, being applicable to "any person" instead of to all "citizens," were afterwards held to include corporations, thus making them equally with individuals secure for the future against arbitrary discrimination by a state. But before the social changes that followed the Civil War and increased the likelihood that a state might unjustly discriminate against a class of its own citizens, the only need recognized by the Constitution for federal security against arbitrary state action had been the need of securing the people of one state against such unjust discrimination by another as in effect would make them aliens in their own country. This security corporations needed as much as individuals. If a state permits individuals and corporations of another state to sell goods to its people, and then passes a law forbidding them to sue in its courts for the money due, the injury done by taking away the privilege is the same whether the seller is an individual or a corporation. And if a state confiscates all goods of noncitizens, the injury done by taking away the immunity is the same in either case. A foreign government might make such outrages the subject of a protest backed by threat of force or of a severance of commercial relations, but the people of a state could rely only on the protection given by the constitutional provision.

In *Paul v. Virginia*, the Court tried to draw a distinction between treating a corporation as a body of citizens for the purpose of enabling it to enjoy the *procedural* right of suing in federal courts which was conferred on citizens, and treating the same corporation as a body of citizens for the purpose of enabling it to enjoy a *substantive* right conferred on citizens. Nevertheless, it would seem that the judges who held in the *Deveaux* case that a suit by a corporation was in substance a suit by its members as citizens of their respective states, and also the judges who in later cases held that a suit by a corporation was a suit by its members as citizens in their corporate capacity of the state of incorporation, should and would have held that a statute which deprived a corporation of the privilege of suing for money due deprived the members in their corporate capacity of privileges accorded by the state to its own incorporated citizens in their corporate capacity, and was therefore invalid. Those judges who said, as judges say today, that a corporation is itself a citizen of its state within the jurisdictional clause could obviously have had no reason to hold that it was not a citizen of the state within the privileges clause. And there is no reason, apart from precedent, why the judges who in so many later cases have held that the word "citizen" as used in statutes includes corporations when corporations need the protection that the statute affords,
should not have applied the same rule to give corporations the benefit of the privileges clause.

As for Justice Field's belief that, if foreign corporations were entitled to the privileges of citizens of a state, they could enter and do business free from restrictions imposed on domestic corporations, the reasoning of later cases shows that no such result need follow. A state may impose a reasonable condition on the freedom of action of its own citizens and enforce the same conditions against citizens of other states, even though it is a condition with which citizens of other states are practically unable to comply. Thus the privilege of selling intoxicating liquor or of acting as agent for a foreign insurer may be limited to residents of the state, because a nonresident by reason of his nonresidence lacks a qualification which the state may reasonably regard as material, though material only because it enables the state to exercise a closer supervision over him. There can be no doubt that a married woman, or a citizen of one state who by the law of another would be a minor, is entitled in such other state only to the privileges that it accords its own married women or minors, and not to the privileges of citizens in general. Correspondingly, a corporation of one state is entitled to act in another only so far as it fulfills the reasonably imposed conditions on which the state permits its own corporations to act, including supervision and control. It would make no difference that foreign corporations were unable to comply with the conditions. The state can require that a foreign corporation give all securities for the proper conduct of its business that domestic corporations are required to give, and that might include a requirement that some of the members or officers reside in the state, that an office be maintained there, or even that the corporation, like its own corporations, take out a charter from the state.

On the other hand, if a state, instead of requiring that all sellers of intoxicating liquors be residents of the state, should arbitrarily waive the requirement of residence as to certain citizens, as by providing that residents of states whose names begin with the letter A should be eligible for license, it would seem that residence, being no longer a necessary qualification, could no longer be required as a qualification from citizens of any state. And if a state admits only foreign corporations whose names begin with A or corporations of states whose names begin with

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A, the exclusion of other corporations is plainly arbitrary, and denies to them and, which is the same thing, to their members as incorporated privileges accorded to domestic corporations and to their members as incorporated, and thus violates the intent of the privileges and immunities clause. If this be so, a corporation is a citizen within the meaning of the clause.

Yet the Supreme Court has often and emphatically denied that a corporation is a citizen within its meaning. This concedes more room to arbitrary government than seems necessary. It strips corporations of a right to be admitted to do business in every state on complying with the requirements of local law, which right they ought to have. All that generally needed to be said in those cases, and perhaps all that was usually meant, was that a corporation is not entitled in another state to the rights of its individual citizens, and may in general be forbidden to carry on business there unless it complies with requirements exacted of domestic corporations, and with such further requirements as by reason of nonresidence the state may make of individual nonresidents. Nevertheless, in *Blake v. McClung* the statement was applied literally. When a foreign corporation appeared in a state court merely to claim a share in the assets of its insolvent foreign debtor, it was held that, though the state must permit the individual creditors who were citizens of other states to share equally with its own citizens, the foreign corporation might be confined to what was left after other claimants had been paid in full. It follows that, so far as concerns the privileges and immunities clause, it might have been denied all right to share even in the surplus. It was also held that the corporation’s appearance in court by attorney to claim its share did not bring it “within the jurisdiction” so as to entitle it under the Fourteenth Amendment to the equal protection of the laws. But, in *Kentucky Finance Corp. v. Paramount Auto Exchange Corp.*, *Blake v. McClung* was overruled on the latter point, for it was there held that a foreign corporation was entitled under the equal protection of the laws.

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93. 262 U. S. 544 (1923).

94. See the dissenting opinion of Justices Holmes and Brandeis, id. at 551.
clause to equal treatment with domestic corporations in the judicial enforcement of its claims. It was therefore unnecessary to decide whether it was not entitled to equality of treatment under the privileges and immunities clause.

It is hard to see a reason why citizens of other states should be excluded from the benefits of a provision intended to protect them from unjust discrimination simply because the discrimination is directed against them in their corporate capacity, or why the principle, now well established, should not be applied, that the word "citizen" is capable of including corporations, and should be construed so as to include them, when the policy of a statute cannot otherwise be carried into effect. If it is true that before the Fourteenth Amendment a state in time of shortage of fuel could compel the factories of foreign corporations to shut down until the need of domestic corporations had been supplied in full, it is fortunate that the need for protecting newly emancipated slaves furnished foreign corporations with an effective safeguard against discrimination in the equal protection clause.

The first section of the Fourteenth Amendment which provides that "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside" does not purport to be a rule of exclusion and does not exclude a corporation from citizenship if it is otherwise a citizen. The amendment goes on to declare that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It has been said that within the meaning of this clause, also, a corporation is not a citizen. It makes little difference whether or not the clause includes corporations unless some interpretation is put upon it which will make it effective to create a privilege or immunity that would not exist without it. At present its only effect is to enable a pleader to allege that an act of a state is invalid because it violates this clause, and prove it by showing that the act violates a privilege or immunity which some other part of the Constitution creates expressly or by implication. For so far as a state has constitutional power to act, nobody has a privilege or immunity against its action. The Court has enumerated as instances of privileges of federal citizenship the right of a citizen to visit the seat of federal government, to have access to its seaports, and to assemble with his fellow citizens

95. See Henderson, The Position of Foreign Corporations in American Constitutional Law (1918) 178-188.

to petition Congress for a redress of grievances. But these privileges do not exist as to a man whom a state has imprisoned for crime, or whom it otherwise prevents from exercising them by any action which, consistently with the other provisions of the Constitution, it may validly take. The Court rejected several attempts to interpret the clause so as to make it creative of right. Afterward, however, in *Colgate v. Harvey*, it gave the clause substantive effect by holding that it entitled a citizen of one of the United States to deal with citizens of another state without being discriminated against by his own state because he had done so, instead of dealing with citizens of his own state. But *Madden v. Kentucky*, by purporting to overrule that decision, extinguished the new light, and again treated the clause as a mere rhetorical declaration that a state shall not do what it lacks power to accomplish.

There is little, if anything, in the decisions of the United States Supreme Court, as distinguished from its dicta, inconsistent with the proposition that a state corporation is a citizen of its state within the meaning of the Constitution.

**Corporations as Possessors of Liberty**

It has been said, and the statement has been made a ground of decision, that though a corporation may have property and hence is susceptible of being deprived of property without due process of law, liberty, like life, is something that only a sentient being can have, and therefore, no matter how arbitrary the restraint imposed, it is impossible to deprive a corporation of liberty. The doctrine seems to have taken its start in remarks made by Justice Field in *County of San Mateo v. Southern Pacific R. R.* In holding that a discriminatory state tax on a railroad corporation was void because it denied the corporation the equal protection of the law and took its property without due process, Justice Field alluded to the vastness of corporate enterprise and the necessity of protecting corporate as well as individual property, and said that the due process clause should be understood as including under "person" the members of a corporation in respect to the corporate prop-

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98. 296 U. S. 404 (1935).
erty. It would seem possible to understand the word person as also including the members of the corporation in respect to the corporate liberty; but Justice Field added that in view of other provisions of the Fifth Amendment protective of liberty, like that against self-incrimination, which were applicable only to individuals, the words which forbade depriving of life or liberty without due process should be held to refer only to the life and liberty of individuals.

Possibly Justice Field, when he spoke, thought that the liberty intended was only freedom from incarceration or other bodily restraint. If the magnitude of interests entrusted to corporate action makes it imperative that corporate property be protected from confiscation, it is also imperative that corporate action be protected from arbitrary restraint. If corporate activity is arbitrarily restricted, of what avail is it that the shareholders might have carried on the enterprise in partnership and would have been protected from such a restriction? Many enterprises practically, and some, such as banks and public utilities, legally, can often be carried on only in corporate form. If a charitable corporation is forbidden to advertise the benefits it is ready to bestow, or a religious foundation the services it is ready to conduct, its purposes may wantonly be defeated. The interests of the public and of the members may be as much and as unwarrantably invaded by restricting the activities of a corporation as by confiscating its assets. The property right of a charitable corporation to receive a legacy under the will of a benefactor is precisely analogous to its liberty of dispensing the money in charity when received. It should be immaterial whether an interest unjustifiably thwarted is an interest in receiving, in keeping, or in using money, or anything else, whether an interference is with the acquisition or retention of property, or with its use for the purposes for which it was acquired.

It is true that a corporation is not possessed of knowledge or capacity for knowledge. But it is not for that reason treated as an idiot. It is also true that a corporation cannot sense its loss of liberty or of property, but the public and the stockholders, who are the persons in interest, can be well aware of it, and therefore it exists. Every right of property is reducible to rights of using, excluding, transferring, or acquiring, which are varieties of liberty of action. The right to receive the payment of a debt stands on a footing with the privilege of using the money when received. It is hard to see why a clause which protects those liberties of action in which the right to property consists, and purports to protect liberty of action in general, should be held applicable to corporations as to one class of liberties and incapable of application as to
CORPORATIONS AS PERSONS

It is equally hard to see a compelling reason why the liberty of a corporate group to act in corporate form, which is the only way in which it can take corporate action, should be denied the constitutional protection accorded to the members' freedom of action in general.

The theory that liberty is something that a corporation from its nature cannot have reverts to the conception of a corporation as unreal. From some of the language used concerning the inapplicability of liberty to artificial persons we might infer that there could be no impairment of the nation's freedom though the national government were overthrown by force, so long as individuals were left at liberty to try to attain, by such concerted action as they could agree upon, the objects previously entrusted to the government. It might seem that if taking a printing press from an incorporated publisher deprives it of property, forbidding its use would deprive it of "liberty." Yet in *Hague v. CIO* 104 Justice Stone, after holding that a New Jersey statute was void as to individuals, stated: "As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons." It follows that as to newspapers published by corporations the Federal Constitution gives no security for the freedom of the press as against state censorship or suppression, unless so far as it may tend to deprive of property by diminishing the profits of the business. One "daring single to be just and utter odious truth," a most likely victim of censorship, could hardly prove that loss of profits would result from the elimination of matter that pleased not the many. And a corporation chartered "not for profit" but solely to enlighten the public on matters of public concern has no standing to resist the heavy hand of unscrupulous and self-interested suppression. Under the Court's doctrine, it would seem that freedom is something which a corporation may seem

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102. Here note an interesting diversity. Since, as the Court has said, "the liberty guaranteed by the due process clause is the liberty of natural, not artificial persons" (307 U. S. 496, 527 [1939]) a corporation may be fined for publishing innocent but prohibited matter. But to tax is to deprive of property. Hence a corporation may not be taxed for publishing innocent matter if the tax is plainly designed, not for revenue, but as a fine. *Grossjean v. American Press Co., Inc.*, 297 U. S. 233, 344 (1936).

103. The cases hold that an unwarranted restriction on a corporation's contracts of employment is void because it deprives the employees of liberty to contract to work. *Wilson v. New*, 243 U. S. 332 (1917); *Adkins v. Children's Hospital*, 261 U. S. 525 (1923); *Meyer v. Nebraska*, 262 U. S. 390 (1923); *Charles Wolff Packing Co. v. Court of Industrial Relations of Kansas*, 262 U. S. 522 (1923). And see *Truax v. Raich*, 239 U. S. 33 (1915); *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). It must also deprive the members, in their corporate capacity, of liberty to hire, unless on the mystic theory that there can be no thing as corporate liberty.

104. 307 U. S. 496, 527 (1939).
to exercise while unrestrained, yet since it cannot sense its loss of freedom it is not in essence restrained, though bound so straitly that the purposes of its creators are brought to naught.

However, if a corporation is arbitrarily singled out from other persons to restrict its activities, it is held to be thereby deprived of the equal protection of the law for the liberty which it is said to be incapable of possessing, and the restriction is invalid. This being so, it is hard to see why if a law restricting the freedom of the press is void as to individual publishers it is not also void as to corporate publishers, because it denies them the equal protection of the law in forbidding them to publish what individual publishers may freely publish. If the law is void as to a corporate publisher, it is hard to see why it may not join with the individual publishers, as in *Hague v. CIO* it tried to do, as co-plaintiff to prevent the enforcement of a statute which, because it is unenforceable against them, is also unenforceable against it. Constitutional guaranties were framed for the protection of men's interests, in whatever form they might exist, against every oppressive device. A statute which unjustifiably encroaches on the interests of a group should not be saved from invalidity merely because those interests are asserted, as they have to be, in corporate form.

Any restriction on the liberty of a corporation is a restriction on the liberty of its members to exercise in corporate form the liberty restricted. If arbitrary, it is an arbitrary restriction on their liberty. To say that a corporation can have property but cannot enjoy liberty is inconsistent. A corporation cannot have or enjoy property in any different sense from that in which it can have or enjoy liberty. In either case the immediate privilege is single and corporate, the ultimate or real interest is collective and individual. The theory that a corporation cannot be deprived of liberty is a flight of fancy that condones legislative crime.

Because it has been held that a corporation is capable of being deprived of property but not of liberty, there is a temptation to prevent injustice by translating deprivations of liberty into deprivations of prop-

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property, and so unduly to stretch the meaning of the word property. Thus it has been said that to limit the patronage of a business is to deprive its owner of property,¹⁰⁷ and that the right to work for such pay as is offered is a property right because it is a means of acquiring property.¹⁰⁸ So the liberty of sawing wood becomes property as soon as anyone is willing to pay for sawing it, and a "living skeleton" who earns his bread by exhibiting himself in a circus sideshow has a property in his lack of flesh of which the state would deprive him if it fattened him by forced feeding.