THE CURIOUS EXCLUSION OF CORPORATIONS FROM THE PRIVILEGES AND IMMUNITIES CLAUSE OF ARTICLE IV

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I. INTRODUCTION

In 1869, the U.S. Supreme Court held in Paul v. Virginia that a corporation was not a “citizen” for purposes of the Privileges and Immunities Clause of Article IV of the U.S. Constitution. In so concluding, the Court agreed with dicta in its earlier cases and numerous state court rulings. Corporations were “the mere creation of local law, [and] can have no legal existence beyond the limits of the

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2. See, e.g., Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 587 (1839) (“The only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state . . . .”). For more on Bank of Augusta, see infra notes 46-48.

3. See, e.g., Ducat v. City of Chicago, 48 Ill. 172, 180-81 (1868), aff’d, 77 U.S. (10 Wall.) 410, 415 (1871) (holding corporations entering another state to do business are not “citizens” under Article IV); Phoenix Ins. Co. v. Commonwealth, 68 Ky. (5 Bush) 68, 78-80 (1868) (same); Commonwealth v. Milton, 51 Ky. (12 B. Mon.) 212, 216 (1851); Tatem v. Wright, 23 N.J.L. 429, 442 (1852) (opinion of Potts, J.) (“Corporations are not citizens within the meaning of the clause referred to.”); id. at 446 (opinion of Elmer, J.) (asserting that the “citizen” in Article IV, Section 2 means “a natural person”); Bard v. Poole, 12 N.Y. 495, 504 (1855) (stating that “corporations are not citizens in the sense of” Article IV, Section 2); People v. Imlay, 20 Barb. 68, 80 (N.Y. Gen. Term 1855) (declaring that “[a]n incorporated company is not a citizen, within the meaning of” Article IV, Section 2); Wheeden v. Camden & Amboy R.R., 1 Grant 420, 423 (Pa. 1856) (stating that it was “impossible” for “a corporation [to] be a citizen”); Slaughter v. Commonwealth, 54 Va. (13 Gratt.) 767, 771-73 (1856).
sustainability where created," Justice Stephen J. Field wrote for the Court. If another state allowed them to do business inside its borders, “such assent may be granted upon such terms and conditions as those States may think proper to impose.” States could even “exclude the foreign corporation entirely,” “unless such prohibition is so conditioned as to violate some provision of the Federal Constitution” other than the Privileges and Immunities Clause. As far as the clause was concerned, “[t]he whole matter rests in their discretion,” Field underscored. The Court has never retreated from these conclusions, and

4. Paul, 75 U.S. (8 Wall.) at 181. The exclusion of corporations from Article IV was subsequently expanded to include a range of organizations, including investment trusts:

Whether a given association is called a corporation, partnership, or trust, is not the essential factor in determining the powers of a state concerning it. The real nature of the organization must be considered. If clothed with the ordinary functions and attributes of a corporation, it is subject to similar treatment. Hemphill v. Orloff, 277 U.S. 537, 550 (1928).

5. Paul, 75 U.S. (8 Wall.) at 181; see Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1856) (“A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. This consent may be accompanied by such conditions as Ohio may think fit to impose . . . .”) (citation omitted); see also St. Clair v. Cox, 106 U.S. 350, 356 (1882) (citing Lafayette Ins. Co., 59 U.S. (18 How.) at 407); Fire Dep’t of Milwaukee v. Helfenstein, 16 Wis. 142, 145 (1862) (maintaining that a state may impose such restrictions and conditions “as it sees fit” on nonresident corporations).

6. Paul, 75 U.S. (8 Wall.) at 181; see S. Ry. Co. v. Greene, 216 U.S. 400, 413 (1910) (citing W. Union Tel. Co. v. Kansas, 216 U.S. 1 (1910)) (noting the line of cases that “sustained the right of the State to exclude a foreign corporation from its borders and to impose conditions upon the entry of such corporations into the State for the purpose of carrying on business therein”); Attorney Gen. v. Bay State Mining Co., 99 Mass. 148, 153 (1868) (“The state may deny to foreign corporations the right to transact their business, hold property, or exercise any corporate function whatever within its limits. Or it may permit them to exercise such privileges upon terms prescribed by law . . . .”). Inlay, 20 Barb. at 69, 80-81 (holding that agent of foreign insurance corporation could be forbidden to do business in state).

7. Sec. Mut. Life Ins. Co. v. Prewitt, 202 U.S. 246, 249 (1906). Although a state could impose “such conditions as [it] may think fit” on an out-of-state corporation, they could not be “repugnant to the constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defence.” Lafayette Ins. Co., 59 U.S. (18 How.) at 407. For example, a state could not condition an out-of-state corporation’s license to do business on not removing cases to federal court. Barron v. Burnside, 121 U.S. 186, 198, 200 (1887) (stating that “state legislation cannot confer jurisdiction upon the Federal courts, nor limit or restrict the authority given to them by Congress in pursuance of the Constitution”); Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 453 (1874) (“The jurisdiction of the Federal courts . . . depends upon and is regulated by the laws of the United States. State legislation cannot confer jurisdiction upon the Federal courts, nor can it limit or restrict the authority given by Congress in pursuance of the Constitution.”).


9. See, e.g., Hemphill, 277 U.S. at 548 (“It is settled doctrine that a corporation organized under the laws of one state may not carry on local business within another without the latter’s permission . . . . A corporation is not a mere collection of individuals capable of claiming all benefits assured them by section 2, article IV, of the Constitution.”); Blake v. McClung, 172 U.S.
commentators have accepted the exclusion of corporations from the clause without protest.10

Denying corporations the protection of the Privileges and Immunities Clause effectively authorized all types of state discriminations against companies chartered under the laws of other jurisdictions. Virginia’s highest court held, in 1856, that the legislature could “forbid foreign corporations from engaging in any pursuit within the state; and, of consequence, to grant permission to engage therein only upon terms” that it imposed.11 Or as the Supreme Court bluntly stated in 1888, “the power of the State to discriminate between her own domestic corporations and those of other States, desirous of transacting business within her jurisdiction, was clearly established.”12 Consequently, in Blake v. McClung, individuals won protection under the Privileges and Immunities Clause, but corporations with identical claims lost.13

It is hardly surprising that states used their discretionary authority over foreign corporations to engage in such overt discriminations until they were found to violate the Dormant Commerce Clause14 and the

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10. See, e.g., THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 188 (Boston, Little, Brown & Co. 1880) (“And the term citizens, as here used, applies only to natural persons, members of the body politic, owing allegiance to the State, and not to corporations, which are artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed.”). One leading modern treatise merely mentions the doctrine in a footnote. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 544 n.92 (2d ed. 1988).

11. Slaughter v. Commonwealth, 54 Va. (13 Gratt.) 767, 773 (1856); see Caldwell v. Armour, 43 A. 517, 518 (Del. Super. Ct. 1899) (“Corporations are the creatures of the local law, and have no right of recognition in other states without their assent, and upon such terms as they may impose.”); Tatem v. Wright, 23 N.J.L. 429, 441 (1852) (opinion of Potts, J.) (noting that if states can exclude all foreign corporations, they can permit them “upon terms” as they wish—in this instance, a special tax); id. at 447 (opinion of Elmer, J.) (“[A]n incorporation has no right to go beyond the limits of the sovereignty which created it, and if it does, must submit to such terms as other sovereignties see fit to impose.”).

12. Pembina Consol. Silver Mining, 125 U.S. at 188.

13. 172 U.S. at 258-59; see infra text accompanying notes 22-23.

14. The Commerce Clause of the U.S. Constitution states: “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .” U.S. CONST. art. I, § 8, cl. 3. The “Dormant Commerce Clause” is the theory that Congress’s power to
Equal Protection Clause, both of which were held to protect corporations.\textsuperscript{15} One of the Court’s major justifications for recognizing the Dormant Commerce Clause was that out-of-state businesses were not in a position to defend themselves in state political processes on a level playing field with their local counterparts.\textsuperscript{16} The same rationale lies behind the Privileges and Immunities Clause, regardless of whether the businesses being protected are corporations, partnerships, or sole proprietorships.\textsuperscript{17}

There are many examples of such discriminations against corporations chartered in other states that were sustained by courts before the Court enlisted the Dormant Commerce Clause and the Fourteenth Amendment to stop them. States exacted licensing fees or imposed special taxes on foreign corporations for the “privilege” of doing business in the jurisdiction.\textsuperscript{18} Most notably, they taxed foreign

regulate interstate commerce implies a restriction on the states, preventing legislatures from passing statutes inhibiting interstate commerce. See Martin H. Redish & Shane V. Nugent, \textit{The Dormant Commerce Clause and the Constitutional Balance of Federalism}, 1987 DUKE L.J. 569, 570 (“The Court has [invalidated a state regulation as a violation of the commerce clause] when it has found that such regulation either discriminates against out-of-state interests or unduly burdens the free flow of commerce among the states.”). The Court held that state taxes and regulations discriminating against interstate business transactions violated the Dormant Commerce Clause. See, e.g., \textit{W. Union Tel. Co. v. Kansas}, 216 U.S. 1, 47-48 (1910) (holding that state tax violated the Dormant Commerce Clause in requiring that “as a condition of its being allowed to do intrastate business in Kansas,” a company must pay a tax based “on all its property, business and interests everywhere, including both its interstate and intrastate business and property”); \textit{Pittsburg & S. Coal Co. v. Bates}, 156 U.S. 577, 588 (1895) (holding the Dormant Commerce Clause prohibits state laws that “will impose any discriminating burden or tax upon the citizens or products of other States coming or brought within its jurisdiction”); \textit{Norfolk & W. R.R.}, 136 U.S. at 115, 120 (holding the state violated the Dormant Commerce Clause by passing a law requiring foreign corporations to either invest capital in the state or pay an annual license fee); \textit{Welton v. Missouri}, 91 U.S. 275, 280 (1875) (stating that “the very object” of the Commerce Clause was to combat discriminating state legislation).


\textsuperscript{16} \textit{See infra} text accompanying note 96.

\textsuperscript{17} \textit{See Austin v. New Hampshire}, 420 U.S. 656, 662 (1975) (stating that the Privileges and Immunities Clause “implicates . . . the structural balance essential to the concept of federalism,” by addressing the fact that “nonresidents are not represented in the . . . legislative halls” outside their own states).

\textsuperscript{18} \textit{See, e.g.}, \textit{Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania}, 125 U.S. 181, 185-86, 190 (1888) (holding that out-of-state corporations that did not invest capital in state could
corporations at higher rates than they did comparable domestic businesses.\textsuperscript{19} States were allowed to limit the business activities of foreign corporations “to particular localities; or they [might] exact such security for the performance of its contracts with their citizens as in their judgment [would] best promote the public interests.”\textsuperscript{20} Foreign corporations generally were permitted to own property or sue in the courts of states outside their place of incorporation, but only by comity.\textsuperscript{21} They could be forbidden altogether to employ the state’s courts to vindicate their legal claims, and consequently states were able to impose terms for allowing access that favored their own citizens.\textsuperscript{22} For instance, out-of-state corporations could be subordinated to state citizens in distributing the assets of an insolvent company,\textsuperscript{23} or be required to appoint an agent to receive service of process.\textsuperscript{24} Likewise, as a condition of maintaining offices in the state, foreign corporations could be obliged to invest a minimum amount of capital there.\textsuperscript{25}

This Article examines the rationales that courts have given for excluding corporations from protection by the Privileges and Immunities
Clause.\textsuperscript{26} It also will ask why the Supreme Court would make that determination while finding that corporations were “citizens” for purposes of federal judicial jurisdiction, as well as “persons” under the Equal Protection and the Due Process Clauses (and a huge number of statutes). In retrospect, it would have been more logical to recognize Article IV as a vehicle for shielding out-of-state corporations from discrimination. This conclusion does not mean the present Court should, much less would, abandon a most a century and a half of precedent and begin including corporations under the Privileges and Immunities Clause. Rather, this Article is about a forgotten avenue of constitutional history. Walking that lane shows how the meaning of citizenship and attitudes about corporations have changed significantly since the beginning of the American republic.

II. THE RATIONALES FOR EXCLUDING CORPORATIONS FROM THE PRIVILEGES AND IMMUNITIES CLAUSE

Nineteenth-century courts produced several overlapping rationales to justify concluding that corporations were not citizens under Article IV. The most basic argument was essentialist—that the word “citizen” inherently could only apply to a human. Many courts agreed with William Blackstone’s characterization of corporations as “artificial persons.”\textsuperscript{27} Chief Justice John Marshall declared, in 1809, that a corporation was an “invisible, intangible, and artificial being, [a] mere legal entity, a corporation aggregate,” that “certainly [was] not a citizen.”\textsuperscript{28} Ten years later, he used similar language to describe corporations in \textit{Dartmouth College v. Woodward}.\textsuperscript{29} A New Jersey Supreme Court justice, in 1852, wrote that “[i]n the very nature of things, the citizen referred to [in Article IV] is a natural person, a human being having rights . . . as a member of a free government, and not a

\textsuperscript{26} See infra Part II.
\textsuperscript{27} 1 \textsc{William Blackstone, Commentaries} *455; see \textit{Bank of Augusta v. Earle}, 38 U.S. (13 Pet.) 519, 586 (1839) (stating that a corporation was an “artificial being”); \textit{Slaughter v. Commonwealth}, 54 Va. (13 Gratt.) 767, 772 (1856) (stating that corporations were “artificial persons”); \textsc{The Law of Corporations: Containing the Laws and Customs of All the Corporations and Inferior Courts of Record in England} 1-2 (London, Assigns of Richard and Edward Atkins 1702) [hereinafter \textsc{Law of Corporations}] (“A Corporation or Incorporation is a Body framed by Policy or Fiction of law, and it’s therefore called a Body Politick; and it’s called an Incorporation or Body Incorporate, because the Persons are made into a Body which endureth in perpetual Succession; and are of Capacity to grant, sue or be sued, and the like.”).
\textsuperscript{28} \textit{Bank of the U.S. v. Deveaux}, 9 U.S. (5 Cranch) 61, 86 (1809). Marshall was discussing whether a corporation was a citizen for the purpose of Article III diversity jurisdiction. \textit{Id}.
\textsuperscript{29} \textit{Dartmouth Coll. v. Woodward}, 17 U.S. (4 Wheat.) 518, 636 (1819) (describing a corporation as “an artificial being, invisible, intangible, and existing only in contemplation of law”).
mere artificial person, the creature of a special charter, having no rights but such as are thereby granted.” The Pennsylvania Supreme Court asserted, in 1856, that the Framers of the Constitution, “doubtless, by design, and on good reasons,” left corporations “out of the federative system altogether.” They “well understood,” the court continued, that “citizen” meant “a human being—a natural person, capable of acting, contracting, suing and being sued without legislative aids.”

The judges who originated the idea of leaving corporations outside the clause relied heavily on the fact that corporations could not, by their nature, exercise some of the major attributes of citizenship, which implied to them that it was impossible for these entities to be “citizens.” A person was able to move from state to state at will, but this was not so for a corporation. Chief Justice Roger B. Taney pointed out, in 1839, that a corporation “can have no legal existence out of the boundaries of the sovereignty by which it is created. . . . It must dwell in the place of its creation, and cannot migrate to another sovereignty.” “[L]oco-motion” was one of the natural rights of persons recognized by Blackstone, but corporations could not exercise the corollary privilege of subjects “to pass through, or to reside in any other state.” A corporation also had a quality that no human could obtain—it was “but one person in law, a person that never dies,” Blackstone noted, even though he acknowledged that there were several ways for a corporation to be dissolved, including “[b]y act of parliament, which is boundless in its operations.” In addition, corporations were able to own property in perpetuity, whereas, alas, humans could not take it with them in the end.

Chief Justice Taney wrote for the Court, in the 1839 decision Bank of Augusta v. Earle, that “corporations of one state are permitted to make contracts in another” only as a matter of comity, “the voluntary act of the

32. Id. at 424.
34. BLACKSTONE, supra note 27, at *130-31.
35. Corfield v. Coryell, 6 F. Cas. 546, 552 (C.C.E.D. Pa. 1823) (No. 3,230). Other courts also held that the Privileges and Immunities Clause guaranteed the right of interstate travel. See, e.g., In re Archy, 9 Cal. 147, 164 (1858) (holding that Article IV, Section 2 protects the right of every citizen of the United States to pass freely through every other state with his property of every description, including negro slaves); Julia v. McKinney, 3 Mo. 270, 272 (1833) (stating that it is undoubtedly the “right of every citizen of the United States to pass freely through every other State with his property of every description, including negro slaves”).
36. BLACKSTONE, supra note 27, at *456.
37. Id. at *473.
38. See id. at *456 (stating that corporations could own property indefinitely).
nation by which it is offered.” Approval could be refused “when contrary to its policy, or prejudicial to its interests.” The New Jersey Supreme Court held, in 1852, that this doctrine was “decisive” on the question of whether corporations could be citizens under Article IV. Considering that “a foreign corporation can only make contracts in this state by mere comity, and this comity is inadmissible where it is contrary to our policy,” the New Jersey court reasoned, “there can be no pretence that it stands . . . clothed with the rights of a citizen of another state.”

Besides, the Virginia court quoted earlier added, states did treat individuals from other states the same as local citizens when they operated corporations. State citizens could not, by “virtue of their mere citizenship,” perform any “corporate act whatever.” As the Kentucky Court of Appeals pointed out, individual citizens of other states “at their own option” were as free “as the citizens of this State” to form corporations under Kentucky law. Put differently, forming a corporation might be a privilege under state law, but it was not considered a privilege of citizenship.

Chief Justice Taney also contended that it would be incompatible with the corporate form to consider these entities as exercising the privileges and immunities of their members:

If . . . the members of a corporation were to be regarded as individuals carrying on business in their corporate name, and therefore entitled to the privileges of citizens in matters of contract, it is very clear that they must at the same time take upon themselves the liabilities of citizens, and be bound by their contracts in like manner.

Obliging the owners of corporations to accept the burdens imposed on citizens, such as exposure of personal assets to suit, Taney continued, “would be to make a corporation a mere partnership in business, in which each stockholder would be liable to the whole extent of his property for the debts of the corporation; and he might be sued for them, in any state in which he might happen to be found.” In other words, the

40. Id.; see also Hale v. Henkel, 201 U.S. 43, 74 (1906) (“[A corporation] receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. It can make no contract not authorized by its charter.”).
41. Tatem v. Wright, 23 N.J.L. 429, 443 (1852) (opinion of Potts, J.); see id. at 445 (opinion of Elmer, J.).
42. Id. at 443 (opinion of Potts, J.).
43. See supra text accompanying note 11.
47. Id.
individual owners of the corporation could not demand “the privileges of citizens in the several states, and at the same time” expect to be “exempt . . . from the liabilities which the exercise of such privileges would bring upon individuals who were citizens of the state.”

Some courts stressed the sheer novelty of the claim that corporations should be considered citizens under the clause. The mere fact that they had never been so treated seemed a good reason to reject the possibility. A Kentucky court, in 1851, noted that the seminal federal case interpreting the Privileges and Immunities Clause, Corfield v. Coryell, made no “reference to corporations or corporate rights, or to any peculiar privileges, or to the right of a corporation to make contracts, or acquire property, or do any corporate act beyond the limits of the State which creates it.” Once stare decisis kicked in, the issue was never seriously re-examined, and eventually, corporations stopped trying to change the minds of the judges and turned to other parts of the Constitution for relief from discriminatory legislation.

III. THE ILLOGIC OF EXCLUDING CORPORATIONS FROM THE PRIVILEGES AND IMMUNITIES CLAUSE

Many of these arguments against including corporations within the purview of the Privileges and Immunities Clause are superficially plausible, but they all have fundamental flaws. To begin with, keep in mind that the issue is not whether a person’s ability to form a corporation is a privilege of citizenship, but rather whether corporations, once formed, should be treated as citizens for purposes of the Privileges and Immunities Clause. Further, the clause only requires a state to treat citizens of other states in the same way they would their own citizens, and a state might not treat its own citizens equally. As the Minnesota Supreme Court said in 1862, the clause did not extend “absolute equality of rights and privileges with every citizen of each state of the Union, but all such privileges and immunities in any state as are, by the Constitution and laws thereof, secured, or extended, to her own people of the same

48. Id.
49. 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230).
50. Milton, 51 Ky. (12 B. Mon.) at 220.
51. Detroit v. Osborne, 135 U.S. 492, 498 (1890) (holding that when the citizen of one state goes into another, that person is “entitled . . . to all the privileges and immunities of citizens of that State; but, under that Constitution, he can claim no more,” and that the person “walks the streets and high ways in that State entitled to the same rights and protection, but none other, than those accorded by its laws to its own citizens”); Costin v. Washington, 6 F. Cas. 612, 613-14 (C.C.D.C. 1821) (No. 3,266) (“A citizen of one state, coming into another state, can claim only those privileges and immunities which belong to citizens of the latter state, in like circumstances.”).
class, and otherwise similarly situated.” 52 For example, many decisions prior to the Civil War held that even when free blacks were considered citizens by a state, in other states they were entitled to no more than the discriminatory treatment those jurisdictions afforded their own freemen (which could include not being allowed to reside in the state once freed). 53

If corporations were counted as citizens under the clause when doing business in states outside their place of incorporation, they would only be entitled to the same treatment those other states afforded their own corporations. The reason is simple: were states obliged to treat foreign corporations like individual citizens for purposes of the clause, rather than domestic corporations, their police powers would be seriously undermined. The courts that fretted over including corporations within the clause because they would be entitled to all the rights of individual citizens did not see this obvious limitation.

The heart of the argument against bringing corporations within the ambit of the clause centered on the idea that, as artificial persons, they could act only under the terms of their legislatively-controlled charters, and then solely within the borders of their states, unless another state allowed them to operate there by comity. A corporation required “the permission, express or implied, of the sovereign in whose territory the corporation attempts to operate.” 54 Natural persons who were citizens of other states did not require such approval. 55

This line of thinking assumed the conclusion it was trying to prove. If corporations were considered citizens for purposes of the clause in the first place, states could not exclude them or discriminate against their business activities any more than they could natural persons. The whole idea that corporations somehow do not exist outside their states of

52. Davis v. Pierse, 7 Minn. 13, 21 (1862).
53. Chancellor James Kent noted that free blacks were allowed to vote in some states, but in other states, they were subject to “such disabilities as the laws of the states respectively may deem it expedient to prescribe to free persons of colour.” 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258 n.b (New York, 5th ed. 1844) (detailing special restrictions on free blacks, including bonding requirements).
54. Milton, 51 Ky. (12 B. Mon.) at 219; see Bard v. Poole, 12 N.Y. 495, 504 (1855) (stating that laws of the state creating a corporation have “no extra-territorial operation”); People v. Imlay, 20 Barb. 68, 80 (N.Y. Gen. Term 1855) (stating that a corporation is “a creation of the state which incorporates it,” that this state “has no power to legislate for other states, or to give to the artificial bodies which it creates powers to act in other states,” and that “[s]uch companies act in other states than those which incorporate them, only by the comity of such other states”).
55. The right of a person to travel throughout the British Empire was a privilege of subjects. See David S. Bogen, The Privileges and Immunities Clause of Article IV, 37 CASE W. RES. L. REV. 794, 817 (1987); David R. Upham, Note, Corfield v. Coryell and the Privileges and Immunities of American Citizenship, 83 TEX. L. REV. 1483, 1493 (2005).
incorporation is based on nineteenth-century formalism—the very sort that lay behind the now discredited theory of territorial jurisdiction in Pennoyer v. Neff. Obviously there is nothing physically impossible about corporations doing business outside their state of inception. For, as a federal circuit court pointed out in 1850, “nothing in their organization . . . should deprive them” of the ability to exercise the same types of powers available to individuals, such as holding property and suing for debt collection. When corporations do business outside their home states, the laws of the foreign jurisdiction apply to their operations, which is no different than when individuals or partnerships act away from their home states. Modern corporations often have very little actual presence in their incorporating states in comparison to their operations elsewhere.

It is also irrelevant that all the privileges of corporations are the result of state grace. The same goes for flesh and blood. All “privileges” were “creations of the local law,” a Kentucky court noted, and “can not by the mere force of that law, exist or be exercised beyond its territorial jurisdiction.” Moreover, any privilege or immunity can be revoked by a state, regardless of whether it advantages a natural person or a corporation. Humans may have natural rights that soulless corporations cannot possess, such as freedom of conscience and the right to bodily integrity, but these never have been regarded as privileges of citizenship.

Chief Justice Taney’s argument for excluding corporations from the purview of the clause—that their shareholders could not be personally liable—proved too much. Corporations have long been treated by law as citizens or persons for many purposes. They enjoy a lengthy list of legal privileges that are the same as those possessed by individual citizens, and did so when Taney wrote, including the rights to own property and to sue and be sued in a corporate name. Corporations

56. 95 U.S. 714, 722 (1878) (holding that “no State can exercise direct jurisdiction and authority over persons or property without its territory”); see Geoffrey C. Hazard, Jr., A General Theory of State-Court Jurisdiction, 1965 SUP. CT. REV. 241, 271 (stating that Pennoyer “is an example par excellence of what Karl Llewellyn called the Formal Style in juristic reasoning”).
61. See infra notes 62-69.
62. See Louisville, Cincinnati & Charleston R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844); BLACKSTONE, supra note 27, at *456; 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 69-226 (London, J. Butterworth 1793) (describing corporate powers, capacities and
receive many of the same procedural protections in criminal and civil cases as individuals, and these have long been understood as privileges of citizenship. By exercising those privileges, such as bringing a lawsuit or demanding a trial by jury, a corporation’s shareholders do not expose themselves personally to the jurisdiction of the state’s courts on unrelated claims. The same is true when corporations invoke federal diversity jurisdiction.

In other constitutional contexts, in the nineteenth century and beyond, the Court has counted corporations as citizens or persons. The basis of these rulings was acknowledgement that individuals owned the companies—real people who suffered from corporate losses and profited by their gains. Chief Justice Marshall wrote for the Court, in 1809, that although corporations were not state “citizens” per se, they nonetheless could in effect be counted as such for purposes of federal diversity jurisdiction under Article III. In so ruling, Marshall gave a rationale that should have applied equally to the Privileges and Immunities Clause: “For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.”

Elaborating on this point, in 1853, Justice Robert C. Grier remarked for the Court that while it was “no doubt metaphysically true in a certain sense” that a corporation existed as an “artificial person,” it was equally true that a citizen who has made a contract, and has a “controversy” with a corporation . . . [does] not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served on an 

incapacities); see also Jay, supra note 60, at 23-24, 35 n.194 (describing corporate privileges). The Court in Louisville, Cincinnati & Charleston R.R. v. Letson said:

[A] corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same state, for the purposes of its incorporation, capable of being treated as a citizen of that state, as much as a natural person. Like a citizen it makes contracts, and though in regard to what it may do in some particulars it differs from a natural person, . . . it is substantially, within the meaning of the law, a citizen of the state which created it, and where its business is done, for all the purposes of suing and being sued. 43 U.S. (2 How.) at 558.

63. The rights relating to criminal prosecutions and civil actions protected in the Bill of Rights and state constitutions were regarded as privileges of citizenship in early America and England, even if their purpose was to protect natural rights. See Jay, supra note 60, at 67. Corporations, however, are not covered by certain provisions of the Bill of Rights. For example, they do not have a right against self-incrimination. See Braswell v. United States, 487 U.S. 99, 105 (1988) (citing Hale v. Henkel, 201 U.S. 43, 74 (1906)).


65. Id.

66. Id. at 91.
imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.67

Diversity jurisdiction was created by the Framers in response to “apprehensions” that state courts would not “administer justice as impartially as those of the nation, to parties of every description,” namely people from other states and nations.68 Exactly the same problem confronted corporations, Marshall contended: “Aliens, or citizens of different states, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name.”69 Even though the corporation appeared in the action, “essentially, the parties in such a case” were the corporation’s owners.70 Thus, when they were “aliens, or citizens of a different state from the opposite party,” the lawsuit “come[s] within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.”71

The very reason why the Constitution created diversity jurisdiction, the Court explained, in 1853, quoting The Federalist No. 80, was to enforce “the privileges and immunities of the citizens of the several States.”72 It is odd to suppose the Framers meant to allow corporations to invoke the diversity jurisdiction of federal courts in order to protect themselves against discrimination, and then decide they had no privileges and immunities to protect. Most likely, they did not consider whether corporations were citizens for any purpose.73 Nonetheless, many years after the ratification of the Constitution, the Court drew a bright line between the use of “citizen” in Article III and Article IV. Chief Justice Taney remarked, in 1839, that “the principle” regarding corporations as citizens for purposes of diversity jurisdiction had “never been extended any farther.”74 Nor would it ever.

Judges strained to explain why corporations that were citizens for Article III purposes were not so under Article IV. A Pennsylvania court, in 1856, was confounded by the distinction, because “[f]he received rules of interpretation would require us to understand the same word in

68. Deveaux, 9 U.S. (5 Cranch) at 87.
69. Id.
70. Id. at 88.
71. Id.
73. See infra notes 124-34 and accompanying text.
the same sense, throughout the instrument, if not controlled in certain places by the context.”

That being so, “if the word citizen, when used in the 4th article, did not include corporations, how, it might be asked, can it be construed in the 3d article to embrace them?”

The court found “nothing in the context of either article to impart a shade of meaning to the word, different from the common understanding of its sense,” which was that citizens were real people.

To resolve the dilemma, it correctly interpreted the Court’s decisions as holding that for diversity purposes, “the members of the corporation, who were natural persons, and the substantial parties on the record, were citizens,” and, in effect, the suit involved them personally.

The problem with this resolution, as the Pennsylvania court recognized, was that it entailed concluding that the corporation’s place of citizenship was that of its “stockholders or corporators” for purposes of determining diversity.

Yet the Court already had held that a corporation was “entitled, for the purpose of suing and being sued, to be deemed a citizen of that state” in which it was incorporated, removing the relevance of the shareholders’ citizenship.

This contradiction matured into a venerable legal fiction that law students now learn as a verity.

In 1886, the Court ruled that corporations were “persons” under the Equal Protection Clause. No explanation was given for this conclusion. Chief Justice Morrison Waite informed counsel that the Justices did not “wish to hear argument on the question,” as they were “all of opinion” that corporations were protected by the Equal Protection Clause.

Likewise, the Court, in the same era, applied the Due Process Clause to safeguard corporations against arbitrary deprivations of their property.
These conclusions must have been based on the view that a corporation was the embodiment of individuals who possessed rights.

All of this is a fiction. A corporation is neither a “person” nor a “citizen” in the sense that those terms are applied to individuals.\textsuperscript{84} Today, in fact, it is perhaps more natural to speak colloquially of a corporation as a citizen than a person. Americans invoke “corporate citizenship” when urging companies to engage in responsible business practices and make contributions to the communities in which they operate. Whether corporations are “persons,” on the other hand, is a matter of heated political debate. Rhetoric aside, the undeniable reality is that real people own corporations.

The justifications for “piercing the veil” of corporations in order to include them under diversity jurisdiction and the Fourteenth Amendment apply with just as much force to the Privileges and Immunities Clause. In all of these contexts, the actual parties concerned are the corporation’s shareholders: “A corporation aggregate is constituted of citizens who, for the purposes of their charter, are authorized to act in the name they have assumed, having the rights generally which may be exercised by an individual.”\textsuperscript{85} The federal Dictionary Act recognizes this, at least implicitly, by providing that for purposes of interpreting statutes, “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”\textsuperscript{86}

Treating corporations as citizens under the Privileges and Immunities Clause would be much more consistent with its original purpose than the Court’s resolution, that states have total discretion in limiting their rights.\textsuperscript{87} It is illogical that owners of business entities operated as corporations can have their privileges and immunities subjected to the whims of states when they would have a great many rights if they operated them as sole proprietorships or partnerships\textsuperscript{88} (the

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\item \textsuperscript{84} See Roe v. Wade, 410 U.S. 113, 157 (1973) (reviewing the use of “person” in the Constitution, and finding that “in nearly all these instances, the use of the word is such that it has application only postnatally”).
\item \textsuperscript{85} N.Y. Dry Dock v. Hicks, 18 F. Cas. 151, 153 (C.C.D. Mich. 1850) (No. 10,204).
\item \textsuperscript{86} The Dictionary Act, 1 U.S.C. § 1 (2012); see Burwell v. Hobby Lobby Stores, Inc., No. 13-354, slip op. at 19 (U.S. June 30, 2014) (“We have no doubt that ‘person,’ in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear.” (quoting FCC v. AT&T Inc., 131 S.Ct. 1177, 1182-83 (2011))).
\item \textsuperscript{87} See supra notes 1-8 and accompanying text.
\item \textsuperscript{88} In 1852, a lawyer arguing before the New Jersey Supreme Court stated aptly: “[T]he rights and privileges of [the corporation] are less than those of the separate individuals who compose it. There seems to be no good reason why it should be so held, any more than in the case of a copartnership; but on the contrary, that the courts will take
same is true of non-profit corporations.) There is a paradox in courts acknowledging that corporations can contract, own property, and sue and be sued, while holding that the underlying rights involved are at the mercy of state discretion. The discriminatory state trade laws of the 1780s that were the immediate impetus for including the clause in the Constitution would not have been any less a source of interstate tension if applied to businesses run as corporations. Businesses just did not typically operate as corporations in those days.

Eventually, the Court interpreted the Fourteenth Amendment and the Commerce Clause as outlawing many types of state discriminations against foreign corporations. But the Framers could not have anticipated these developments. It is worth considering that because the Privileges and Immunities Clause was held not to protect corporations, even as this form of business became essential to the American economy, these other provisions were recruited to provide a constitutional basis for stopping discrimination against companies with interstate operations. Elimination of that clause as a protective mechanism for corporations left a vacuum that was filled by interpreting other parts of the Constitution in ways that went well beyond what their texts or drafting histories directly supported.

These alternatives had substantial drawbacks as constitutional interpretations. For example, the question of using the Equal Protection Clause as the basis for striking state laws that discriminated against foreign companies drew a persuasive dissent from four members of the Court in *Metropolitan Life v. Ward*. Writing for the four, Justice

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notice that corporations are composed of individual citizens, and take care to protect their constitutional rights.

Tatem v. Wright, 23 N.J.L. 429, 432-33 (1852) (expressing defendants’ counsel’s argument).

89. See Jay, supra note 60, at 9-15 (describing how concerns over interstate trade discrimination led to inclusion of the Privileges and Immunities Clause in the Constitution).

90. Id. at 3.

91. The two clauses serve different ends, even if they overlap in application. The Dormant Commerce Clause “protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.” Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127-28 (1978). By contrast, the Privileges and Immunities Clause bars state discrimination based on citizenship in another state. So long as the law in question equally burdens local citizens and Americans from out-of-state, it does not matter for purposes of the clause that the flow of commerce is thereby disrupted. See Atkinson v. Phila. & T.R. Co., 2 F. Cas. 105, 106, 109 (C.C.E.D. Pa. 1834) (No. 615) (rejecting a claim by a citizen of another state that a law authorizing a bridge that obstructed “free navigation” of the river violated Article IV because it equally affected the state’s citizens); Allen v. Sarah, 2 Del. (2 Harr.) 434, 439 (1838) (holding that the state could ban exportation of slaves by both its citizens and citizens of other states); Shipper v. Pa. R.R., 47 Pa. 338, 343-44 (1864) (holding that a higher tonnage tax on foreign versus domestic goods did not violate the clause because the tax “denie[d] to no citizen of another state any privilege or immunity which it d[id] not deny to [Pennsylvania’s] own citizens”).

Sandra Day O'Conner objected to the departure from the usual deference given to states in tax and economic regulatory matters. She also pointed out that if states could not discriminate against out-of-state companies by virtue of the Equal Protection Clause, neither could Congress authorize them to do so, which might adversely affect the ability “of the Federal Government to formulate economic policy.”

As for the Dormant Commerce Clause, its existence can only be justified by imaginative inferences from the constitutional text and a few scraps of statements by the Framers and ratifiers, all bound together by modern political theory. Earlier it was noted that a major justification for the doctrine is the need to protect out-of-state businesses from the vicissitudes of local political processes over which they have no influence. Thus, the Court has said: “In applying [the Dormant Commerce Clause] the Court has often recognized that to the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected.” Precisely the same concern underlies the Privileges and Immunities Clause.

By the same token, it is anomalous that for-profit corporations have First Amendment rights, yet under Article IV they cannot claim the privileges and immunities possessed by individual owners of those businesses. As the Court, in Burwell v. Hobby Lobby Stores, Inc.,

93. Id. at 893-902.
94. Id. at 901. Some commentators in the nineteenth century thought that the Privileges and Immunities Clause conferred “a personal right which neither Congress nor a State can impair.” JOHN RANDOLPH TUCKER, THE CONSTITUTION OF THE UNITED STATES: A CRITICAL DISCUSSION OF ITS GENESIS, DEVELOPMENT, AND INTERPRETATION 530 (Henry St. George Tucker ed., Chicago, Callaghan & Co. 1899). But there are no reported cases involving an attempt by Congress to override the clause.
95. See Brannon P. Denning, Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine, 94 Ky. L.J. 37, 81-99 (2005-2006) (arguing that the Dormant Commerce Clause is consistent with original intent of the Constitution’s drafters and ratifiers). But see Tyler Pipe Indus., Inc. v. Wash. State Dep’t of Revenue, 483 U.S. 232, 260, 263 (1987) (Scalia, J., dissenting) (stating that there is a “lack of any clear theoretical underpinning for judicial ‘enforcement’ of the Commerce Clause”); FELIX FRANKFURTER, THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WAITE 12-14 (1937) (arguing that there was “no expression” by the drafters and ratifiers to support the view that “the mere grant of the commerce power to Congress dislodged state power”). In Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, Justice Antonin Scalia also noted: “The historical record provides no grounds for reading the Commerce Clause to be other than what it says—an authorization for Congress to regulate commerce.” 483 U.S. 232, 260, 263 (1987) (Scalia, J., dissenting).
97. See supra notes 16-17 and accompanying text.
98. First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 784 (1978) (“We thus find no support in the First or Fourteenth Amendment, or in the decisions of this Court, for the proposition that
remarked about for-profit corporations when deciding that they counted as “persons” protected by the Religious Freedoms Restoration Act, “‘separate and apart from’ the human beings who own, run, and are employed by them, [they] cannot do anything at all.” Corporations obviously are incapable of having religious sentiments, or any opinion for that matter, just as they are unable to profess the loyalty attached to citizenship. Unquestionably, cases such as *Hobby Lobby* consider the corporation as a shell for its owners who wish to run their business according to religious principles. Justice Samuel A. Alito’s opinion for the majority in *Hobby Lobby* agreed that calling a corporation a person was a “fiction,” the purpose of which is “to provide protection for human beings.” “A corporation,” he explained, “is simply a form of organization used by human beings to achieve desired ends.” Surely, it is just as plausible to think that corporations represent their owners when it comes to deciding whether they can be the objects of discriminatory legislation.

Ironically, the provisions of the First Amendment protecting freedom of expression and religion were themselves regarded in the eighteenth century as privileges and immunities of citizenship. The right to free exercise of religion, for example, was a privilege intended to safeguard the natural right of conscience. Likewise, many sources in that era referred to the freedoms of speech and religion as privileges of being a citizen or subject. For example, Tacitus wrote in a Philadelphia newspaper, in 1767, that Americans were “fortunate as to exist in these blessed Times, when we are happy in the unlimited Enjoyment of that most precious Privilege ‘of thinking what we please, and of speaking what we think.’” While defending his proposed Bill of Rights in speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation . . . ."

100. Id. at 18.
101. Id.
102. Id.
103. Nothing said on these pages should be understood as endorsing the result of *Hobby Lobby*, or for that matter, *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that corporations have First Amendment rights to engage in election-related speech). Rather, the point here is one of consistency. If for-profit corporations have First Amendment rights and can be endowed with rights of conscience by Congress, it is hardly a stretch to consider them as protected against economic discrimination by the Privileges and Immunities Clause. There are good reasons to treat corporations differently from individuals, particularly with regard to the First Amendment and elections, but those issues are beyond this Article’s scope. Article IV merely requires states to treat foreign corporations as they would their own; it does not obligate states to confer any particular rights on business entities.
104. See Jay, supra note 60, at 59-60.
Congress, Madison praised “[t]he freedom of the press and rights of conscience” as “those choicest privileges of the people.”

Of the three clauses—the Equal Protection Clause, the Dormant Commerce Clause, and the Privileges and Immunities Clause—which is the most logical basis for empowering courts to decide if a state has improperly discriminated against a business from another state? The latter clause was placed in both the Articles of Confederation and then the Constitution in principal part to prevent state discrimination against out-of-staters on matters of trade. That certainly cannot be said of the Equal Protection Clause. And as for the Commerce Clause, the Framers indeed were concerned with creating a national common market, but they expressly assigned that task to Congress, not the judiciary.

Applying the Privileges and Immunities Clause to corporations would, of course, require interpretation of the Constitution inasmuch as the text does not resolve the issue. Early history also does not support the idea that the term “citizens” in the clause was intended by the Framers to include American corporations. Rather, the argument for expanding the clause’s reach to corporate entities is one of logical consistency and public policy. The same reasons for counting corporations as citizens for purposes of diversity jurisdiction, or as persons under the Fourteenth Amendment, support their protection by the Privileges and Immunities Clause.

IV. WHY DID COURTS EXCLUDE CORPORATIONS FROM ARTICLE IV?

Since the mid-nineteenth century, courts consistently have interpreted the Privileges and Immunities Clause of Article IV as not applicable to corporations. Considering all the other instances in which corporations have been treated like citizens, and even people, the question is why courts came to this conclusion. From the perspective of a modern observer, the various explanations given for the exclusion are unconvincing. Yet, that is looking at the issue in hindsight. The question remains why the tape of constitutional history played the way it did in this instance. Why did nineteenth-century judges seemingly instinctively, and almost unanimously, find corporations ineligible for citizenship under Article IV?

106. 1 ANNALS OF CONG. 436 (1789) (Joseph Gales ed., 1834) (statement of James Madison); see Jay, supra note 60, at 45-46, 45 n.256 (quoting eighteenth-century sources referring to rights of conscience, press, and speech as privileges of citizens).

107. See Jay, supra note 60, at 5-19 (detailing how the Privileges and Immunities Clause in the Articles and the Constitution were intended to deal with interstate trade discrimination).

108. See supra notes 1-4, 9-10 and accompanying text.

109. See supra notes 61-64, 83-85 and accompanying text.
In the eighteenth century, incorporation was far from the typical business model. Corporations were created by special legislative enactments. There were no general incorporation laws at the time—states adopted those mostly in the mid- to late-nineteenth century. Initially, these new incorporation laws imposed significant capital limitations on the companies, and restricted the “scope of a business corporation’s powers and activity.” Few trading corporations were chartered in American states prior to the creation of the Constitution.

The entire idea of business corporations, as opposed to incorporation of religious, charitable, and educational societies, was highly controversial far into the nineteenth century. Justice Louis D. Brandeis explained why:

Fear of the subjection of labor to capital. Fear of monopoly. Fear that the absorption of capital by corporations, and their perpetual life, might bring evils similar to those which attended mortmain. There was a sense of some insidious menace inherent in large aggregations of capital, particularly when held by corporations.

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110. FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS states:
The cloud of disfavor under which corporations labored in America was not dissipated until near the end of the eighteenth century, and during the last 11 years of that period, the total number of charters granted did not exceed 200, most of the business of that period being transacted by unincorporated joint stock companies more in the nature of limited partnerships.

111. WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS § 2, at 8 (Carol A. Jones ed., Thomson West rev. vol. 2006).

112. Id. at 7-8.

113. Id. at 7-10.

114. Louis K. Liggett Co. v. Lee, 288 U.S. 517, 549 n.4, 550 n.5 (1933) (Brandeis, J., dissenting) (listing the first general incorporation laws, from New York in 1846 to Virginia in 1902, and noting capital restrictions); BLACKSTONE, supra note 27, at *462 (stating that “it is the will of the king that erects a corporation”).

115. Louis Kiggett Co., 288 U.S. at 554-64 (Brandeis, J., dissenting).

116. FLETCHER CYCLOPEDIA OF THE LAW OF CORPORATIONS states: “During the colonial period of American history, there were but six purely native-born business corporations, although English trading corporations operated on this continent. Only 20 were added to this list during the 13-year period preceding the adoption of the federal Constitution . . . .” FLETCHER, supra note 110, § 2, at 8.

117. Louis K. Liggett Co., 288 U.S. at 548-49 (Brandeis, J., dissenting). At the Constitutional Convention, a proposal to give Congress the power to create corporations was rejected in part due to fear of corporate monopolies. Madison proposed that Congress be given power “[t]o grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent.” See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 325 (Max Farrand ed., 1911). This proposal was referred to the Committee of Detail. See id. Subsequently, in the course of discussing whether to empower Congress to create corporations to operate post roads and canals, “[Madison’s] primary object was however to secure an easy communication between the States.” 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 615 (Max Farrand ed., rev. ed. 1937). Rufus King objected that the “power [was] unnecessary,” and that “[t]he States will be prejudiced and divided into parties by it.” Id. at 615-16.
In chartering business corporations, legislatures both limited their operations and extended all sorts of privileges and immunities to them, including monopolization of certain markets, such as exclusive rights to operate toll bridges, canals, and locks. Most of the resulting companies had a local focus. A great many incorporations were for religious societies (such as congregations in specific towns) and educational institutions (such as colleges), which thereby received a long list of privileges and immunities. Municipalities were created in the same manner, and likewise obtained extensive privileges and immunities. For that matter, a number of the American colonies began as corporations. As a reading of colonial charters will show, they bestowed privilege after privilege on the colonies. Delegates at the Constitutional Convention debated whether the states still should be regarded as “mere corporations,” “dependent on the Gen[eral] Legislature,” or sovereign governments. Whatever the context, the incorporations focused on particular jurisdictions, not interstate operations. This probably explains why no one in the founding generation discussed whether corporations were covered by the Privileges and Immunities Clause—and likewise, why the issue did not arise in debates over diversity jurisdiction at the Constitutional

He predicted that “in Philadelphia & New York, it will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies.” Id. at 616. George Mason argued that the power of incorporation by Congress should be limited “to the single case of Canals,” because “[h]e was afraid of monopolies of every sort.” Id. Even limited to canals, the Convention rejected giving Congress the express power of incorporation. See id.

117. See Jay, supra note 60, at 23 (describing and quoting a 1788 South Carolina statute granting privileges to corporations, such as erecting and operating “locks, dams or canals”).

118. Id. at 23-24 (providing an example of legislative charters for religious societies, as well as Harvard).

119. See 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 552 (Max Farrand ed., rev. ed. 1937) (statement of Governor Morris); FLETCHER, supra note 110 § 2, at 6 (“In America, some of the colonies were themselves essentially public corporations, albeit they were chartered companies . . . .” (footnote call number omitted)).

120. See, e.g., Charter of Connecticut (1662), reprinted in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 533 (Francis Newton Thorpe ed., 1909) [hereinafter AMERICAN ORGANIC LAWS] (providing that the colonists “shall have and enjoy all Liberties and Immunities of free and natural Subjects” in England); see Charter of Rhode Island & Providence Plantations (1663), reprinted in AMERICAN ORGANIC LAWS at 3220 (“[Colonists] shall have and enjoy all libertyes and immunitie of free and naturall subjects . . . borne within the realme of England.”); Jay, supra note 60, at 32-33 (detailing privileges granted by colonial charters).

121. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, supra note 116, at 362 (statement of Colonel Mason).

122. 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, supra note 119, at 357 (statement of James Madison).
Convention and in ratification proceedings. They were not important interstate actors, but rather impersonal entities created for a range of specific local purposes, most of which had nothing to do with business.

Words themselves have no essence; their meaning varies by conventional usage, which can diverge among speakers of the same language and change over time. "Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea," Chief Justice Marshall wrote in *McCulloch v. Maryland*. The meaning of words depends on the culture in which they are used, including the assumptions of the era in which they are expressed. As Ludwig Wittgenstein said: "[T]o imagine a language means to imagine a form of life." How words are used explains a great deal about a culture. In this instance, the meaning of citizenship and its attendant rights have changed significantly since the Constitution was adopted, as have attitudes about corporations.

For early Americans, the idea of a "citizen" paralleled the English concept of a "subject." The privileges and immunities of subjects arose from the reciprocal obligations of the monarch and the people born on British soil. The subject owed allegiance to the crown, and the king or queen in turn owed a duty to protect the subject’s natural rights. "Allegiance is the right of the magistrate, and protection the right of the people," Blackstone wrote. This allegiance was tied to birth in the crown’s dominions, and it was a permanent obligation, "which cannot be forfeited, cancelled, or altered," except by "the united concurrence of the legislature." In the English scheme, it would have been bizarre to think of corporations as subjects, because the elements of birth in the country and fealty to the monarch were inherently missing. An early English treatise writer on corporate law explained that "[a] Corporation aggregate cannot do Fealty; for a Body invisible cannot be in Person, cannot swear," and thus, "cannot commit Treason." Furthermore, there would have been no point in worrying about discrimination against corporations by

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125. See Blackstone, *supra* note 27, at *119* (describing reciprocal rights and duties of the monarch and subject).
126. Id.
127. Id. at *357*. By contrast, "aliens" only owed allegiance "for so long time as he continues within the king’s domain and protection." Id. at *358*. They could not have "a permanent property in lands" without owing permanent allegiance to the monarch, "which would probably be inconsistent with that, which he owes to his own natural liege lord." Id. at *360.*
different parts of the kingdom. Unlike the thirteen states in America, Great Britain was a single country. All of the privileges and immunities of subjects were controlled by Parliament. At the same time, it was easy to rationalize the legal existence of corporations by analogizing them to real people—“artificial persons.”129 They were owned by subjects who were in effect acting as one individual for purposes of the company.

Under English law, corporations had numerous “privileges and immunities”130 that also were possessed by subjects, including the ability “[t]o purchase lands, and hold them, for the benefit of themselves and their successors.”131 Corporations are a “Fiction of Law,” that are “framed in similitude as a natural Body; with a Capacity to take, hold, and enjoy, and act as a natural Body: it is a Capacity framed to be and act as one Person.”132 In a manner of speaking, corporations were “born” in England by acts of Parliament, and they could even die through dissolution.

When the Revolution abruptly transformed Americans from subjects to citizens, they seamlessly adapted the concept of being a subject to the idea of citizenship. Indeed, the whole point of the Privileges and Immunities Clause was to continue the rights Americans possessed as British subjects when they traveled or did business throughout the kingdom, including in other colonies.133 Americans of the revolutionary era also associated citizenship with loyalty, literally expelling the disloyal and confiscating the property of those unwilling to transfer allegiance.134 Pledging allegiance to the new American states literally was required of many in the founding era, as the rebelling colonies went about cleansing themselves of British loyalists.135 Citizenship could only be conferred on “a person of whom allegiance is predicable, and who may be guilty of treason.”136

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129. See supra text accompanying note 26.
130. BLACKSTONE, supra note 27, at *456.
131. Id. at *463.
132. LAW OF CORPORATIONS, supra note 27, at 1-2.
133. See Jay, supra note 60, at 19-20.
135. In addition to loyalty oaths during the Revolution, states in the early nation commonly required persons wishing to become citizens to take a loyalty oath. See Jay, supra note 60, at 36, 49 & n.279.
In modern America, the legal connection between allegiance and citizenship has become tattered. According to the Court’s interpretation of the First Amendment, a person cannot be forced to pledge allegiance to the nation. American citizens even have a First Amendment right to belong to organizations that seek to overthrow the government by force, and advocate the same, so long as they do not act to further the illegal ends of the group. Citizens can be conscripted into the armed forces, which might be seen as the ultimate test of loyalty, but permanent non-citizen residents also have been subjected to the draft. It is true that, at naturalization ceremonies, new citizens pledge to “bear true faith and allegiance to” the Constitution and laws of the United States and vow to “bear arms on behalf of the United States when required by the law.” However, conscientious objectors to military service may opt out of the requirement and still be naturalized. In any event, after citizenship is conferred, newly-minted citizens are free to change their minds about loyalty and advocate overthrowing the government.

Today “citizenship” is regarded as more of a legal status than a matter of allegiance to a sovereign, especially at the state level. People become citizens of the United States to benefit from the privileges and immunities of that status, even if their personal loyalty remains with another homeland. “Dual citizenship” is now possible, even if that term would have been an oxymoron in the eighteenth century. The same is not to deny that many Americans connect citizenship with loyalty to their country. The issue here is the legal relationship between citizenship and allegiance to a state or nation.

137. See W. Va. State Bd. Educ. v. Barnette, 319 U.S. 624, 626, 642 (1943) (holding that students cannot be required to pledge allegiance to the flag because “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein”).

138. See Scales v. United States, 367 U.S. 203, 221-24, 228-30 (1961) (construing the Smith Act to exclude culpability of “mere passive members” of the Communist Party in order to avoid “close constitutional questions”); Yates v. United States, 354 U.S. 298, 321-22 (1957) (stating that mere “advocacy [of forcible overthrow of the state], even though uttered with the hope that it may ultimately lead to violent revolution, is too remote from concrete action to be regarded as the kind of indoctrination preparatory to action” that is outside the First Amendment).

139. See Military Selective Service Act, 50 U.S.C. app. § 453 (2012) (requiring draft registration “of every male citizen of the United States, and every other male person residing in the United States”). The Universal Military Training and Service Act, which became effective June 19, 1951, made aliens who were “permanent residents of this country” subject to conscription. Astrup v. INS, 402 U.S. 509, 510 n.1 (1971).

140. 8 C.F.R. § 337.1 (2015).


142. See Mandoli v. Acheson, 344 U.S. 133, 134, 139 (1952) (holding that a U.S. citizen by birth did not lose such citizenship as a result of gaining Italian citizenship through his parents and living abroad past the age of majority).
true of state citizenship, only more so. No proof of allegiance is required to become a state citizen, even though, in the beginning of the nation, it was, at least if one wanted to exercise a right open only to citizens—voting.\textsuperscript{144} No state now demands that its citizens serve in the militia, although this was an obligation of male citizens in the early republic.\textsuperscript{145} Furthermore, under the Court’s interpretation of the Equal Protection Clause, once individuals have established a domicile in a state, they are entitled to vote within, at most, a month or two,\textsuperscript{146} which hardly seems long enough to develop feelings of loyalty or even familiarity with local issues. The first state constitutions often imposed one-year waiting periods for voting, along with property ownership requirements, which were designed to assure that voters were committed members of the state with a stake in its proper governance, as well as knowledgeable about local affairs.\textsuperscript{147}

State citizenship now is irrelevant for most purposes, and the idea of loyalty to a state is not a concept most Americans today have even contemplated. Residency and domicile, not citizenship, are the critical questions when it comes to ascertaining an American’s legal affiliation with a state. Residency determines such matters as eligibility to vote, qualification for in-state tuition at public universities, and ability to claim various state subsidies, as well as liability for state taxes. In effect, residency has become the modern substitute for state citizenship, as the Court has squarely held in applying the Privileges and Immunities Clause.\textsuperscript{148} Yet residency in a state does not depend on showing loyalty to

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\textsuperscript{144} Jay, supra note 60, at 48-49 (discussing the oaths required for state voting privileges). But see Minor v. Happersett, 88 U.S. (21 Wall.) 162, 173-75 (1874) (denying that “suffrage was necessarily one of the absolute rights of citizenship”). The Court was forced to this conclusion in order to deny women the franchise under the Privileges and Immunities Clause of the Fourteenth Amendment. Id. at 163-64, 177-78. Chancellor Kent had written earlier that “[t]he privilege of voting, and the legal capacity for office, are not essential to the character of a citizen, for women are citizens without either.” 2 Kent, supra note 53, at 258 n.b. Other courts disagreed, stating that although women were citizens, in effect men voted on their behalf—they “are generally dependent upon adult males through whom they enjoy the benefits of those rights and privileges.” Amy v. Smith, 11 Ky. (1 Litt.) 326, 333-34 (1822).
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\textsuperscript{145} See Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271 (repealed 1903) (requiring militia service of “every free able-bodied . . . male citizen” between the ages eighteen and forty-five); Michael J. Golden, The Dormant Second Amendment: Exploring the Rise, Fall, and Potential Resurrection of Independent State Militias, 21 WM. & MARY BILL RTS. J. 1021, 1028 (2013).
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\textsuperscript{146} See Marston v. Lewis, 410 U.S. 679, 680-81 (1973) (upholding a fifty-day voter registration cutoff as “necessary to permit preparation of accurate voter lists,” but affirming the holding in Dunn v. Blumstein that a three-month waiting period was “too long”); Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (holding that “30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much”).
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\textsuperscript{147} See, e.g., Jay, supra note 60, at 36, 50 & n.286.
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\textsuperscript{148} See Supreme Court v. Friedman, 487 U.S. 59, 64 (1988) (stating that “[w]hile the
that sovereign, such as by swearing allegiance. Rather, it means that a person is living inside a state’s borders.149 Residency is not even the same thing as being a domiciliary, which includes the element of intending to remain in the state indefinitely.150 Even so, allegiance is not a requirement for establishing a domicile.

But why would the Court treat corporations differently for purposes of diversity jurisdiction, or regard them as persons in so many other contexts? Each application has its own explanation, or rather rationalization, tied to a particular history.

Treating corporations as citizens for diversity purposes was understandable given that the abilities to sue and be sued in a corporate name were long considered core attributes of a corporation.151 Bringing them within federal judicial jurisdiction also did not require recognizing that they had any specific substantive rights. As the Kentucky Court of Appeals observed in 1851, “[t]he privilege of suing, and the form of suing, and the question in what tribunal the [case] is to be entertained, do not reach the question of the privilege of acquiring the rights which are to be asserted in the suit.”152 The necessity of giving corporations access to national courts in interstate disputes was beyond doubt, particularly as the corporate form of business became vastly more common. Furthermore, including them within diversity jurisdiction had a convenient explanation that might have resonated with the Framers had they thought about the matter. States controlled all aspects of the corporation’s existence. They needed only to authorize shareholders to sue or be sued on behalf of the company, and thus, their citizenship could count for diversity purposes. The Court eventually took something like that approach to the problem by deciding that, for this purpose, the shareholders were the true parties appearing in the case.153

Privileges and Immunities Clause cites the term ‘Citizens,’ for analytic purposes citizenship and residency are essentially interchangeable”.

149. See BLACK’S LAW DICTIONARY 1502 (10th ed. 2014) (defining “residency” as “[a] place of residence” and defining “residence” to mean “bodily presence as an inhabitant in a given place”).

150. In determining whether a person is a citizen of a state for federal diversity jurisdiction, courts inquire as to whether the party is a domiciliary, not a mere resident. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001) (“The natural person’s state citizenship is then determined by her state of domicile, not her state of residence. A person’s domicile is her permanent home, where she resides with the intention to remain or to which she intends to return.”).

151. See LAW OF CORPORATIONS, supra note 27, at 2 (defining “corporation” as a “Body Politick” that, among other attributes, could “sue or be sued”).

152. Commonwealth v. Milton, 51 Ky. (12 B. Mon.) 212, 228 (1851); see also Tatem v. Wright, 23 N.J.L. 429, 446 (1852) (opinion of Elmer, J.) (“A corporation having a right to sue like a natural person, may well be considered an inhabitant or citizen of a particular state, for the purpose of bringing suit . . . .”).

153. See supra text accompanying notes 67-68.
Not recognizing corporations as persons for purposes of the Fourteenth Amendment would have conflicted with the reality that, by the last decades of the nineteenth century, these business entities owned vast amounts of property and were increasingly critical to the national economy. Courts certainly could not have allowed states to confiscate the property of corporations or deny them fair trials. The consequences for the owners of the companies, as well as interstate commerce itself, would have been incalculable.

V. CONCLUSION

Since the mid-nineteenth century, courts have held consistently that corporations cannot be citizens for purposes of the Privileges and Immunities Clause of Article IV. By itself, that conclusion is reasonable, given the historical legacy of basing membership in the polity as a citizen or subject on loyalty to a monarch or republic. Considering the scarcity of interstate business corporations when the Constitution was written, however, it is highly unlikely that any of the Framers or ratifiers thought about the matter. But the same goes for diversity jurisdiction, under which corporations are counted as citizens because they embody the interests of actual people. The Court also extended to corporations many of the same rights that individuals had under the Fourteenth Amendment, with no explanation at the time.

This episode of constitutional history stands as a prime example of what Oliver Wendell Holmes, Jr. wrote about—“[t]he life of the law,”154 that it was not one of “logic: it has been experience.”155 He explained:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, and even the prejudices which judges share with their fellow-men, have had a good deal more to do than syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.156

There is a good case to be made that, in principal, courts should have brought corporations under the wing of the Privileges and Immunities Clause on the same basis that they included them within diversity jurisdiction. Ultimately, in both contexts, real people are the

155. Id.
156. Id.
ones affected by treatment of the companies they own. The reasons why courts did not do so are somewhat complex, but they are not based so much on logic as attitudes about citizenship and corporations in early America that have long faded. Modern corporations come in many shapes and sizes; the great majority are small businesses, while some are so enormous that their downfall could imperil the national economy. At the same time, a large percentage of the investors in publicly-traded corporations are pension funds for ordinary people, a phenomenon that no nineteenth-century judge could have imagined. Yet the doctrine excluding corporations from the Privileges and Immunities Clause persists through unreflective repetition, its mission largely supplanted by interpretations of the Commerce Clause and the Fourteenth Amendment.