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Mark Moller

Lawrence B. Solum

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MARK MOLLER*

LAWRENCE B. SOLUM**

ABSTRACT

Federal courts control an outsize share of big-ticket corporate litigation. And that control rests, to a significant degree, on the Supreme Court's extension of Article III's Diversity of Citizenship Clause to corporations. Yet, critics have questioned the constitutionality of corporate diversity jurisdiction from the beginning.

In this Article and a previous one, we develop the first sustained critique of corporate diversity jurisdiction.

Our previous article demonstrated that corporations are not "citizens" given the original meaning of that word. But we noted this finding alone doesn't sink general corporate diversity jurisdiction. The ranks of corporate shareholders include many undoubted "citizens." And so corporate litigants might preserve their access to diversity jurisdiction if that jurisdiction can vest through diverse shareholder *citizenship.*

In this Article, we consider whether corporations can indeed preserve access to diversity jurisdiction through this route. We conclude they cannot. From an originalist perspective, shareholders are not parties to Article III "controversies" that proceed in the corporate

* Professor of Law, DePaul University College of Law. The authors would like to thank Allan Erbsen, Greg Mark, Jim Pfander, Alex Reinhart, Mila Sahoni, Mark Weber, and participants at the Seventh Annual Civil Procedure Workshop and a DePaul University College of Law workshop for helpful comments. Any errors are the authors' alone.

** William L. Matheson and Robert M. Morgenthau Distinguished Professor of Law and Douglas D. Drysdale Research Professor of Law, University of Virginia School of Law.

name. In such controversies, shareholder citizenship cannot establish diversity jurisdiction.

The result of our analysis is that corporations are not citizens, and they normally can't use shareholder citizenship to access diversity jurisdiction either. It follows that general corporate diversity jurisdiction is not authorized by the constitutional text.

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INTRODUCTION

In the early decades of the twentieth century, progressives went to war against an unassuming foe: federal diversity jurisdiction.[1] *Swift v. Tyson*[2] had turned diversity jurisdiction from a level playing field for out-of-state defendants into a home field advantage for corporations.[3] Outraged, progressives not only mounted failed attempts to eliminate diversity jurisdiction outright in Congress,[4] but also attacked corporate diversity jurisdiction's very constitutionality.[5]

And certainly, the then-prevailing constitutional justification for diversity jurisdiction over corporations looked implausible on its face. At the start of the twentieth century, corporate diversity jurisdiction remained rooted in Chief Justice John Marshall's 1809 opinion in *Bank of the United States v. Deveaux*.[6] Article III's Diversity Clause grants federal jurisdiction over "Controversies ... between Citizens of different States."[7] In *Deveaux*, Chief Justice Marshall held that corporate entities were not citizens within the meaning of the Diversity Clause because "citizen" is a term reserved for natural persons.[8]

But Chief Justice Marshall rescued corporate access to diversity jurisdiction by positing that the natural persons who compose a corporation are the real parties in controversies involving the corporate entity.[9] Thus, he reasoned, when a corporation is sued, there is in

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1. *See generally* EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000).

2. 41 U.S. (16 Pet.) 1 (1842).

3. Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 523 (1928) ("[L]egal metaphysics about corporate 'citizenship' has produced a brood of incoherent legal fictions concerning the status of a corporation, defeated the domestic policies of states, and heavily encumbered the federal courts with controversies which, in any fair distribution of political power between the central government and the states, do not belong to the national courts.").

4. PURCELL, *supra* note 1, at 77-85.

5. *See* Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 861-62 (1943).

6. 9 U.S. (5 Cranch) 61, 84-85 (1809).

7. U.S. CONST. art. III, § 2.

8. *See* 9 U.S. (5 Cranch) at 86.

9. *See id.* at 87-88.

fact a controversy "between" citizens of different states so long as the humans who form the corporation are from states other than that of the corporation's litigation adversary.[10] The Taney Court later added that in corporate cases, members of corporations should be irrebuttably presumed to be citizens of the state of the company's incorporation.[11]

Could this convoluted justification of corporate diversity jurisdiction really be the right reading of Article III's text? Progressive scholars, like Dudley O. McGovney, argued that it was not. Diversity jurisdiction over suits against corporate entities was a "Supreme fiction," wrote McGovney—a constitutional usurpation by nineteenth-century federal courts in cahoots with corporate capital.[12]

Progressive scholars did not, however, methodically examine whether *Deveaux* was rightly decided as an original matter. And no one else has since. The existing scholarship that does examine corporate diversity jurisdiction either rejects an originalist framework or assumes that *Deveaux* was correctly decided as a matter of original meaning.[13] After *Erie* overturned *Swift*,[14] interest in

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10. *Id.* at 87-92.

11. Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 326-29 (1853).

12. *See generally* McGovney, *supra* note 5.

13. *See* Christopher J. Wolfe, *"An Artificial Being": John Marshall and Corporate Personhood*, 40 HARV. J.L. & PUB. POL'Y 201 (2017) (analyzing the original understanding of corporate status as constitutional persons, rather than the status of corporations under the Diversity Clause, and focusing almost exclusively on early Marshall Court decisions); Daniel J.H. Greenwood, *Neofeudalism: The Surprising Foundations of Corporate Constitutional Rights*, 2017 U. ILL. L. REV. 163, 181-90 (criticizing *Deveaux* in passing based on a conclusory claim that the decision was inconsistent with Article III's text, before concentrating on contemporary policy and fit with modern corporate law concepts); Leo E. Strine, Jr. & Nicholas Walter, *Originalist or Original: The Difficulties of Reconciling* Citizens United *with Corporate Law History*, 91 NOTRE DAME L. REV. 877, 901-03 (2016) (discussing *Deveaux* in passing without an analysis of the text or original meaning of the Diversity Clause); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 WM. & MARY L. REV. 1673, 1680-87 (2015) (assuming Marshall and Taney Supreme Court decisions reflected the original understanding of the corporation and ignoring the text and original meaning of the Diversity Clause); Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 73 (2005) (discussing *Deveaux* without an analysis of the text or original meaning of the Diversity Clause); Gregory A. Mark, *The Court and the Corporation: Jurisprudence, Localism, and Federalism*, 1997 SUP. CT. REV. 403 (analyzing, in a nonoriginalist historical essay, the early judicial understanding of the corporation by focusing on Supreme Court decision-making and ignoring the text and original meaning of the Diversity Clause); Herbert Hovenkamp, *The*

curtailing diversity jurisdiction waned. In 1958, Congress ratified corporate diversity jurisdiction—by treating the corporate entity itself as a state "citizen."[15] *Deveaux* was forgotten.

All the while, originalists stayed silent about the bona fides of corporate access to diversity jurisdiction. But that's changing, in part out of a sense that the constitutional law of civil procedure is an area where originalism may lead to surprising[16]—and for some proponents of originalism, challenging—results.

Based on that hunch, we recently investigated whether corporations are citizens within the meaning of Article III's Diversity Clause. We found that the term "citizen" didn't encompass corporate entities during the framing period, just as Chief Justice Marshall concluded in *Deveaux*.[17] To the extent that Congress's grant of diversity jurisdiction over corporations is based on a corporate entity's "citizen" status, that grant is beyond the authority conferred in Article III.[18]

The next question that an originalist doctrine of diversity jurisdiction must address is whether Chief Justice Marshall was also right that members of corporations are the real "parties" to Article III controversies involving their corporation, making *their* citizenship status, not their entity's, the proper textual focus of the

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Classical Corporation in American Legal Thought, 76 GEO. L.J. 1593, 1597-98 (1988) (suggesting, based exclusively on discussion of Marshall Court decisions, that the prevalent understanding of corporations was as an association at the beginning of the nineteenth century); David P. Currie, *The Federal Courts and the American Law Institute* (pt. 1), 36 U. CHI. L. REV. 1, 34-35 (1968) (analyzing corporate diversity jurisdiction based exclusively on Marshall and Taney Court decisions); James W. Moore & Donald T. Weckstein, *Corporations and Diversity of Citizenship Jurisdiction: A Supreme Court Fiction Revisited*, 77 HARV. L. REV. 1426 (1964) (criticizing *Deveaux* from an anti-originalist perspective); Frederick Green, *Corporations as Persons, Citizens, and Possessors of Liberty*, 94 U. PA. L. REV. 202, 212-17 (1946) (same); *see also* Tara Helfman, *Transatlantic Influences on American Corporate Jurisprudence: Theorizing the Corporation in the United States*, 23 IND. J. GLOB. LEGAL STUD. 383, 384-86 (2016) (noting, in a historical essay that does not attempt an originalist analysis of corporate diversity jurisdiction, that past treatments of corporate form have focused on postratification intellectual history during the nineteenth century, while ignoring the preratification record).

14. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79 (1938).

15. 28 U.S.C. § 1332(c)(1).

16. The notion that originalism can produce surprising results is explored in Lawrence B. Solum, *Surprising Originalism*: *The Regula Lecture*, 9 CONLAWNOW 235, 249 (2018).

17. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86 (1809).

18. *See generally* Mark Moller & Lawrence B. Solum, *Corporations and the Original Meaning of "Citizens" in Article III*, 72 HASTINGS L.J. 169 (2020).

diversity jurisdiction inquiry. If the Chief Justice was right, it is possible that very broad corporate diversity jurisdiction might be reconciled with the original meaning of the Diversity Clause's text.

This Article turns to that more difficult question, which no one has analyzed using the methods of modern originalism. And while not free from all doubt, this Article's findings tend to vindicate the view of the Old Progressives. The evidence shows that cases and controversies were legal proceedings that subsisted "between" parties in the technical legal sense.[19] Legal authorities, in turn, generally classified corporators as nonparties in cases and controversies proceeding in the corporate name.[20] *Deveaux* was one of a few outliers and was perceived as such at the time.[21]

This evidence suggests diversity jurisdiction in corporate cases is a mistake. The entity is not a "citizen" of a state (or anywhere else) in the original sense of the term. And because controversies filed by or against corporations subsist "between" the entity, not its members, and the entity's opponent, members' citizenship is textually irrelevant to diversity jurisdiction. Justice William Johnson's overturned circuit ruling in *Deveaux* was right: corporate suits based exclusively on state law[22] belong, as an original matter, almost exclusively in the state court system.[23]

Corporate America thus has a significant stake in the ongoing debate over when and how the Supreme Court should correct its

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19. *See infra* Part III.A.1.

20. *See, e.g.*, *infra* Part III.B.3.b.

21. *See infra* Part III.C.3; Bergen Cnty. Mut. Assurance Ass'n v. Cole, 26 N.J.L. 362, 367-68 (1857) (holding that "the cases are uniform, that a corporator is not a party to an action brought by or against the corporation" and "it is obvious that [contrary federal decisions] have turned upon questions of constitutional construction, and have been influenced by considerations of public policy").

22. Actions brought by or against corporations on the basis of federal question jurisdiction might include state law claims. The modern approach to such claims is provided by the supplemental jurisdiction statute, 28 U.S.C. § 1367, and by the constitutional test for determining the scope of a constitutional case or controversy announced by the Supreme Court in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725 (1966). In this Article, we do not explore the question whether the *Gibbs* "common nucleus of operative fact" test is tenable from an originalist perspective. We note, however, that so far as we know, there is no originalist defense of the *Gibbs* test and no indication in the historical materials that the common-nucleus formula captured the original understanding of "case" or "controversy."

23. *See* Bank of the U.S. v. Deveaux, 2 F. Cas. 692, 693 (C.C.D. Ga. 1808) (No. 916) (opinion of Johnson, C.J. & Stephens, J.) (per curiam), *rev'd*, 9 U.S. (5 Cranch) 61 (1809).

constitutional mistakes.[24] The Article ends by suggesting that corporate diversity jurisdiction might be an example of what we call an edge case of constitutional mistake. Edge cases are those in which claims that current law is mistaken satisfy a simple preponderance of the evidence standard but not more demanding burdens. We end by examining different approaches to correcting mistakes in edge cases and the implications of each approach for the future of corporate diversity jurisdiction.

I. ORIGINALIST METHODOLOGY

This Article investigates the original meaning of the Diversity Clause from the standpoint of public meaning originalism. Public meaning originalism is based on three claims: (1) that the meaning of the Constitution's text is its public or conventional meaning (the Public Meaning Thesis),[25] (2) that its meaning was fixed at the time of the Constitution's adoption (the Fixation Thesis),[26] and (3) that constitutional doctrine produced by courts must be consistent with this meaning (the Constraint Principle).[27] In other words, constitutional actors (including the Supreme Court) ought to regard the original public meaning of the constitutional text as binding.

The conventional or popular meaning of the Constitution's text at the time of ratification (the fixation period) is a function of what the words in light of surrounding context communicated to the public,

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24. *See* Dylan Matthews, *The Legal Theories of Amy Coney Barrett, Explained*, VOX (Oct. 27, 2020, 11:43 AM), https://www.vox.com/policy-and-politics/21453067/amy-coney-barrett-potential-nominee-supreme-court [https://perma.cc/EW35-DD92] (interview with Keith Whittington noting that originalists are grappling with "[w]hat ... you do about the fact that there are, from a theoretical perspective, mistakes that have been made over time").

25. Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 1957 (2021); *see also* Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599, 609-11 (2004) (discussing the public meaning turn of the "new originalism"). For a critique of the Public Meaning Thesis, see Richard H. Fallon, Jr., *The Chimerical Concept of Original Public Meaning*, 107 VA. L. REV. 1421 (2021). For a response to Fallon's critique, see Solum, *supra*, at 2006-23.

26. Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1, 1 (2015).

27. Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 2-3 (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/D429-SYLN].

ordinary citizens who read and understood American English.[28] So research in the vein of public meaning originalism focuses on usage patterns in lay communities during the fixation period—evidenced not just by dictionaries, or statements by given Framers, but also by the more sophisticated techniques of corpus linguistics.[29]

Some of the words and phrases in the constitutional text were, however, terms of art.[30] Terms of art communicate to ordinary readers via a "division of linguistic labor."[31] So while members of the public might not know the meaning of a technical term, they understand that the term has a meaning within a specialist community.[32] As a result, the "public" meaning of such a term is its conventional, specialist sense.[33] Solving the riddle of corporate diversity jurisdiction, we will see, requires an inquiry into terms of art and therefore an examination of technical rather than lay sources.[34]

Most variants of originalism, including public meaning originalism, also accept what has come to be known as the interpretation-construction distinction.[35] This distinction is primarily conceptual and only secondarily terminological.[36] The word "interpretation" represents the activity of determining the "meaning" (or, more precisely, "communicative content") of the text.[37] The word "construction" refers to the activity of determining the legal effect that constitutional actors (including judges) derive from the text.[38] This conceptual distinction could be expressed using different terminology.[39]

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28. *See* Solum, *supra* note 25, at 1990.

29. *See generally* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621.

30. *Id.* at 1631.

31. *Id.* at 1631-32.

32. *See id.*

33. *See id.*

34. *See infra* note 88 and accompanying text.

35. *See generally* Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010); Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 (2011).

36. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 475 (2013).

37. *Id.* at 455 & n.3.

38. *See id.* at 455-56.

39. For example, interpretation could be called "linguistic interpretation," and construction could be named "legal interpretation." *See id.* at 475.

Interpretation aims to recover "communicative content," the set of propositions and concepts[40] conveyed by the text to the public. Communicative content is a function of both semantics[41] (word meanings as combined by syntax and punctuation) and pragmatics[42] (roughly, the contribution that context makes to meaning).[43] One important role of context is disambiguation. Almost all of the words and phrases in the constitutional text have multiple senses,[44] but ordinarily the relevant sense can be identified by looking to the context of constitutional communication, including both surrounding provisions of the text itself and the situation in which constitutional communication occurred.[45]

Construction aims at the determination of legal effect, including the decision of particular cases and the articulation of constitutional doctrines.[46] Sometimes the constitutional text is clear, and construction is simply the translation of its communicative content into legal content[47]: for example, the meaning of the requirement that the President be thirty-five years of age[48] is clear, precise, and unambiguous. But in other cases, the communicative content underdetermines the legal content of constitutional doctrine, creating a "construction zone."[49] For example, the text might be vague or open textured, prompting judicial creation of an implementing rule or

40. Roughly, concepts are the ideas represented by individual words and phrases, whereas propositions are the ideas expressed by full sentences. *See* Eric Margolis & Stephen Laurence, *Concepts*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (June 17, 2019), https://plato.stanford.edu/archives/sum2019/entries/concepts/ [https://perma.cc/U85U-SBYY]; Matthew McGrath & Devin Frank, *Propositions*, STAN. ENCYCLOPEDIA OF PHIL. ARCHIVE (Jan. 25, 2018), https://plato.stanford.edu/archives/spr2018/entries/propositions/ [https://perma.cc/K58A-2FEM].

41. *See* Solum, *supra* note 25, at 1982-83.

42. *See id.* at 1983-87.

43. For an introduction to the semantics-pragmatics distinction, see generally ALAN CRUSE, MEANING IN LANGUAGE: AN INTRODUCTION TO SEMANTICS AND PRAGMATICS (3d ed. 2011).

44. *See, e.g.*, Solum, *supra* note 25, at 1963.

45. *See id.* at 1973-74; Solum, *supra* note 26, at 25, 28; Solum, *supra* note 29, at 1635.

46. Lawrence B. Solum, *The Unity of Interpretation*, 90 B.U. L. REV. 551, 569 (2010).

47. *See id.* at 569, 572.

48. U.S. CONST. art. II, § 1, cl. 5 ("No person ... shall be eligible to the Office of President [of the United States] ... who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

49. This use of the phrase "construction zone" first appeared in Lawrence B. Solum's article *The Unity of Interpretation*. Solum, *supra* note 46, at 569.

precisification.[50] If the context does not clarify an ambiguous constitutional provision, constitutional construction might select one of the possible meanings.

This Article is an exercise in constitutional interpretation: our focus is on the question of whether the communicative content of the Diversity Clause is clear and thus settles the constitutionality of corporate diversity jurisdiction, or whether the propriety of corporate diversity jurisdiction is a matter left open by the text, requiring settlement through constitutional construction.

Finally, various accounts of originalism take different views about the burden of persuasion for establishing a term's original meaning.[51] As we will discuss in Part IV, the conclusions readers draw from the evidence collected below depend on which burden of persuasion ought to govern. A standard view, rooted in part in practical inferences from a written constitution's settlement function, is that the communicative content of the term is its "most likely" public meaning in context—that is, the meaning supported by the preponderance of all available evidence.[52] Alternatively, we might say that constitutional actors should adopt the interpretation that provides the best explanation for all the available evidence.[53]

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50. *See* Solum, *supra* note 27, at 9; Solum, *supra* note 29, at 1679.

51. Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 NOTRE DAME L. REV. 1945, 1971 (2017) ("The question for an originalist judge is when the likelihood is sufficiently high to justify overturning a political-branch decision. One can imagine a range of answers from 'fifty percent plus one' to 'almost one hundred percent,' with various intermediate positions."). Ramsey's formulation uses numerical probabilities to express degrees of certainty, but the same ideas can be expressed without the use of numbers.

52. This burden seems to be implicit in the standard originalist contention that the Constitution's meaning is what the words "ordinarily mean." *See* Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999) (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA 144 (1990)); Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 601 (2008) ("To the extent that originalists have confronted this issue, they have tended toward the middle ground that originalism need only be able to determine that a particular meaning is more likely than not the original public one."). John McGinnis and Michael Rappaport also argue for this burden based on a claim that constitutional interpretation should adhere to "original methods" of interpretation. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 774-75 (2009) ("[T]here is a strong argument that the applicable interpretive rules at the time of the Framing generally required interpreters to select the more likely interpretation, unless two interpretations were equally plausible.").

53. This view relies on the philosophical idea of inference to the best explanation or abduction. *See* Lawrence B. Solum, *Legal Theory Lexicon 089: Inference to the Best*

Given this burden, there are also "edge cases"—situations in which the balance of evidence suggests an earlier case was wrongly decided but is nonetheless also relatively close to the line set by the relevant burden of persuasion. Under a regime in which original meaning is demonstrated by a preponderance of the evidence, edge cases are those where the case that a previous decision is wrong as an original matter meets a preponderance of the evidence standard but not more demanding burdens. Edge cases are also cases where application of a preponderance standard might lead to shifting judgments about which interpretation is best as new evidence is discovered and new arguments are produced. Corporate diversity jurisdiction could be argued to be an edge case; we will discuss this possibility below.[54]

II. THE ORIGINAL MEANINGS OF "CITIZENS" AND "CONTROVERSIES"

This Article investigates whether corporations' access to the federal diversity docket is consistent with the original meaning of the Diversity Clause, using the methods of public meaning originalism.

Diversity jurisdiction is the term for Article III's authorization of federal jurisdiction over "[c]ontroversies ... between Citizens of different States."[55] An originalist doctrine of corporate diversity jurisdiction involves solving a series of interlocking problems posed by this text. We have already answered some of these questions. In this Part, we briefly review our findings.

The first problem posed by the text of the Diversity Clause is the meaning of "citizen" of a state. We recently explored whether corporations, considered as "entities" or "artificial persons," are "citizens" of a state within the original meaning of Article III.[56] We concluded that they are not. "Citizens" was a term reserved for natural, rather than artificial, persons.[57] This is the same conclusion that Chief Justice Marshall reached in the Supreme Court's first

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Explanation (Abduction), LEGAL THEORY LEXICON (Dec. 27, 2020), https://lsolum.typepad.com/legal_theory_lexicon/2019/02/legal-theory-lexicon/ [https://perma.cc/5TPL-B4BS].

54. *See infra* Part IV.

55. U.S. CONST. art. III, § 2, cl. 1.

56. *See generally* Moller & Solum, *supra* note 18.

57. *Id.* at 204.

corporate rights case, *Bank of the United States v. Deveaux*,[58] and that the Taney Court, after some back and forth, made the root of the nineteenth-century doctrine of diversity jurisdiction.[59]

The fact that "citizen" was a term reserved for natural persons does not, though, settle the constitutionality of corporate diversity jurisdiction. It might be argued that controversies involving corporations really subsisted "between" the members of the corporation and the corporation's adversary.[60] If so, then the fact the corporate entity is not a citizen is textually irrelevant. It is the diverse citizenship of those who are really the parties to the controversy—the natural persons who compose the corporation—that would matter. But again, this is so *only if* the original meaning of "[c]ontroversies between" was consistent with the argument that the members, not the corporation itself, are the constitutionally relevant parties.

This argument provided the route to justifying corporate diversity jurisdiction taken in *Deveaux* itself. After concluding that corporations considered as abstract entities were not citizens of a "state" or any other polity, Chief Justice Marshall argued that the corporation was a fiction—a cover for the real or substantial parties to the "controversy," the members of the corporation.[61] Because a corporate controversy was really "between" members of the corporation and the corporation's litigation adversaries, it was *their* citizenship status, not the corporate entity's, that actually mattered under the text of Article III.[62] With some revision, this remained the basis for corporate diversity jurisdiction until the middle of the twentieth century.

Deveaux thus poses what might be termed the question of the *party composition* of Article III cases and controversies: Who are the

58. 9 U.S. (5 Cranch) 61, 86 (1809).

59. Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 552-55, 558-59 (1844); Marshall v. Balt. & Ohio R.R. Co., 57 U.S. (16 How.) 314, 325-29 (1853).

60. *See, e.g.*, *Deveaux*, 9 U.S. (5 Cranch) at 87.

61. *Id.* at 86-88.

62. *Id.* at 87-88. Earlier, the Taney Court responded to this problem by briefly flirting, in *Louisville, Cincinnati, & Charleston Railroad Co. v. Letson*, with grounding corporate diversity jurisdiction on the idea that corporations, not their members, are the "citizens" in a corporate suit. 43 U.S. (2 How.) at 558-59. But the Taney Court ultimately balked at this route. *Marshall*, 57 U.S. (16 How.) at 327-29.

real parties to Article III controversies in corporate cases? That question is the focus of this Article.

The Article III party composition question can be subdivided into two subsidiary questions. The first threshold question is whether cases or controversies in context communicated a lay or technical meaning.

Like the question about the meaning of "citizen," this question is the subject of previous originalist research, which demonstrates that "case" and "controversy" communicated a technical meaning in context.[63] Cases and controversies were "suits"—legal disputes that have been placed before a court.[64]

We will not revisit the evidence for this claim here, which is widely attested in existing work (including, but not limited to, our own).[65] It suffices to note for our purposes some examples of this view. Here is Chief Justice Marshall at the beginning of the nineteenth century:

> [The judicial] power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares, that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States.[66]

And here is the Supreme Court a century later, at the beginning of the twentieth century (quoting Justice Field, writing just after the Civil War in the midway point between these two authorities, in the middle of the nineteenth century):

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63. *See, e.g.*, Mark Moller, *A New Look at the Original Meaning of the Diversity Clause*, 51 WM. & MARY L. REV. 1113, 1132, 1162, 1173-74 (2009).

64. *See id.* at 1131-32, 1162, 1173-74.

65. *See id.* (developing evidence that cases and controversies are litigated disputes). James Pfander and Daniel Birk's pathbreaking work on noncontentious jurisdiction also develops evidence that the Framers understood cases and controversies as different types of justiciable lawsuits while expanding our understanding of the models of justiciability on which the Framers drew. *See* James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1418-21 (2015); James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1634-35, 1665-66 (2011) (arguing that legal scholars have missed the extent to which the hierarchical structure of the Scottish judicial system influenced the structure of the Article III judicial system).

66. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 816, 819 (1824).

> By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.[67]

We have, in other words, long understood a case or controversy to be a judicial proceeding—not an abstract, prelitigative dispute.

The technical nature of cases and controversies also answers a key threshold question about their party composition. Suits, said William Blackstone, require an "actor," or person who initiates the action, and "reus," the target of the action.[68] Or, as Edmund Pendleton put it in *The Case of the Prisoners* in 1782, "suits and controversies" are "terms proper to describe disputes between litigant parties."[69] Chief Justice Marshall, then a Representative, echoed the same view in 1800: in order to have a case, "[t]here must be parties to come into court, who can be reached by its process, and bound by its power; whose rights admit of ultimate decision by a tribunal to which they are bound to submit."[70] That interpretation was also taken by a pre-Marshall Court decision *Fowler v. Lindsey*, which held that controversies subsisted between real legal parties to the action, not merely interested bystanders who will be "consequentially affected" by the suit,[71] and it was reaffirmed by Chief Justice Marshall himself in *Osborn v. Bank of the United States*.[72]

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67. Muskrat v. United States, 219 U.S. 346, 356-57 (1911) (quoting *In re* Pac. Ry. Comm'n, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (opinion of Field, J.)).

68. 3 WILLIAM BLACKSTONE, COMMENTARIES *25.

69. Commonwealth v. Caton (*The Case of the Prisoners*), 8 Va. (4 Call) 5, 13-14 (1782) (opinion of Pendleton, J.).

70. John Marshall, Chief Just., Sup. Ct. of the U.S., Speech Delivered in the House of Representatives, of the United States, on the Resolutions of the Hon. Edward Livingston, Relative to Thomas Nash, Alias Jonathan Robbins (Mar. 7, 1800), *in* 4 THE PAPERS OF JOHN MARSHALL 82, 96 (Charles T. Cullen & Leslie Tobias eds., 1984).

71. 3 U.S. (3 Dall.) 411, 412 (1799) (opinion of Washington, J.).

72. 22 U.S. (9 Wheat.) 738, 851-58 (1824).

Because cases and controversies subsisted between litigant parties, an originalist inquiry into corporate diversity jurisdiction must investigate the original legal criteria for identifying "litigant parties" to a case or controversy. Do these criteria settle whether members of a corporation are the real litigants in suits proceeding in the corporate name?

This Article takes this question, which no one has explored using the techniques of modern originalism, as its focus.

III. THE ORIGINAL UNDERSTANDING OF ARTICLE III PARTIES

Because "citizen" was a term for natural persons, diversity jurisdiction over corporations exists as an original matter only if the natural persons who form the corporation are the parties to Article III controversies—what the last Part termed Article III's party composition question. This Part turns to that question. What was the original understanding of parties in the context of Article III's grant of diversity jurisdiction over cases "between Citizens of different States"?

Because Article III controversies subsisted between the "litigant parties" in court, the party composition question boils down to an inquiry into who comprised the litigant party to suits involving corporations at the Founding—the entity or its members? This Part explores that question in two stages.

Section A develops a picture of the general features of "litigant parties" at the end of the eighteenth century. The identity of a litigant party was a technical matter answered by the common law of parties. Parties, in turn, were persons acted on directly or personally through the judicial process to reach their rights or duties. Acting on someone personally meant acting on them individually rather than as part of an abstract collective with indefinite, fluctuating membership.

Section B turns to corporations' place in this framework. Corporations were defined as artificial persons, and artificial persons' defining feature was, in turn, legal "individuality"—meaning an identity separate from the corporation's members. This individuality converted the abstract group encapsulated by the corporation into a justiciable jural object.

The corollary of that individuality was that the artificial person, not its natural person members, was the party in suits proceeding in the corporation's name. This understanding was, finally, a ground rule, or fixed procedural operating norm, in the law of parties, and not a "fiction" that courts felt free to look behind.

Following this Part's review of the history, Part IV will consider what the history means for an originalist doctrine of diversity jurisdiction and consider objections.

A. The General Features of an Article III Party

1. Party Composition Was a Technical Matter

A threshold question that we must address is whether "litigant parties" was a specialist or lay term. If the former, the evidence for the public understanding of the parties to Article III controversies will depend on specialist legal usage.

Part II noted that Article III uses the words "cases" and "controversies" to designate suits (lawsuits), a concept with technical meaning.[73] That implies that the party composition of cases and controversies was also understood in technical terms.[74]

The evidence bears this out. First, lay dictionaries through the eighteenth century that we have examined either offered no definition of "parties" in relation to courts and suits—a classic indicator that the term, in relation to suits, was understood as a specialist matter—or defined the term "party" to suits by referring to "law" or technical legal "process."[75]

Period case law came to the same conclusion. In *President of the Merchants Bank v. Cook*, a case we will examine in greater detail later, the Massachusetts Supreme Judicial Court Chief Justice, Isaac Parker, noted the word "party," used in the context of legal

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73. *See supra* notes 63-67 and accompanying text.

74. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150-52 (1951) (Frankfurter, J., concurring).

75. NATHAN BAILEY, AN UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY 613 (London, 17th ed. 1759) (offering no definition of party in relation to a suit or cause of action); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 286 (London, 6th ed. 1785) (defining "party," in a legal sense, as "[o]ne of two litigants"); *id.* at 54-55 (defining litigant as "[o]ne engaged in a suit of law" and litigate as "to debate by judicial process").

process and legal proceedings, "is unquestionably a technical word."[76] In *Osborn*, Chief Justice Marshall said the same.[77] And the Ellsworth Court decided the same in *Fowler v. Lindsey*, in which it looked to the prevailing technical distinction between parties and those consequentially affected to understand the party composition of Article III cases and controversies.[78]

Surrounding clauses also suggest party composition of cases and controversies was a technical matter. Consider, first, Article III's Original Jurisdiction Clause, which distinguishes between the Supreme Court's jurisdiction over cases "in which a State [is a] Party" and "Cases affecting Ambassadors."[79] Because Article III uses "case" to encompass "controversies" (Article III's grant of Supreme Court appellate jurisdiction uses "case" to encompass all of the heads of jurisdiction other than those that are committed to the Supreme Court's original jurisdiction, including those earlier denoted "controversies"),[80] the Clause bears on the meaning of parties to both cases and controversies.

The Clause's structure, in turn, suggests that cases and controversies are composed of parties in the technical legal sense. When someone uses different terms in the same clause, the inference is that different words were chosen to impart distinct meanings. But the ordinary, lay understanding of a "party" to a dispute was someone with a general interest or stake in the outcome, which is a function of being affected by the suit.[81] As a result, if parties to controversies are persons who have an interest in the underlying dispute, the distinction made in this clause between persons who are parties and those affected by cases and controversies is fuzzy or uncertain.[82]

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76. 21 Mass. (4 Pick.) 405, 410-11 (1826).

77. *See* 22 U.S. (9 Wheat.) at 816, 851-58.

78. 3 U.S. (3 Dall.) 411, 412 (1799) (opinion of Washington, J.).

79. U.S. CONST. art. III, § 2, cl. 2.

80. *Id.* art. III, § 2, cl. 1.

81. *See*, *e.g.*, 2 JOHNSON, *supra* note 75, at 286 (defining sense of a "party" in relation to a prelitigative or nonlitigative dispute to mean "[o]ne concerned in any affair"; "[a] number of persons confederated by similarity of designs or opinions in opposition to others; a faction"; "[c]ause"; "[s]ide"; and "[p]articular person; a person distinct from, or opposed to, another").

82. Chief Justice Marshall made exactly this point in *Osborn*. *See* 22 U.S. (9 Wheat.) at 852-53 ("If jurisdiction depend ... on the interest of the State, what rule has the constitution given, by which this interest is to be measured? If no rule be given, is it to be settled by the

But if cases and controversies are legal proceedings that subsist between parties to suits in a technical sense, then that distinction is more determinate. Parties to a suit were those before the court through judicial process under the technical law of procedure and thereby subject to the court's judicial power, and nonparties were those consequentially affected (those outside the formal structure of the suit with a practical interest in the outcome).

As a result, the inference from the word choice in the Original Jurisdiction Clause is that cases and controversies are legal proceedings that subsist between those who are properly considered before the court under prevailing legal standards. Chief Justice Marshall himself made this very point (based on inferences from the textual choices in the same clause) in *Osborn*:

> This Court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes, when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national Courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.[83]

Article I's Impeachment Clause indicates the same understanding of cases and controversies' party composition. It provides:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.[84]

Court?").

83. *Id.* at 855.

84. U.S. CONST. art. I, § 3, cl. 7.

The Clause treats impeachment as a judicial power—as a "case" ending in a "judgment."[85] By referencing the "conviction" of a "party" in a case of impeachment, this clause plainly uses "parties" to cases and controversies to refer to persons subjected to Congress's adjudicative power through legal process.

All of this suggests the party composition of cases and controversies was a technical matter defined by reference to legal standards. The Diversity Clause grants jurisdiction when the *legal* parties are citizens of different states.

2. The Technical Meaning of "Parties"

Public meaning originalism embraces the idea that some of the words and phrases in the constitutional text are terms of art with technical meanings. So long as these technical meanings are publicly accessible, they should be viewed as within the original public meaning of the constitutional text.[86]

When the Constitution uses legal terms, the terms are used in their conventional or most common legal sense. This is an entailment of contemporaneous canons of interpretation, which form part of legal terms' original meaning.[87] These suggested that when legal texts incorporate a legal term, such as the term "parties" to legal controversies, the term is understood in its most conventional sense.

For example, Matthew Bacon's *A New Abridgment of the Law*, the leading authority for interpretive canons in the eighteenth century, provided that "[w]hen a statute uses a word which is well ascertained at common law, the word shall be understood in the statute in the same sense in which it is understood at common law."[88] Similarly, the early Supreme Court held that when a codification refers to "terms as they are found in our treatises of the common

85. *See* Trump v. Mazars USA, LLP, 940 F.3d 710, 755 (D.C. Cir. 2019) (Rao, J., dissenting) (collecting authorities).

86. *See* Solum, *supra* note 25, at 2023-26.

87. *See id.* at 1977 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 436-37 (Boston, Hilliard, Gray & Co. 1833)).

88. 9 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 238 (Henry Gwyllim et al. eds., Philadelphia, T. & J.W. Johnson & Co. 1861) (citing Kitchen v. Tyson, 7 N.C. (3 Mur.) 314, 315 (1819)); *see also* Raoul Berger, *Jack Rakove's Rendition of Original Meaning,* 72 IND. L.J. 619, 621 (1997) (discussing the authority of Bacon on canons applicable to terms of art).

law," the definitions of such terms "are necessarily included, as much as if they stood in the text of the act."[89]

As the reference to "our treatises of the common law" indicates, the authorities relevant to the conventional legal meaning of common law terms did not just include cases. In the eighteenth century, the common "law" had an existence apart from and external to judicial opinions in any particular jurisdiction.[90] Common law was discovered, not made, by courts. Cases were one source of *evidence* of the law. But they were hardly determinative and indeed couldn't be: case reporting was not standardized, and circulation of published case reports was uneven.[91] Lawyers accordingly treated treatises, as well as private compilations, and just plain observation of common court practice as roughly equivalent evidence of the common law's content.[92] Caleb Nelson notes that this was particularly true of rules of practice and procedure.[93]

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89. United States v. Smith, 18 U.S. (5 Wheat.) 153, 160 (1820).

90. Caleb Nelson, Stare Decisis *and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1, 23 (2001) ("Much of the common law was thought to rest on external sources. Lawyers of the day might not always have agreed with each other about exactly what those sources were; some accounts of the common law stressed the dictates of natural reason, others stressed the customs adopted in some relevant community, and many wove reason, custom, and divine revelation together. But each of these sources of law had an existence separate and apart from judicial decisions. To a large extent, then, courts were thought to *discover* rather than to *make* the rules and principles that they applied." (footnotes omitted)).

91. Erwin C. Surrency, *Law Reports in the United States*, 25 AM. J. LEGAL HIST. 48, 50 (1981) ("[L]egal education during the colonial period ... encouraged students to prepare notebooks, commonly called 'common place' books, containing the principles of law extracted from statutes and decisions, and arranged by topics.... These written sources of law were useful to colonial and later lawyers, so that they were much less dependent upon published volumes [of cases] than are present members of the profession."); *see also id.* at 51-52 (noting, however, that English authorities were considered superior because of the uneven training and quality of colonial judges).

92. *See* Harold J. Berman & Charles J. Reid, Jr., *The Transformation of English Legal Science: From Hale to Blackston*e, 45 EMORY L.J. 437, 509 (1996) (noting that until at least the late decades of the eighteenth century, English lawyers assumed "the validity of legal rules and doctrines [was] established by their confirmation by the close-knit profession of judges and lawyers in applying them to analogous cases"); Nelson, *supra* note 90, at 23 ("[S]ome accounts of the common law ... stressed the customs adopted in some relevant community, and many wove reason, custom, and divine revelation together." (footnotes omitted)). *But see* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1324-25 (1991) (arguing the framing generation did not have a coherent conception of sources of legal authority).

93. Nelson, *supra* note 90, at 32 ("[M]any jurists did not think that the unwritten law's foundational principles had dictated particular rules of procedure; appropriate rules had

In addition, the evidence for the conventional meaning of legal terms also wasn't isolated to particular jurisdictions—the common law had a transjurisdictional existence. As a result, lawyers in early America consulted treatises as well as reported cases across different common law jurisdictions to discern the meaning of common law terms.[94]

Finally, the evidence also suggests that framing era lawyers preferred English to colonial sources. In the preface to his Virginia reports, Thomas Jefferson noted that because colonial judges were

> chosen without any regard to their legal knowledge, their opinions could never be quoted either as adding to, or detracting from the weight of those of the English courts, on the same point. Whereas on our peculiar laws, their judgments, whether formed on correct principles of law, or not, were conclusive authority.[95]

As a result, preratification English treatises, reported English case law, and postratification practice suggestive of majority professional understanding in and around the 1780s all bear on the original legal meaning of the "parties" to adjudicative controversies.

3. Usually, Parties Were Persons and Named As Such on the Record

Let us turn, then, to the evidence. At the end of the eighteenth century, a commonly cited party-identification rule—famously referenced by Chief Justice Marshall in *Osborn*—was that the identity of the parties to a suit depended on who was named as such on the

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instead been built up by the custom of the courts.").

94. *See* Surrency, *supra* note 91, at 54 ("In all probability, the legal profession during the colonial period did not feel the need for these reports because they looked to England and the English reports as a source of all laws.... With Independence, American lawyers strove to create a distinctively American body of law. This meant that lawyers developed an interest in the decisions of other states, whose law now supplemented the law of England and the law of their own jurisdiction as a source of decisional rules." (footnote omitted) (first citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW (1977); and then citing WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW (1975))).

95. *Id.* at 51-52 (quoting THOMAS JEFFERSON, *Preface* to VIRGINIA REPORTS).

pleadings, or "record."[96] This is sometimes called the "party of record" rule of party identification.[97]

The party of record rule is, though, an incomplete description of party identification principles at the end of the eighteenth century. First, the law of parties also incorporated a sense of *proper* parties.[98] Naming someone on the record entailed a claim that the named person had the attributes of a proper party to a justiciable case or controversy.[99]

The law of proper parties in turn incorporated what Robert Bone calls a "rights-based" view of the proper adjudicative structure.[100] He explains that period courts "conceived of the unit of litigation as the legal right (and its correlative duty) .... [Because] [r]ights attached to persons ... the person who held a particular right had to be a party or *quasi*-party in order for the court to act on that right."[101]

In *Potter v. Lansing*, decided shortly after ratification, the court explained the rights-based view of adjudicative structure in terms of property concepts.[102] Rights of action, said the court, followed property interests.[103] Because only the "owner" of the underlying property interest had dominion over the assertion of that interest in court, only he could "maintain an action in his own name."[104]

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96. *See* Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 851-58 (1824). The traditional association of parties with those named as such on the record reflected the premises of common law procedure that the "parchment transcripts of pleadings and rulings there were kept secure in the Treasury ... were incontrovertible proof of what had happened in each case." David E. Engdahl, *The Classic Rule of Faith and Credit*, 118 YALE L.J. 1584, 1595 (2009); *see also* Walter Wheeler Cook, *The Powers of Courts of Equity* (pt. 3), 15 COLUM. L. REV. 228, 229 (1915) (noting that originally equity was not a court of record but has always been considered so in America).

97. *See* Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 155-56 (1977).

98. *See, e.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 765 (argument of appellant); Milligan v. Milledge, 7 U.S. (3 Cranch) 220, 228 (1805).

99. *See, e.g.*, *Osborn*, 22 U.S. (9 Wheat.) at 857.

100. Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213, 246-47 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987)).

101. *Id.* at 259.

102. *See* 1 Johns. 215, 223-24 (N.Y. Sup. Ct. 1806) (opinion of Tompkins, J.).

103. *Id.* Analogies between rights and property were a common feature of framing-era legal thinking. *See* James Madison, *Property*, NAT'L GAZETTE, Mar. 27, 1792, *reprinted in* 14 THE PAPERS OF JAMES MADISON 266, 266-68 (Robert A. Rutland et. al. eds., 1983).

104. *Potter*, 1 Johns. at 221 (argument of counsel); *see also id.* at 224 (opinion of Tompkins, J.) ("If his property in the goods was devested ... no right of action for them could have

Similarly, John Marshall would explain that "[a] private suit instituted by an individual [respecting his property] can only be controled by that individual."[105]

As a result, right owners had to be made party plaintiffs in suits asserting their rights because they were the only ones who had the power to carry the right into court. Similarly, the owner of the correlative duty to make the plaintiff whole was the person who must be named as the defendant because he "owned" the corresponding legal defense.

Other commentators, such as Zephaniah Swift, also linked the concept of "property" in claims with the principle that one could not be divested of a right without a hearing. "It is," wrote Swift in 1818,

> a solecism to say, that a man is the owner of a thing, and cannot bring an action in his own name.... [Thus] if, in contemplation of law, he is the owner of the note, so that he must, be the plaintiff in an action brought on the note, then for the same reason he ought to be made a party to the petition, which seeks to divest him of that legal right.... [F]or it is a first principle, that no man can be divested of a legal right, by a proceeding at law, to which he is not a party.[106]

Thus, a party was generally understood to be (1) the person named on the record in the process of commencing a legal suit *because* (2) she is an alleged owner of legal rights or duties at issue and (3) *therefore* is a person who must be afforded notice and hearing in an adjudicative proceeding affecting those rights.

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remained.").

105. Marshall, *supra* note 70, at 99.

106. Colbourn v. Rossiter , 2 Conn. (2 Day) 503, 506 (1818) (opinion of Swift, C.J.); *see also* The Mary, 13 U.S. (9 Cranch) 126, 144 (1815) ("[I]t is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are *in rem*, notice is served upon the thing itself.").

4. Exceptionally, Parties Included Unnamed Represented Persons

By the 1780s, though, the law of parties had also begun to recognize exceptions to the "named on the record" rule of party identification. First, in special cases where joinder is impracticable, persons could be made "virtual parties" if their rights were asserted by a properly named legal representative.

Thus, in *Leigh v. Thomas*, two members of a crew of a privateering vessel manned by eighty crewmen brought a bill seeking an accounting of shares of a prize owed to the ship's crew members.[107] The defendant demurred for failure to make all of the other crew members parties.[108] The court granted the demurrer, but suggested that the litigants could cure the want of proper parties by pleading that they were suing on behalf of the rest of the crew.[109] Doing so would "let[ ] in all the others ... as plaintiffs" after a decree established the size of the prize.[110]

Similarly, in *Chancey v. May*, a suit just predating Lord Hardwicke's tenure as Chancellor, a bill for an accounting was brought by the present president and treasurer of the Temple Mills Brass Works, an unincorporated joint stock company (which was treated as a type of partnership), on behalf of all other "proprietors and partners in the first undertaking" other than the previous treasurers and managers, who were defendants in the action.[111] The defendants demurred for failure to join the other members of the Temple Mills Brass Works.[112] The court sustained the bill because "it was in behalf of themselves [the named plaintiffs], and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties."[113]

American courts seized on these authorities to recognize unnamed persons as parties soon after ratification. An example is found in 1801's *Marshall v. Lovelass*, a North Carolina suit brought on behalf

107. (1751) 28 Eng. Rep. 201, 201, 2 Ves. Sen. 312, 312.
108. *Id.*
109. *Id.* at 202, 2 Ves. Sen. at 313.
110. *Id.* at 201, 2 Ves. Sen. at 313.
111. (1722) 24 Eng. Rep. 265, 265, Prec. Ch. 592, 592.
112. *Id.*
113. *Id.*

of an unincorporated religious society, the Unitas Fraternum of North Carolina.[114] There, an agent for the company sued on behalf of current unnamed members of the religious association in order to try title to lands claimed by members of the society.[115] The defendants, who claimed they were rightful purchasers of the land, demurred from the society's bill because all interested persons had not been made parties.[116]

The justices on the North Carolina court agreed that ordinarily all persons concerned in a demand should be called before the court by name.[117] But, relying on cases such as *Leigh* and *Chancey*, they also agreed that as long as some of the interested parties appeared by name, others could be brought before the court through representation without naming them individually if it were impractical to join them individually.[118] Following the usage in *Leigh* and *Chancey*, Justice Taylor referred to these represented persons as "virtually and in effect parties."[119]

5. Parties Were Individuals, Not Abstract Groups

Thus, by the 1780s, parties to a legal controversy could be both named persons before a court and unnamed persons brought into court through representation. Still other authorities added yet another layer of meaning: whether they were named or unnamed, parties were specific individuals, not abstract groups. Abstract groups are groups with indefinite membership, such as a village conceptualized as a group of present and future members extending through time.

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114. 1 N.C. (Cam. & Nor.) 412, 412 (1801).

115. *Id.* at 413.

116. *Id.* at 415-16.

117. *Id.* at 427-28 (opinion of Hall, J.); *id.* at 440 (opinion of Johnston, J.); *id.* at 447-48 (opinion of Taylor, J.).

118. *See, e.g.*, *id.* at 438 (opinion of Hall, J.). Justice Johnston, however, thought that it would be practical to join the members of the association by name. *Id.* at 440-41 (opinion of Johnston, J.).

119. *Id.* at 466 (opinion of Taylor, J.) ("With equal propriety it may be said in the present case, that the suit being brought by Marshall, in behalf of himself and the concerns of the U. F., all the persons who have an interest in the money advanced are virtually and in effect parties, and if continual abatements would not be the necessary effect of inserting the whole, at least endless delays might be expected as the natural consequence.").

As late as the early seventeenth century, English courts loosely referred to both individuals and abstract groups—such as the communal membership (present and future) of an unincorporated village, town, or parish—as parties.[120]

But in the eighteenth century, courts began to confine the term "parties" to only specific individuals. The shift is evident when you compare how courts talked about the exercise of judicial power in relation to two different groupings of legal interests: cases involving voluntary associations with definite membership and cases involving "general rights" affecting indefinite classes.

Associational cases involved actions fixing the rights of a fixed group of specific persons brought into court through representation, such as the rights of present members of a ship's crew to a prize or the contractual rights of present members of a partnership. *Leigh* and *Chancey* discussed above are such cases. In these cases, the persons bound by the judgment were invariably described as persons "considered as plaintiffs."[121]

These cases contrast with the way courts described exercise of judicial power in cases dealing with what were variously called "public," "quasi-public," or "general" rights—that is, the customary or legal incidents of a communal status. In these cases, the Chancery issued decrees determining the legal incidents of a status that affected all the shifting occupiers of a legal status, both current occupiers as well as those "to come."[122]

But, although they were in practice bound by the judgment, the anonymous, changing members of the abstract group out of court, while affected by the judgment, were not described as parties. They were described as persons "concerned" in interest who were affected

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120. Thus, courts would loosely define anyone who joined a communal organization as a party to suits, past and present, involving communal rights. *See* Howard v. Bell (1616) 80 Eng. Rep. 241, 241-42, Hobart 91, 91-92 (persons not named in a communal tenants' rights case are nonetheless "parties" and therefore disqualified from testifying "since the title was one against all, it was in effect but one's defence, and one defendant, for the trial in one man's case tried all"). *See generally* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

121. Leigh v. Thomas (1751) 28 Eng. Rep. 201, 201-02, 2 Ves. Sen. 312, 312-13; *see also* Chancey v. May (1722) 24 Eng. Rep. 265, 265, Prec. Ch. 592, 592.

122. Brown v. Booth (1690) 21 Eng. Rep. 960, 960, 2 Vern. 184, 184; *see also* Brown v. Howard (1701) 21 Eng. Rep. 960, 960, 1 Eq. Ca. Abr. 163, 163; Bone, *supr*a note 100, at 264 & n.121 (collecting authorities).

indirectly as a consequence of the court's power to determine the incidents of the status they occupied.[123]

The same pattern recurs in in rem actions—suits affecting rights inhering in property, which can be viewed as a type of general right. In these cases, courts established a general duty of noninterference with the res at issue.[124] All the unknown persons out in the "world"—the indefinite class of nonowners with a duty of noninterference—were thus practically "bound" by the in rem judgment.[125] But, as in the other general right cases, they, also, were not descried as "parties" to the suit. Rather, they were conceptualized as persons affected as a consequence of the court's exercise of power over the discrete piece of property before the court.[126]

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123. *See* Mayor of York v. Pilkington (1737) 26 Eng. Rep. 180, 181, 1 Atk. 282, 284 (referring to persons out of court in cases of "general right" as persons "concerned" in interest); *id.* at 180, 1 Atk. at 282-83 (noting that in cases in which "there is one general right to be established against all," the persons out of court whose legal interests are determined through the litigation of the general right are not "parties"); *Howard*, 21 Eng. Rep. at 960, 1 Eq. Ca. Abr. at 163 (holding that in a decree affecting a customary right, those affected by the determination of the right are not "parties"; although all tenants "were bound ... only a few Tenants [are] Parties; ... where there are such Numbers, no Right could be done, if all must be Parties; for there would be perpetual Abatements; and it is no Maintenance for all the Tenants to contribute, for it is the Case of all").

124. *See* Bernardi v. Motteux (1781) 99 Eng. Rep. 364, 367, 2 Dougl. 576, 581; AG v. Norstedt (1716) 146 Eng. Rep. 203, 216, 3 Price 97, 136-38.

125. *See Bernardi*, 99 Eng. Rep. at 367, 2 Dougl. at 581 ("The first principles are clear, and admitted. All the world are parties to a sentence of a Court of Admiralty."); *Norstedt*, 146 Eng. Rep. at 209, 3 Price at 115-16 (holding in rem proceedings are conclusive against the world); *id.*, 3 Price at 116 (reporters' note observing that in *The Duchess of Kingston's Case* in 1776 "there was not the slightest doubt thrown out but that the decisions of the Court of Admiralty, and the Court of Instance, which are all put together, were conclusive and binding, because they proceeded in rem. It was admitted, and there can be no doubt of it, that they would be binding upon all the world").

126. *See* Town of Canaan v. Greenwoods Tpk. Co., 1 Conn. 1, 8 (1814) ("The sentence of a court of admiralty in a case of prize is conclusive on all mankind as to all matters expressly found and points directly decided in it—not (as is sometimes alleged) on the ground that all men are actually *parties* in the trial, which is a technical fiction and impossible in fact, but because the decree of that court, operates *in rem*, and according to the established law of nations, effects a transfer of the property." (first emphasis added) (citation omitted)). The "parties" to suits in rem were thus the specific individual claimants who had come into court. *See* Brown v. Smith, 1 N.H. 36, 38 (1817) (noting, in the course of explaining that in rem proceedings are the exception to the usual rule that suits subsist between an actor and a reus, that "in replevin, the party instituting the suit is not alone the actor; nor in the present case the sole prevailing party. It is a preceeding [sic] *in rem*. It resembles a libel in a court of admiralty, and the parties are *both* claimants" (second emphasis added)). Following Justice Mansfield's lead in *Bernardi*, some courts distinguished between parties to the sentence in

Together, these authorities seem to reflect an understanding, by the end of the eighteenth century, that the judiciary acted directly on specific individuals. It did not act directly on abstract groups with fluctuating membership. To the extent courts rendered judgments that affected members of such a group, the effect of that judgment had to be justified by conceptualizing the court as acting on a concrete person or thing brought into court, with an indirect ripple effect across an anonymous, fluctuating group of *non*parties outside of court.

In turn, Chief Justice Marshall would expressly acknowledge this understanding in *Fletcher v. Peck*, in which he emphasized that the judicial power acts directly only on "individuals," while the legislative branch acts on the larger "society."[127]

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an in rem proceeding and parties to the suit. *See* 99 Eng. Rep. at 367, 2 Dougl. at 581. All the world were parties to the sentence—that is, were bound; but the claimants in court, "between" whom the proceeding subsisted, were the only "parties to the suit." United States v. The Anthony Mangin, 24 F. Cas. 833, 834 (D. Pa. 1802) (No. 14,461) (noting that "[t]he proceeding being in rem, all the world become parties to the sentence, as far as the right of property is involved; and of course all persons in any wise interested in the property in question, are admissible to claim and defend their interests"; but the "parties" asserting actual claims "in court," "between whom" the issues in the case "arise," are the only "part[ies] to the suit"). Some courts reconciled in rem jurisdiction with the principle that courts act on specific individuals by redescribing in rem proceedings in in personam terms, as proceedings that were in actuality against a discrete set of persons with existing claims against the property. *See* The Mary, 13 U.S. (9 Cranch) 126, 144 (1815) (acknowledging the usual formula that a proceeding in rem binds the world, but arguing this simply means that "[e]very person ... *who could assert any title* to the Mary, has constructive notice of her seizure [due to the attachment of the property in question], and may fairly be considered as a party to the libel. But those who have no interest in the vessel which could be asserted in the Court of admiralty, have no notice of her seizure, and can, on no principle of justice or reason, be considered as parties in the cause so far as respects the vessel" (emphasis added)).

127. 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments."); *see also* Trump v. Mazars USA, LLP, 940 F.3d 710, 755 (D.C. Cir. 2019) (Rao, J., dissenting) (collecting authorities demonstrating that in the system of separation of powers, the executive and judicial branch's distinctive objects are "individuals").

6. In Cases Involving Pleading "Fictions," Courts Looked Behind the Fiction to Recognize the "Real" or "Substantial" Parties

Parties to a legal proceeding were thus a discrete set of specific individuals singled out and acted on directly through the judicial process either by name or through representation. The last important feature of parties arose in cases involving pleading fictions, in which English courts by the 1780s had recognized the concept of "real" or "substantial" parties—persons behind the fiction with the attributes of an actual party.

One of the oldest such fictions arose to allow claimants to use the writ of ejectment to try title to a freehold. Originally, the writ of ejectment was only available to plaintiffs who held land for a term of years.[128] To enable fee simple owners to use ejectment to try their title to land, the owner would lease the land to a friend.[129] When the other claimant to the land turned the "lessee" out, the (manufactured) "lessee" would then sue the adverse claimant.[130] Because the "lessee," to prove his right to possession, would then need to prove his "lessor" had title, the suit would accomplish the end of the owner—litigating his title to the land in question.[131]

Eventually, to save the "lessee" the trouble of being turned out by the adverse claimant, courts allowed the device of the "casual ejector"—another friend of the landowner who fictitiously "turned out" the "lessee."[132] To remedy this injury, the "lessee" then brought his action against the "casual ejector," who would notify the actual adverse claimant.[133] When the real adverse claimant then appeared, his name was substituted for the casual objector on the record.[134] As a condition of being allowed to appear in the place of the causal ejector, the real claimant was required to stipulate that the fictive premise for his appearance—the ouster of the fictive "lessee"—had

128. MacMillan Bloedell, Inc. v. Ezell, 475 So. 2d 493, 495 (Ala. 1985).
129. *Id.*
130. *Id.*
131. *Id.* at 495-96 (describing origins of the writ of ejectment).
132. *Id.* at 495.
133. *Id.*
134. *Id.*

actually happened.[135] By the late eighteenth century, English courts had dispensed with the elaborate string of manufactured leases and simply allowed the claimants to sue in the name of entirely fictitious parties, with service as a matter of course directed to the actual defendant (whose name would then be placed on the record when he appeared to defend in the "casual objector's" stead).[136]

This use of fictitious parties remained common practice in 1787, with different American jurisdictions employing different conventions for naming the fictive parties in writs of ejectment.[137] In New York, for example, there was standard practice to use "Jackson" as the name of the fictitious lessee and "John Stiles" as the name of the fictitious ejector; thus, a suit by the asserted owner and actual plaintiff was styled "Jackson on the demise (on the lease of) [name of the real claimed owner of the property in question] v. Stiles."[138]

Another key area where fictions obscured the real parties was in cases founded on assignments. At common law, choses in action (meaning, generally, notes) could not be assigned.[139] But in equity, assignments were enforced.[140] As a result, in equity, an assignee could sue in his own name as the equitable owner of the assigned chose.[141] In courts of common law, however, only the original owner of a note was considered the person with title to the note and therefore the power to sue.[142]

However, courts at law devised a workaround by allowing assignees to sue using the name of the assignor in suits at law.[143] The

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135. *Id.* at 495-96.

136. *Id.*; *see also* John V. Orth, *Fact & Fiction in the Law of Property*, 11 GREEN BAG 2D 65, 66 (2007).

137. *See* Orth, *supra* note 136, at 66.

138. *See, e.g.*, Jackson *ex dem.* Swartwout v. Stiles, 5 Cow. 282, 282 (N.Y. Sup. Ct. 1826); Jackson *ex dem.* Sager v. Stiles, 1 Cow. 134, 134 (N.Y. Sup. Ct. 1823); Jackson *ex dem.* Cantine v. Stiles, 4 Johns. 492, 492 (N.Y. Sup. Ct. 1809); *see also* Orth, *supra* note 136, at 66.

139. Charles E. Clark & Robert M. Hutchins, *The Real Party in Interest*, 34 YALE L.J. 259, 260 (1925) (citing Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 822 (1916)).

140. *See id.* (citing JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF ACCORDING TO THE PRACTICE OF THE COURTS OF EQUITY OF ENGLAND AND AMERICA (Isaac F. Redfield ed., 8th ed., Boston, Little, Brown & Co. 1870)).

141. *See id.* at 260-61.

142. *See id.* at 259; Walter Wheeler Cook, *The Alienability of Choses in Action*, 29 HARV. L. REV. 816, 816-17 (1916).

143. *See* Cook, *supra* note 142, at 821-23.

use of the assignor's name was understood to signal that the assignee had received the assignor's permission to enforce the *assignor's* right through a power of attorney.[144] At law, the assignee was therefore understood as a kind of litigation agent for the assignor—someone who was representing the assignor in court.[145] In reality, the assignee was the real plaintiff—the person prosecuting the suit for her own benefit.[146]

In both ejectment proceedings and lawsuits upon assignments, courts would come to distinguish between the fictive parties—which were termed "nominal" or named parties—and the real parties (those actually prosecuting the claim and defense in their own interest) for some purposes. The distinction first appeared in an anonymous decision after the turn of the eighteenth century.[147] "The plaintiff in ejectment," said Chief Justice Holt, "is a mere nominal person, and trustee for the lessor."[148] As a result, the fictive plaintiff had no power to release the action without, presumably, the lessor's consent.[149]

Later cases considered the identity of the parties in ejectment actions in suits involving "mesne profits"—that is, rents and other profits lost as a result of the unlawful occupation of the property. In 1758's *Aslin v. Parkin*, speaking for an en banc sitting of the King's Bench, Lord Mansfield considered an action for mesne profits brought against the real defendant in interest (the "tenant in possession") in an earlier ejectment action.[150] The defendant had failed to appear in the previous action, and a default judgment had been entered, which the plaintiff alleged precluded the real defendant in interest from contesting the plaintiff's possessory rights in the new suit.[151] The defendant in the action for mesne profits countered that he was not a named party in the earlier ejectment

144. *See id.* at 822-23.
145. *See id.*
146. *See id.* at 823.
147. Anonymous (1705) 91 Eng. Rep. 228, 228, 1 Salkeld 260, 260 (Lord Holt CJ).
148. *Id.*, 1 Salkeld at 260.
149. *See id.* at 228-29, 1 Salkeld at 260.
150. *See* (1758) 97 Eng. Rep. 501, 501, 2 Burr. 665, 665; *see also* (1758) 96 Eng. Rep. 1215, 1215-16, 2 Keny. 376, 376-77 (alternate report of the same case).
151. *See Aslin*, 97 Eng. Rep. at 501, 2 Burr. at 665-67; *see also Aslin*, 96 Eng. Rep. at 1215-16, 2 Keny. at 376-77.

suit.[152] The court said that the real defendant was indeed precluded from contesting the lessor's title or the plaintiff's possession, assuming he was properly notified of the earlier suit.[153] "We are all of opinion," said Lord Mansfield,

> that the nominal plaintiff [the lessee], and the casual ejector, are fictitious characters, introduced merely for form, for the more effectual, and expeditious way of trying the title (without delay by special pleading, &c.), and do substantially, and, in fact, represent the lessor of the plaintiff, and the tenant in possession, they are substantially the parties.[154]

Thus, "the lessor of the plaintiff, and the tenant in possession, are, substantially, and in truth, the parties, and the only parties to the suit."[155] In this way, the court "put this fictitious remedy by ejectment, upon a true and liberal foundation: to attain speedily and effectually the complete ends of justice."[156]

In the 1780s, English courts also began to treat the assignee as, for some purposes, the real party in cases such as *Bottomley v. Brooke*, *Rudge v. Birch*,[157] and *Winch v. Keeley*.[158] In 1791, Justice

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152. *See Aslin*, 96 Eng. Rep. at 1216, 2 Keny. at 377.

153. *See Aslin*, 97 Eng. Rep. at 503, 2 Burr. at 668.

154. *Aslin*, 96 Eng. Rep. at 1216, 2 Keny. at 378; *see also Aslin*, 97 Eng. Rep. at 503, 2 Burr. at 667-68 ("[T]he nominal plaintiff, and the causal ejector, are judicially to be considered as the fictitious form of an action really brought by the lessor of the plaintiff against the tenant in possession; invented, under the control and power of the Court, for the advancement of justice in many respects; and to force the parties to go to trial on the merits, without being intangeled [sic] in the nicety of pleadings on either side.").

155. *Aslin*, 97 Eng. Rep. at 503, 2 Burr. at 668.

156. *Id.*, 2 Burr. at 668-69; *see also* Payne v. Rogers (1780) 99 Eng. Rep. 261, 261, 1 Dougl. 407, 407 (rejecting tenant's purported release of ejectment action against the defendant—something that would be enforceable if done by a real party—and "express[ing] great indignation at this attempt of the defendant, to prevent a landlord from trying a right in the name of his tenant"). *But see* Jefferies v. Dyson (1728/29) 93 Eng. Rep. 968, 968, 2 Strange 960, 960 (in an action in trespass for mesne profits, the plaintiff argued the defendant was estopped by prior judgment against the casual ejector; the Chief Justice "held, that though it would have been an estoppel, if the present defendant had been made a defendant in the ejectment, and the verdict against him; yet this judgment, to which he was no party or privy, could be none; and therefore admitted the defendant to controvert the title").

157. Both *Bottomley* and *Rudge* are summarized in the report of *Winch v. Keeley*, (1787) 99 Eng. Rep. 1284, 1284, 1286, 1 T.R. 619, 619, 621-23. Decided in the early 1780s, in these cases the court allowed defendants to setoff debts owned by the assignee—the beneficially interested party who was, putatively, the attorney for the real party, the assignor—from the recovery that was, formally, owed the assignor on the cause of action filed on the assigned

Buller would describe the real party in the context of assignments as an accomplished fact:

> Courts of Law ... in many cases ... have adhered to the formal objection, that the action shall be brought in the name of the assignor, and not in the name of the assignee. I see no use or convenience in preserving that shadow when the substance is gone; and that it is merely a shadow, is apparent from the later cases, in which the Court have [sic] taken care that it shall never work injustice.[159]

Thus, the Constitution was ratified just as common law was increasingly willing to recognize "real parties" in ejectment and assignments.[160]

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claim. *See id.*, 1 T.R. at 619, 622-23.

158. *Id.* at 1286, 1 T.R. at 623. Decided during the same year as the Constitutional Convention, the court considered whether the bankruptcy of the assignor, in whose name the action was brought, should bar the suit. *Id.* at 1284-85, 1 T.R. at 619, 621. The usual rule was that bankruptcy acted as a bar on personal actions for debt, but the court dodged this rule by treating the assignee, who was not a bankrupt, as, in effect, the substantial or "real" party to the action, although not putting it in quite these terms. *See id.* at 1286, 1 T.R. at 623 ("[I]f this Court will take notice of a trust why should they not of an equity? It is certainly true that a chose in action cannot strictly be assigned: but this Court will take notice of a trust, and consider who is beneficially interested; as in *Bottomley v. Brooke*, where the Court suffered the defendant to set off a debt due from Mrs. Chancellor in the same manner as if the action had been brought by her.").

159. Master v. Miller (1791) 100 Eng. Rep. 1042, 1053, 4 T.R. 320, 341; *see also* Kinnersley v. Orpe (1780) 99 Eng. Rep. 330, 330, 2 Dougl. 517, 517-18 (holding that a servant of one Dr. Cotton was bound by the result of another suit against a different servant of Dr. Cotton because in each case Dr. Cotton, while not named on the record, was the "real defendant").

160. By the end of the eighteenth century, courts of law in England began to push back against the drift toward treating the assignee as the real party for procedural purposes. Thus, in *Bauerman v. Radenius*, the King's Bench was asked to decide whether to recognize an admission against interest by the assignor in an assigned action. *See* (1798) 101 Eng. Rep. 1186, 1186-87, 7 T.R. 663, 663-64. The rule was that admissions against interest were admissible against the "party" to the action, and construed strictly, that would mean an admission by the assignor could be admitted to defeat the claim of the assignee because the assignor—not the assignee—was, technically, the "party" plaintiff. *See id.* at 1187, 7 T.R. at 664. The attorneys for the assignee cited the recent decisions in *Bottomley*, *Rudge*, and *Winch* and argued that

> [i]f a defendant may shew [sic] who the real plaintiff is, though not the plaintiff on the record, for the purpose of setting off a debt due from the real party, or of giving in evidence declarations of that party, so the real party ought to have the privilege of disclosing himself, so as not to be bound by the declarations of the nominal plaintiff, which, if he had not been such, could not have been given in evidence as the declarations of a mere agent.

After ratification, the Supreme Court embraced this idea in *Fowler v. Lindsey*.[161] There, Connecticut had granted land to the plaintiffs, who brought an action of ejectment in Connecticut circuit court against the current occupiers.[162] The defendants claimed the land was located in New York, and that therefore only New York courts had jurisdiction over the res.[163] Because the plaintiffs countered that the land was actually in Connecticut, the defendants sought removal by writ of certiorari into the Supreme Court based on the Court's exclusive original jurisdiction, granted under the first Judiciary Act, over controversies between different states.[164] The defendants argued that states were "parties" to the controversy within the meaning of the Judiciary Act and Article III's Original Jurisdiction Clause because states were concerned in interest—the dispute dealt with the location of state boundaries, a vital state concern.[165]

"Without entering into a critical examination of the Constitution and laws, in relation to the jurisdiction of the Supreme Court," wrote Justice Washington,

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Id. at 1187-88, 7 T.R. at 665 (argument of counsel). Lord Kenyon vigorously rejected the argument. He wrote:

> If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt or Hardwicke, I believe it never would have occurred to them sitting in a Court of Law, that they could have gone out of the record and considered third persons as parties in the cause. Here it has been contended that Bauerman and Co. are to be laid out of the case entirely, and we are desired to substitute Van Dyck and Co. as plaintiffs in their room .... It is my wish and my comfort to stand super antiquas vias: I cannot legislate, but by my industry I can discover what our predecessors have done, and I will servilely tread in their footsteps. I am therefore clearly of opinion on principles of law, that the plaintiffs cannot recover in this action, and we cannot in this case assume the jurisdiction of a Court of Equity in order to overrule the rigid rules of law.

Id. at 1189, 7 T.R. at 668 (Lord Kenyon CJ). Later in *Wake v. Tinkler*, Lord Ellenborough noted, "If you could shew [sic] that this case ranged itself within the decisions of *Bott[o]mley v. Brooke*, and *Rudge v. Birch*, we would hear you further; but I am much more inclined to restrain than to extend the doctrine of those cases." (1812) 104 Eng. Rep. 1002, 1003, 16 East 36, 38 (Lord Ellenborough CJ); *see also* Outram v. Morewood (1803) 102 Eng. Rep. 630, 637, 3 East 346, 366 (Lord Ellenborough CJ) (doubting the holding of *Kinnersley* that persons not on the record could be bound as "real defendants" in previous cases).

161. 3 U.S. (3 Dall.) 411 (1799).

162. *Id.* at 411.

163. *Id.*

164. *Id.* at 411-13 (opinion of Washington, J.).

165. *Id.* at 413-14 (opinion of Paterson, J.).

> I lay down the following as a safe rule: That a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a state has in the controversy, must be a case, in which a State is either nominally, or substantially, the party. It is not sufficient, that a State may be consequentially affected.[166]

Later authorities would treat this not simply as a statement of the Court's original state-party jurisdiction but a statement of the litigant-party concept embedded in each of the party-related jurisdictional grants.[167] Thus, controversies between citizens of different states were controversies in which citizens' different states were nominally or *substantially* the adverse parties within the meaning of the law of parties.

How far did the legal concept of the "real party" stretch? As *Fowle*r noted, the English precedents suggested the real party was not simply someone who was concerned in interest—someone, that is, who merely had some "consequential" stake in the outcome. Real parties were persons who enjoyed the "substance" of a legal party.

At a minimum, having the use or enjoyment of the right asserted was one attribute. Relying on the association between parties and ownership of the right or duty in question, later authorities would suggest a right to control the claim or defense at issue was another attribute of a "real party."[168] But by the 1780s, no court had squarely defined the "real party" concept.

B. Situating Corporations in the Original Law of Article III Parties

We arrive, then, at the key question: Who was the legal party in corporate proceedings? This question is the key to the constitutionality of corporate diversity jurisdiction: because corporations themselves are not "citizens," it follows that if corporations, as opposed to their members, are the legal party to suits in which they are named, the original meaning of Article III does not authorize diversity jurisdiction over "controversies" in which corporations are

166. *Id.* at 412 (opinion of Washington, J.).

167. *See*, *e.g.*, Browne v. Strode, 9 U.S. (5 Cranch) 303, 303 (1809); Wormley v. Wormley, 21 U.S. (8 Wheat.) 421, 451 (1823); McNutt v. Bland, 43 U.S. (2 How.) 9, 14-15 (1844).

168. *See McNutt*, 43 U.S. (2 How.) at 14-15.

named parties. We begin our investigation of this key question with an overview of the relevant evidence.

1. Overview of the Evidence

Most scholarship on early conceptions of parties in corporate contexts starts with postratification evidence—Steward Kyd's 1793 treatise on corporations and then Joseph Angell and Samuel Ames's 1832 American treatise. Both described the corporation as at once (1) a legal person separate from its members and (2) as a body politic composed of many individuals.[169] Based on these characterizations, many corporate law scholars have suggested that the conception of the corporation was unsettled during this period—leaving it open to the court to treat corporators as the "real parties" who had been brought before the court through representation.[170]

Yet, the historians who delved deeply into the preratification law of parties and procedure generally, such as Frederick Pollock, William Holdsworth, and, more recently, Stephen Yeazell, all came away with the opposite impression: that by the eighteenth century, lawyers (in Yeazell's words) seemed to have "completely assimilated the idea that the corporation is an entity—an artificial individual—rather than a collection of persons"—a shift that allowed them to describe the judicial power as something that was limited to acting on individuals, even as corporate litigation became more and more prominent.[171]

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169. *See* 1 STEWART KYD, A TREATISE ON THE LAW OF CORPORATIONS 13 (London, J. Butterworth 1793); JOSEPH K. ANGELL & SAMUEL AMES, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 1 (Boston, Hilliard, Gray, Little & Wilkins 1832).

170. *See* Blair & Pollman, *supra* note 13, at 1681-82, 1684 (suggesting the early understanding of corporations was associational based solely on an examination of Marshall and Taney Court decisions); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1503-05, 1507 & n.170, 1508 (1989) (suggesting courts were divided between associational and nonassociational understandings of the corporate form based solely on discussion limited to Kyd and Blackstone); Hovenkamp, *supra* note 13, at 1597 (suggesting, based exclusively on discussion of Marshall Court decisions, that the prevalent understanding of corporations was as an "association" at the beginning of the nineteenth century).

171. YEAZELL, *supra* note 120, at 157 (suggesting in passing that by the end of the eighteenth century, "[p]eople no longer perceived the world in terms of collections of humans, but rather as humans and corporate entities"). *But see* Frederick Pollock, *Has the Common Law Received the Fiction Theory of Corporations?*, 27 LAW Q. REV. 219, 220-22 (1911) (arguing

Although not free from all doubt, the evidence suggests that the second set of scholars has the better view of most lawyers' understandings at the end of the eighteenth century. As we have seen, parties were individuals before the court.[172] Lawyers in the eighteenth century strictly divided individuals into two, and only two, categories, which they treated as distinct base units of the legal system: natural persons and artificial persons.[173] Artificial persons were in turn generally synonymous with corporations (although, as we will see, not all "corporations" had the full attributes of artificial persons).[174]

The key property of a corporate artificial person, the thing that made the indefinite group or society encapsulated by the corporation something amenable to judicial process, was legal "individuality."[175] Individuality meant the entity with legal personhood had a separate legal identity from its members.

The general rights cases hint that corporations' separate individuality may have been a device to reconcile corporate law with the justiciability norms barring courts from acting directly on "societies" (abstract groups with indefinite, fluctuating membership).[176] Incorporation was the legislative act that converted societies into justiciable units by giving them separate legal concreteness or "individuality."

Corporate individuality had a procedural corollary in the law of parties: Because the artificial person, not its members, was the "person" brought within judicial jurisdiction, only the entity and not its members was acted on directly.[177] And so only the entity was the "party" in suits proceeding in the corporate name.

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corporate personhood was "real" not "fictional" in common lawyers' minds, and noting corporations were "artificial" persons in the sense that something created by art or skill, such as a chair, is "artificial" yet still real); W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 YALE L.J. 382, 406 (1922) ("This idea that the corporation is to be treated as far as possible like a natural man is the only theory about the personality of corporations that the common law has ever possessed.").

172. *See supra* Part III.A.5.

173. This point is developed in Part III.B.2.

174. *See infra* Part III.B.2; *see also infra* note 180 and accompanying text.

175. *See* Alexander Hamilton, Opinion as to the Constitutionality of the Bank of the United States (Feb. 23, 1791), *in* 4 THE WORKS OF ALEXANDER HAMILTON 104, 114 (John C. Hamilton ed., N.Y., Charles S. Francis & Co. 1851). This claim is developed across the rest of Part III.

176. *See supra* Part III.A.5.

177. For the principal evidence in support of this claim, see *infra* Part III.B.2-3.

Below we review the evidence supporting the widespread acceptance of this corollary at the founding. The first line of evidence, which others have also canvassed, is the timing of courts' recognition that corporators were not directly liable in suits in the corporate name. That assumption—a straightforward entailment of corporators' nonparty status in such suits—appeared quickly after ratification and with little debate. That suggests that corporators' nonparty status in suits in the corporate name was already the conventional view by ratification.

The second, much more direct line of evidence is found in case law employing the concept of "party" in the ordinary law of evidence, procedure, and venue. Below we show that, just as the quick recognition of limited direct liability would suggest, a majority of authorities in the decades before ratification treated corporators as nonparties. Like persons affected in general rights cases or in rem actions discussed earlier, corporators were classified as persons who were merely "concerned in interest"—the procedural term for nonparties, or persons standing outside the suit and so merely affected indirectly.[178]

We also show that, as we move into the nineteenth century, the record reveals significant resistance across jurisdictions to the idea corporators were the "real parties" in suits proceeding in the corporate name, even as the real party concept gained steam in other areas. This postratification resistance is yet more proof that in the 1780s, corporators' nonparty status in suits proceeding in the corporate name was what we call a "ground rule"—a fixed given constitutive of a properly judicial system that participants did not look behind or theorize in terms of other principles. The next Sections develop this evidence in greater detail.

2. Indirect Evidence that Corporators Were Not Parties in Controversies Proceeding in the Corporate Name

"A corporation," said Thomas Wood in the 1720 edition of his *An Institute of the Laws of England*, "is a ... Person in a Political Capacity created by the Law."[179] The leading eighteenth-century

178. For prior discussion of the general rights cases, see *supra* Part III.A.5.

179. 1 THOMAS WOOD, AN INSTITUTE OF THE LAWS OF ENGLAND; OR, THE LAWS OF ENGLAND

systematizers of English law, Matthew Hale and William Blackstone, would, likewise, divide "persons" into two (and only two) kinds: "politic," or "artificial," persons and "natural" persons, while equating "artificial persons" with corporations (either sole or aggregate).[180]

The key attribute of artificial persons was, as Alexander Hamilton noted, "individuality":

> To erect a corporation, is to substitute a *legal* or *artificial* to a *natural* person, and where a number are concerned, to give them *individuality*. To that *legal* or *artificial* person, once created, the common law of every State, of itself, annexes all those incidents and attributes which are represented as a prostration of the main pillars of their jurisprudence ... [unless] the general rule of those laws assign a different regimen.[181]

The individuality of an artificial person entailed intertwined propositions in the law of parties. The first was that the corporation, not its members, is the party in actions proceeding against the corporation. The second was that members of entities possessing personhood were immune from *direct* liability in actions against the corporation. This second corollary was simply a statement of the legal consequence of the first because imposition of personal liability required an exercise of judicial authority over someone—by making them a "party."

One way to test the proposition that members of corporations were not parties in actions proceeding in the corporate name is by investigating when the second corollary—shareholder immunity from direct liability for corporate wrongs—became accepted. If that immunity was rapidly accepted without comment after ratification,

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IN THEIR NATURAL ORDER, ACCORDING TO COMMON USE 181 (Holborn, Eliz. Nutt & R. Gosling 1720).

180. MATTHEW HALE, THE HISTORY OF THE COMMON LAW OF ENGLAND 290 (3d ed., London, E. Nutt & R. Gosling 1739) ("As to The Persons themselves, they are either, 1. Persons Natural; Or, 2. Persons Civil or Politick, *i.e.* Bodies Corporate."); 1 WILLIAM BLACKSTONE, COMMENTARIES *118 (establishing a division between the "*rights of persons*," "the *rights of things*," "*private wrongs*," and "*public wrongs*"); *id.* at *119 (dividing persons into either "natural persons, or artificial" and defining "artificial" persons as "such as created and devised by human laws for the purposes of society and government"); *id.* at *455-73 (treating corporations in the last chapter of the first book, titled "Of the Rights of Persons").

181. Hamilton, *supra* note 175, at 114.

this is evidence that nonparty status of corporators was already accepted at the time of ratification. We might call this the *indirect* method of looking for evidence of corporators' nonparty status because it looks for evidence bearing on corporators' nonparty status in corporate suits by looking for the characteristic legal *effects* of nonparty status.

This inquiry has already been the subject of an extensive amount of scholarly investigation (although it has not been framed as an inquiry bearing on the "party" status of corporators). Some historians—notably William Holdsworth—placed the rise of the presumption of corporators' immunity from direct liability at the end of the sixteenth century.[182] Others place it later.[183] But as Phillip Blumberg notes, "[m]ost charters simply were silent, and it had become accepted increasingly that in the absence of charter provision, shareholders were not directly liable" by at least the end of the eighteenth century.[184]

The evidence, indeed, stretches back to the fixation period. In England, Lord Kenyon in 1784 would, as attorney general, issue a private opinion that incorporation presumptively conferred immunity from direct liability. In a suit against the corporation alone, "the Corporate stock alone would be answerable to the engagements, and the individuals who may compose the Corporation would not be liable in their private characters."[185]

When Lord Kenyon was elevated to Chief Justice of the King's Bench, he held the same in 1788's *Russell v. Men Dwelling in Devon*, where he distinguished between true corporations and quasi corporations.[186] Lord Kenyon suggested that judgments against quasi corporations could be executed directly against their members'

182. Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 579 & n.11 (1986) (first citing 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 484 (5th ed. 1973); and then citing L. GOWER, PRINCIPLES OF MODERN COMPANY LAW 26 (4th ed. 1979)).

183. *Id.* at 579.

184. *Id.* at 580; *see also* STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, LIMITED LIABILITY: A LEGAL AND ECONOMIC ANALYSIS 28 (2016) ("[B]y the late eighteenth century, the predominant view among government attorneys was that the default rule for such corporate charters when silent was limited liability.").

185. ARMAND BUDINGTON DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT 1720-1800, at 95-96 (Julius Goebel, Jr., ed., 1971) (citing Letter from Samuel Wyatt to Matthew Boulton (on file with the Birmingham Assay Office, Boulton & Wyatt Collection)).

186. (1788) 100 Eng. Rep. 359, 362, 2 T.R. 667, 671-73 (Lord Kenyon CJ).

personal assets.[187] By contrast, if an entity was a true corporation, judgments against the corporation were executable only against the common corporate fund.[188] Kenyon's distinction between quasi and true corporations implied corporators' immunity from direct liability was a *defining* feature of a true corporation—a corporation was a true corporation (or complete artificial person) only if incorporation conferred immunity from direct liability on corporators in suits against the corporation.

And shortly after, American courts would articulate this position as settled law. Thus in 1816's *Myers v. Irwin*, the Pennsylvania Supreme Court considered whether an association had been lawfully "incorporated" within the meaning of a statute regulating the issuance of bank notes.[189] The association at issue argued it had been "virtually" incorporated by the Pennsylvania legislature.[190] Not so, wrote Chief Justice Tilghman. In the ostensible statute of "incorporation," it was

> enacted, that if any association of citizens should thereafter be formed for the purposes of banking, every member thereof should be individually and personally liable for the debts of the association. How this can be construed into an implied incorporation of the association ... I confess I am unable to conceive. I should draw an inference directly the contrary, because the personal responsibility of the stockholder is inconsistent with the nature of a body corporate.[191]

Similarly, by 1808's *Tippets v. Walker*, Massachusetts courts conceptualized leviation—a levy against corporators to pay a judicial judgment against the corporation—as a third-party claim *by the corporation* for contribution or indemnification, rather than as a

187. *Id.*, 2 T.R. at 672-73.

188. *Id.*, 2 T.R. at 671-73 (distinguishing between a corporation and "quà a corporation" and suggesting that the characteristic of the former is that "damages are not to be recovered against the corporators in their individual capacity, but out of their corporate estate"). Kenyon's concept of "quasi corporations" seemed to refer back to argument of counsel distinguishing between suits against corporations and suits holding members of "fluctuating bod[ies]" of men individually liable. *Id.* at 360, 2 T.R. at 668 (argument of counsel).

189. 2 Serg. & Rawle 368, 370 (Pa. 1816) (opinion of Tilghman, C.J.).

190. *Id.* at 371.

191. *Id.*

form of direct execution against corporators themselves.[192] As Massachusetts Supreme Court Chief Justice Parsons explained in *Tippets*, when the corporation cannot satisfy its obligations from general funds, "the bodies or private property of the individual members cannot be taken in execution to satisfy a judgment against the corporation."[193] Instead, the *corporation's remedy* depended on whether it had contracted for a right of assessment against shareholders.[194]

In other words, a judgment against the corporation could not be executed directly against shareholders. Instead, the corporation had its own derivative right of action against shareholders. Chief Justice Parsons's description of corporators' liability for assessments as derivative—owed to the corporation, not to the litigants against the corporation—presupposed that corporators are separate persons from their corporation and therefore not "parties" to judgments against the corporation in the corporate name.[195]

Two years later, in 1810's *Riddle v. Proprietors of the Locks & Canals on Merrimack River*, a Massachusetts court again embraced the immunity from direct liability and based this immunity on *Men of Devon*.[196] Some bodies of men, Lord Kenyon had suggested in *Men of Devon*, were not complete or proper corporations—they effectively were akin to a partnership (a "quasi corporation") because they lacked complete individuality.[197] But in a full-blown, or true, corporation, by contrast, the entity was a complete artificial person and so corporators' personal assets would not answer for the corporation's debts.[198] *Riddle* adopted this reasoning to explain its tradition allowing execution of judgments respecting towns against town members—these towns were an example of an imperfect or quasi corporation.[199]

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192. *See generally* 4 Mass. (1 Tyng) 595 (1808).

193. *Id.* at 597.

194. *See id.*

195. E. Merrick Dodd, *The Evolution of Limited Liability in American Industry: Massachusetts*, 61 HARV. L. REV. 1351, 1358 (1948) (discussing *Tippets*).

196. *See* Riddle v. Proprietors of the Locks & Canals on Merrimack River, 7 Mass. (1 Tyng) 169, 187-88 (1810).

197. (1788) 100 Eng. Rep. 359, 362, 2 T.R. 667, 671-73 (Lord Kenyon CJ).

198. *See id.*, 2 T.R. at 672-73.

199. 7 Mass. (1 Tyng) at 187 ("We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers without

The same equation between a true corporation and shareholder immunity from direct liability appeared in the opinions in the New York case *Thomas v. Dakin*.[200] The court reasoned, first, that corporations (which it equated with an artificial person) are a natural kind:

> If [associations] have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such, than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species.[201]

What were the essential properties of an artificial person? Artificial persons, the court reasoned, possessed "*individuality*."[202] Chief Justice Nelson's opinion in *Dakin* suggested, in turn, that absence of direct shareholder liability for corporate debts was a basic "attribute" of entity individuality.[203]

Together all of this evidence suggests lawyers defined artificial corporate persons through a tautology. Limited member liability was the hallmark of corporate individuality—an entity was a true corporation with complete individuality only if corporators enjoyed immunity from direct personal liability. And at the same time, this individuality simultaneously dictated member immunity from direct

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their consent. These are in the books sometimes called *quasi* corporations. Of this description are counties and hundreds in *England;* and counties, towns, &c. in this state.").

200. 22 Wend. 9, 103 (N.Y. Sup. Ct. 1839) (opinion of Cowen, J.); *id.* at 70 (opinion of Nelson, C.J.) ("A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter; the use of the term *corporation* in its creation is of itself unimportant, except as it will imply the possession of these.").

201. *Id.* at 103 (opinion of Cowen, J.).

202. *Id.* at 100.

203. *Id.* at 73 (opinion of Nelson, C.J.) (noting that a mark of a "corporation" is "perpetual succession," which is characterized by a situation in which "[f]or the entire duration ... of the association, and which may be without limit, ... the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable" (citation omitted)); *see also id.* at 88 (opinion of Cowen, J.) (noting "collective existence" is an essential attribute of a corporation, which means "[i]t recovers judgments for debts due to it, and execution is levied on its property, upon a recovery against it"); *id.* at 89 (defining a "partnership" in opposition to a corporation, and noting that in a partnership, "[e]ach is individually liable for the whole debts due from the company").

liability—if a corporation had real individuality, then corporators were logically not parties in suits against their corporation and so were not directly liable.

3. Direct Evidence that Corporators Were Not Parties

Because "parties" were persons acted on directly, the conclusion that members of true corporations were immune from direct liability implied that members of such corporations were not "parties" in suits brought by or against their corporate entity. The quick and uncontroversial rise of limited direct liability immediately after ratification is thus important *indirect* evidence that members of true corporations enjoying artificial personhood were not considered "parties" in suits naming the corporation at the end of the eighteenth century.

But even more powerful *direct* evidence for that proposition lies in the everyday law of evidence and procedure. That law, which scholars of the corporate personality have ignored, had several strands involving the "party" concept.

First, at the end of the seventeenth century, the concept of "parties" played a central role in the law of testimonial evidence. English cases had recognized two grounds for barring testimony. "Parties" (either plaintiff or defendant) were barred from testifying in their own civil or criminal trials.[204] By the mid-seventeenth century, a series of cases had extended the bar to "interested persons [who were] not parties."[205]

The concept of "parties" also played a central role in what we today would (anachronistically) call the law of procedure. In English and colonial practice, summons were served by state officers—typically a sheriff or marshal.[206] But by the eighteenth century, the

204. 1 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 575, at 691 (1904).

205. *Id.* § 575, at 692-93 (tracing the development and eventual abolition of the bar on testimony by parties and persons concerned in interest and noting the extension to nonparties concerned in interest arose in the middle of the seventeenth century after "Coke's time"); *see also* Kenneth S. Abraham, *The Common Law Prohibition on Party Testimony and the Development of Tort Liability*, 95 VA. L. REV. 489, 491-97 (2009) (discussing the origins of the rule).

206. An Act in Addition to an Act Entituled "An Act Relating to the Duty and Office of a Coroner," Made in the Twelfth Year of the Reign of King William the Third (1717), *reprinted*

rule developed—and was codified in Massachusetts—that service could not be effectuated by the sheriff when he was party to the suit.[207]

The concept of "parties" also figured in the rules governing juries. Sheriffs were responsible for empaneling juries—here the common law rule barred the sheriff from performing this role if he was a party or person interested in the action. Still other cases fixed venue based on the identity or domicile of the parties.

What we find in these cases is that after some uncertainty about the party status of corporate entities in the seventeenth century, English law coalesced around the view that corporators were not parties in suits by or against the corporate entity by the middle of the eighteenth century, a position that carried over to the United States. This evidence is yet more proof that the early nineteenth-century cases on direct liability reflected a preexisting understanding that artificial personhood created a litigant "party" separate from the members of the entity granted that personhood. The next Subsections trace the evidence in detail.

a. The Seventeenth-Century Authorities Disagree About Corporators' Party Status

When we rewind to the end of the seventeenth century, we find English cases equivocating over corporators' party status. These cases are of interest, first, because they help pinpoint the law's coalescence around a theory of corporate "parties" in the early decades of the eighteenth century, and second, because these old cases remain reference points through the ratification and immediate postratification periods and so require the reader's familiarity before we canvass the main evidence.

In the first two of these cases, *The King v. Mayor of London*[208] and *Case of the City of London, Concerning the Duty of Water-Bailage*,[209]

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in 2 THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY 74 (Boston, Wright & Potter 1874).

207. *Id.* (providing that the sheriff was disqualified from serving process when he was "concerned as plaint[*iff*], complaintant or defendant in any writ, action or process" (alteration in original)).

208. (1678) 83 Eng. Rep. 533, 2 Lev. 231.

209. (1680) 86 Eng. Rep. 226, 1 Ventris 351.

the judges equivocated. In each case, counsel argued that members of the corporation were parties in suits proceeding in the corporate name. In *The King v. Mayor of London*, the King brought a quo warranto proceeding challenging the City of London's right to impose duties on sea coals.[210] The City claimed the right was established by prescription and sought to call "several citizens, freemen of London" in support of its defense.[211] The Crown objected that "they ought not to be witnesses, *quia in proprio casu*"[212]—that is, they were called to testify in their own cause, implying the Crown was invoking the bar on party testimony.

The court let the witnesses in, holding that while it was true that the corporation collects the duties "for the benefit of the whole corporation, of which all the citizens and freemen are members," the ordinary members of the corporation "hav[e] no particular profit to themselves."[213] Rather, the duties were paid into a common fund managed for the general benefit of the city. Given the suit would therefore bring them an "advantage so small and so remote," it could not be "presumed that ... they would be partial and perjure themselves."[214] Chief Justice William Scroggs added that "it ought not to be a general rule, that members of corporations shall be admitted or denied to be witnesses in actions for or against their corporations: but every case stands upon its own particular circumstances."[215]

In the *Case of the City of London, Concerning the Duty of Water-Bailage*, the City of London sued to collect the "water-bailage," a custom on imported goods, and called freemen of London as witnesses in the City's favor.[216] But the defendants objected—not simply on the grounds that the witnesses were "interested" but also on the grounds that they "were parties, the commonalty of London comprehending all the freemen."[217] The City of London argued in return "that their interest was in no sort to be considered, it being

210. 83 Eng. Rep. at 533, 2 Lev. at 231.
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.*
216. (1680) 86 Eng. Rep. 226, 226, 1 Ventris 351, 351.
217. *Id.*

so very small and remote."[218] Three of four justices, including Chief Justice Scroggs, sided with the City's arguments.[219] However, the City subsequently withdrew its witnesses and offered new ones that were not subject to objection, mooting the issue.[220]

Chief Justice Scroggs's opinions in *The King v. Mayor of London* and the *Case of the Water-Bailage* were ultimately equivocal about corporators' party status. In each case, the court let in the witnesses, over objections that the witnesses were parties, but without making clear that the court, by admitting the witnesses, had rejected the view that corporators were "parties." Perhaps the courts were taking the view that corporators were "parties" when they had a "private" or individualized interest rather than a "general" or "public" interest in the suit. If so, though, these cases were departures from the traditional view that parties were disqualified from testifying, regardless of the nature of their interest in the action.

A decade later, the Chancery took a clearer tack. In 1694's *Dowdeswell v. Nott*, a noncorporate witness disqualification case, the Chancellor characterized these authorities narrowly, as cases treating corporators as mere "part[ies] ... concerned in interest" (a term used to describe persons who were not "parties to the suit" or "litigant parties" but were only consequentially affected by the outcome of the case).[221] *Dowdeswell* would also go on to reject the view that disqualification depended on the nature of degree of corporators' interest in favor of a blanket rule that any interest should be disqualifying, relying in part on an unreported decision, called the *Case of the Water Bailiff,* in which it was said the issue had been so resolved "upon great debate" in a case (again) involving

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218. *Id.*

219. *Id.* at 227, 1 Ventris at 351.

220. *Id.*

221. (1694) 23 Eng. Rep. 805, 805, 2 Vern. 317, 318 (per curiam) (referring to witnesses as persons who are disqualified for "interest," rather than party status); *id.* ("The cases, where the party was concerned in interest though never so small, have always prevailed, and it was so resolved upon great debate in the case of the City of *London*, concerning the *Water Bailiff*."); *see also supra* notes 123-26 and accompanying text; WIGMORE, *supra* note 204, § 575, at 692-93 (noting cases classified persons disqualified into two categories— "parties" and nonparties disqualified because of "interest"). For an extensive catalogue of cases on the distinction between parties and those concerned in interest, with a focus on the fixation period, see *infra* notes 243, 251, 262 and accompanying text.

the City of London.[222] Following *Dowdeswell* and the *Case of the Water Bailiff,* it became common practice for corporations to temporarily disenfranchise their members so that they could testify in suits by or against the corporation.[223]

Then, after another decade, Chief Justice Holt took an intermediate position, reminiscent of the modern doctrine of corporate alter egos, in *City of London v. Wood*.[224] Chief Justice Holt's opinion for the King's Bench turned on the distinction between corporations aggregate in which many persons are capable, with or without a head.[225] In the latter—corporations aggregate composed of many persons capable, without a head—no particular member of the corporation was an "integral part" of it; and no single person personified it. In the former, the corporation was conceptualized as an anthropomorphic union of "integral" parts—including a "trunk" or "body" and a "head."[226] The head, an office occupied by a particular member of the corporation, was the repository of executive power, and in medieval law, its occupant personified the corporation in litigation.[227]

The City of London was the former type of corporation—its existence was predicated on a commingling of three integral parts: a particular person or mayor occupying its "head"; the aldermen or "common council" forming a "definite body" of elected officers; and the citizens, an indefinite class.[228] The combination of these three

222. *Dowdeswell*, 23 Eng. Rep. at 805, 2 Vern. at 318.

223. *See, e.g.*, Warden & Co. of Sadlers of London v. Jones (1704) 87 Eng. Rep. 922, 923, 6 Mod. 165, 166.

224. (1701) 88 Eng. Rep. 1592, 12 Mod. 669.

225. *See generally id.*

226. F.W. MAITLAND, STATE, TRUST AND CORPORATION 34 (David Runciman & Magnus Ryan eds., 2003).

227. *See id.* ("[M]edieval thought conceived the nation as a community and pictured it as a body of which the king was the head. It resembled those smaller bodies which it comprised and of which it was in some sort composed.... [T]he commune of a county or the commune of a borough."); FRÉDÉRIC MORET, THE END OF THE URBAN ANCIENT REGIME IN ENGLAND 159 (Melanie Moore trans., 2015) ("While in office, the mayor personified the corporation."); Joshua Getzler, *Plural Ownership, Funds, and the Aggregation of Wills*, 10 THEORETICAL INQUIRIES L. 241, 263 (2009) ("Medieval English lawyers tended to personify the local corporation in its human head for purposes of litigation.").

228. MAITLAND, *supra* note 226, at 115-65.

parts formed the corporation. The conceptualization of the corporation as a fusion of these groups was reflected in the corporation's name: the "Mayor, Commonalty, and Citizens of London."[229]

In *Wood,* the City of London sued in the Mayor's Court, which was ostensibly a sitting of the Mayor and aldermen. Chief Justice Holt held the court lacked jurisdiction because the same person could not be both judge and *party*.[230] The Mayor was ostensibly a judge in the Mayor's Court and was "essentially" a "party" plaintiff.[231] Because one could not be the judge of one's own case and the Mayor could not be temporarily disenfranchised from the corporation without destroying it (a "head," an integral part of the corporation, was essential to its existence), the Mayor's Court could not exercise jurisdiction over the suit.[232]

In response to the objection that the Mayor was not a party because the body politic is "invisible"—a disembodied artificial person with an identity separate from its members—Chief Justice Holt responded that "[i]t is true," but the Mayor was the corporation's alter ego: "the head is visible ... and he is the most conspicuous part of the corporation, ... without which there would not be a corporation existing."[233] In this, Chief Justice Holt was true to the tendency of medieval and early modern conceptions to treat the member-"head" as personifying a corporation of integral parts to the public.[234]

b. The Nonparty Position Prevails in the Eighteenth-Century and Early Nineteenth-Century Authorities

On balance, the preceding cases suggest the party status of corporators was unsettled as late as the concluding decades of the seventeenth century. But in the succeeding decades, *Wood* disappeared from corporate case law. Instead, the position in *Dowdeswell* and the *Case of the Water Bailiff* that corporators are

229. *Wood*, 88 Eng. Rep. at 1594, 12 Mod. at 674.

230. *Id.* at 1593, 12 Mod. at 672.

231. *Id.*

232. *Id.* (the mayor was "essentially plaintiff and Judge"); *id.* ("[T]he mayor is both Judge and party, a thing against natural justice.").

233. *Id.* at 1602, 12 Mod. at 688.

234. *See id.*

nonparties prevailed in all of the major practical treatises of the eighteenth century.

Each such treatise, first, classified a corporation as a kind of person. "A *Corporation*," said Thomas Wood in his 1720 *An Institute of the Laws of England*, "is a ... Person in a Political Capacity created by the Law."[235] Matthew Hale and William Blackstone would similarly treat corporations in sections discussing the rights of "persons," which they each subdivided into two kinds: "politic," or "artificial," "persons" and "natural" persons.[236] Stewart Kyd, too, would classify a corporation as a "political person."[237]

This division suggested that a corporation had a separate personality from the natural persons who composed it. Corporations' separate personalities implied in turn that corporators were not acted on directly in judicial actions against their corporation and so were nonparties. Coke himself had gestured at this idea in his *Institutes of the Laws of England* in the seventeenth century:

> Regularly ... every naturall [sic] man ... ought to be named in all original[ ] [writs].... If it be a corporation aggregate of many able persons; as ma[y]or and comm[o]nalty, dean and chapter, master of an hospital and confreres, &c. the ma[y]or, deane, [sic] or master need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and sirname [sic].[238]

Matthew Bacon's influential early eighteenth-century abridgment of the law, first published in the 1730s, made it explicit that artificial corporate persons, not the members of the corporation, were the only "party" in a suit proceeding in the corporate name. In a gloss on the preceding passage of Coke's *Institutes*, Bacon explained:

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235. 1 WOOD, *supra* note 179, at 181.

236. HALE, *supra* note 180, at 290 ("As to the Persons themselves, they are either, 1. Persons Natural; Or, 2. Persons Civil or Politick, *i.e.* Bodies Corporate."); 1 BLACKSTONE, *supra* note 180, at *118 (establishing a division between the "*rights of persons*," "the *rights of things*," "*private wrongs*," and "*public wrongs*"); *id.* at *119 (dividing persons into either "natural persons, or artificial" and defining "artificial" persons as "such as created and devised by human laws for purposes of society and government"); *id.* at *455-73 (treating corporations in the last chapter of the first book, titled "Of the Rights of Persons").

237. 1 KYD, *supra* note 169, at 15.

238. 1 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND; CONTAINING THE EXPOSITION OF MANY ANCIENT AND OTHER STATUTES pt.2, at *666 (London, E. & R. Brooke 1797) (1642).

> [W]here the Corporation is Aggregate of many capable Persons, as Mayor and Commonalty, Dean and Chapter, &c. none of them in Pleading, are named by their proper Christian and Surnames; and the Reason is, because in the first place, the Death of the Individual is a good Plea in *Abatement*, for a new Successor comes in his place, that was not Party to the former Writ; but Bodies Aggregate are immortal and invariable; and therefore the Parties to the first Writ are always the same.[239]

This passage was then repeated not just in every edition of Bacon's *Abridgement* through the eighteenth century but in each edition of Geoffrey Gilbert's *The History and Practice of Civil Actions*, Charles Viner's *A General Abridgment of Law and Equity*, and Timothy Cunningham's *A New and Complete Law Dictionary, or, General Abridgment of the Law*—in other words, in the leading practical treatments of the law of evidence and procedure across the eighteenth century.[240]

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239. 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, BY A GENTLEMAN OF THE *MIDDLE TEMPLE* 504 (London, E. & R. Nutt & R. Gosling 1736). According to J.G. Marvin, Bacon's *Abridgment* was "probably in more general use ... than any other English Abridgment of the Common Law." J.G. MARVIN, LEGAL BIBLIOGRAPHY, OR A THESAURUS OF AMERICAN, ENGLISH, IRISH, AND SCOTCH LAW BOOKS 85 (Philadelphia, T. & J.W. Johnson 1847).

240. 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 504 (6th ed., Dublin, Luke White 1793); GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF THE COURT OF COMMON PLEAS 188 (London, E. & R. Nutt & R. Gosling 1737); GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF CIVIL ACTIONS, PARTICULARLY IN THE COURT OF COMMON PLEAS 233-34 (2d ed., London, S. Richardson & C. Lintot 1761); GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF CIVIL ACTIONS, PARTICULARLY IN THE COURT OF COMMON PLEAS 233-34 (3d ed., London, His Majesty's L. Printers 1779); GEOFFREY GILBERT, THE HISTORY AND PRACTICE OF CIVIL ACTIONS, PARTICULARLY IN THE COURT OF COMMON PLEAS 233-34 (3d ed., Dublin, James Moore 1792); 6 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 303 (2d ed., London, G.G.J. & J. Robinson, T. Payne, E. & R. Brooke, T. Wheldon, J. Butterworth & L. White 1792); 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW 581 (Dublin, Cotter, Hen. Saunders & Jam. Williams 1764) (as electronically paginated on Eighteenth Century Collections Online (ECCO)) [hereinafter 1 CUNNINGHAM 1764]; 1 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW 597 (3d ed., London, J.F. & C. Rivington, T. Longman, S. Crowder, G. Robinson, W. Flexney, R. Baldwin & W. Fox 1783) (as electronically paginated on Eighteenth Century Collections Online (ECCO)); *see also* Martin Jordan Minot, Note, *The Irrelevance of Blackstone: Rethinking the Eighteenth-Century Importance of the* Commentaries, 104 VA. L. REV. 1359, 1392-95 (2018) (finding, based on study of American lawyers' commonplace books, including John Marshall's, that Matthew Bacon's *Abridgment* and other treatises predating Blackstone played a dominant role in shaping the American bar's understanding of the law).

Consistent with this understanding, each of the major treatments of the law of evidence in the eighteenth century also analyzed corporators in terms reserved for nonparties. The law of evidence barred testimony based on witnesses' interest in the action and distinguished between different types of interested witnesses: parties and nonparties.[241] The former were automatically disqualified, subject to few exceptions.[242] The latter were referred to as "persons interested" or "concerned in interest," a distinction that was standard language for distinguishing nonparties during the framing period.[243]

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241. *See* GEOFFREY GILBERT, THE LAW OF EVIDENCE 128-31 (3d ed., London, His Majesty's L. Printers 1769).

242. *See id.* at 132-33.

243. For English authorities illustrating use of persons or parties interested to refer to nonparties with a stake in the prelitigative dispute, see Mounson v. Broxholme (1617), *reprinted in* REPORTS OF CASES DECIDED BY FRANCIS BACON IN THE HIGH COURT OF CHANCERY (1617-1621), at 63, 63-64 (1932) (persons are neither "parties to the suit nor interested in the decree"); The King v. Warden of the Fleet (1700) 88 Eng. Rep. 1363, 1363, 12 Mod. 337, 338 (Lord Holt CJ) (distinguishing between persons who are a "party" or "interested"); 1 Ann. c. 11 (1702) (Eng.) (referring to persons who are neither "part[ies]" nor "interested"); Kynaston v. Mayor of Shrewsbury (1737) 95 Eng. Rep. 309, 310, Andrews 85, 85-87 (distinguishing between "parties" and persons "interested in" or "concerned in" the "cause"); Mayor of York v. Pilkington (1737) 26 Eng. Rep. 180, 181, 1 Atk. 282, 284 (referring to persons out of court in cases of "general right" as persons "concerned" in interest); Devit v. Coll. of Dublin (1742) 25 Eng. Rep. 166, 167, Gilb. Rep. 241, 242 (using the term "Parties in Interest" to refer to persons "concerned" in a dispute about land rights preceding the filing of any claim); Sara Barnardina (1790) 166 Eng. Rep. 197, 198 n.1, 2 Hagg. 145, 149 n.1 (reproducing a report of the decision in the "Sara Barnardina" case in the notes accompanying the report of a different, later decision) (referring to a person who was "neither part[y] nor interested"); Cockburn v. Thompson (1809) 33 Eng. Rep. 1005, 1007, 16 Ves. Jun. 321, 325-26 (distinguishing between "persons, materially interested in the subject of the suit" and those who have been made "parties"); Wilkins v. Fry (1816) 35 Eng. Rep. 665, 671, 1 Mer. 244, 262 (distinguishing between "parties interested in the subject of the suit" and those "before the Court, either in the shape of Plaintiffs or of Defendants"); Small v. Attwood (1832) 159 Eng. Rep. 1051, 1072, You. 407, 458 ("[T]he general rule is that all persons who are interested in the question must be parties to a suit instituted in a Court of equity."); JOHN MITFORD, A TREATISE ON THE PLEADINGS IN SUITS IN THE COURT OF CHANCERY BY ENGLISH BILL 39 (2d ed., London, W. Owen 1787) ("All persons concerned in the demand ... ought to be parties, if within the jurisdiction of the court."); 1 GILES JACOB, THE COMPLEAT CHANCERY-PRACTISER: OR, THE WHOLE PROCEEDINGS AND PRACTICE OF THE HIGH COURT OF *CHANCERY*, IN A PERFECT NEW MANNER 139 (London, E. & R. Nutt & R. Gosling 1730) ("[I]f those whose Right is concern'd [sic], are not made Parties, the Defendant may demur to such Bill."); *see also supra* notes 123-26 and accompanying text.

For postratification American authorities making the same distinction, see *infra* note 264. Eighteenth-century evidence writers, such as Gilbert, treated disqualification of parties as a "corollary" of disqualification for interest but were always careful to note party status where

Every treatise on evidence, in turn, treated corporators as persons concerned in interest rather than parties. Thus, Viner referred to the disqualification cases involving members of a corporation as examples involving the testimony of "interested persons," following the classification in *Dowdeswell*, while discussing the disqualification of parties in a separate section.[244] Similarly, in his entry on evidence, Cunningham addressed the corporations in the section dealing with them based on "interested persons," a category he distinguished throughout from "parties."[245] And when Cunningham discussed disqualification of witnesses to wills in his entry on testamentary law, he treated *Water-Bailage* and *Dowdeswell* as cases dealing with the admission of *nonparties*' testimony.[246] Thus, he argued, *Dowdeswell* spoke to the degree of interest necessary to disqualify the *non*party witness to a will in a probate proceeding.[247]

Geoffrey Gilbert's *The Law of Evidence* discussed the rules similarly. He listed disqualification rules pertaining to the plaintiff and defendant and the rules pertaining to corporators separately in his index.[248] The plaintiff and defendant were categorically disqualified because, as parties, they were the "most immediately Interest[ed]."[249] Corporators, like other nonparties, were instead disqualified based on the nature and degree of their interest.[250]

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it existed while reserving the term person or party "interested" without qualification for nonparties. *See infra* notes 248-50 and accompanying text.

244. CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 15 (London, F. Worrall 1751) (treating disqualification of corporators under the heading of "Witnesses. Who May be. Interested Persons"); *id.* at xii (classifying corporators along with "[j]udges" and "[j]urymen" under the heading "Interested Persons"); *id.* at 21 (separately treating the disqualification of "[p]arties").

245. 1 CUNNINGHAM 1764, *supra* note 240, at 761-62 (discussing corporators along with other nonparties under the section on disqualifying "an interested person") (as electronically paginated on Eighteenth Century Collections Online (ECCO)); *id.* at 759-60 (discussing the disqualification of "plaintiffs" and "defendants" under a separate heading) (as electronically paginated on Eighteenth Century Collections Online (ECCO)).

246. 2 TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW DICTIONARY, OR, GENERAL ABRIDGMENT OF THE LAW 822 (3d ed., London, J.F. & C. Rivington, T. Longman, S. Crowder, G. Robinson, W. Flexney, R. Baldwin & W. Fox 1783) (discussing *Water-Bailage* and *Dowdeswell* in conjunction with a discussion of disqualification of witnesses to wills) (as electronically paginated on Eighteenth Century Collections Online (ECCO)).

247. *Id.*

248. *See* GILBERT, *supra* note 241, at 365 (separately listing rules relating to "[p]laintiff" and "[d]efendant" from rules relating to members of corporations in the index).

249. *Id.* at 132.

250. *See id.* at 128-31.

King's Bench Justice Francis Buller's *An Introduction to the Law Relative to Trials at Nisi Prius* assumed the same classification.[251] In his section on evidence, Justice Buller followed Gilbert and was careful to distinguish between persons disqualified because they are "plaintiff[s]," "defendant[s]," or "parties to the suit" from disqualified persons who were not parties.[252] Following period nomenclature, Justice Buller described the latter as simply "part[ies] interested," and he included corporator-witnesses among their number.[253]

Finally, the same pattern reappeared in Stewart Kyd's 1793 treatise on corporations, published just after ratification. Kyd devoted relatively limited time to the issue of corporator testimonial disqualification but, following the eighteenth-century authorities, described corporators as persons "interested in the event" who were disqualified based on the nature of their "interest" rather than party status.[254]

The main fault line across eighteenth-century authorities was not whether corporators were parties to suits by or against their corporation—the sources agreed they were not unless separately named as such—but rather what kind of interest was necessary to disqualify corporators (considered as a type of nonparty) from testifying. Geoffrey Gilbert relied on Chief Justice Scroggs's opinion in the *Case of the Water-Bailage* and *The King v. Mayor of London* to distinguish between "public" and "private" interests: private interests (those affecting a witness's personal "fortune") were disqualifying, while public interests—generic or general interests

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251. *See* FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 285-91 (6th ed., Dublin, Eliz. Lynch 1791).

252. *See id.*

253. *Id.* (discussing rules governing disqualification of "plaintiff" and "defendant" as a special case while referring to nonparties throughout as simply "part[ies] interested" without qualification). For examples of Justice Buller's care to distinguish persons who were parties from those merely interested, see *id.* at 285 (discussing disqualification of "plaintiff" and "defendant" as a special instance of rules disqualifying "interested" witnesses); *id.* at 289 (distinguishing witness who "be himself plaintiff"); *id.* at 290 (distinguishing a person who was a "party interested" in one action from his role as a "party to a suit" in another). For Buller's discussion of corporators, see *id.* (classifying corporators as simply a "party interested" without qualification).

254. 1 KYD, *supra* note 169, at 304-05 (referring to corporator-witnesses as "interested in the event" while at the same time repeatedly distinguishing them from "plaintiffs" in his discussion of the *Water-Bailage* case).

shared with the rest of the body politic—were not.[255] By contrast, Timothy Cunningham rejected Gilbert's public/private interest distinction and sided with the view in *Dowdeswell* and the *Case of the Water Bailiff* that any "glimmering, that *scintilla*" of interest "shall be as powerful to exclude the witness, as the most substantial profit."[256]

The same pattern of usage recurred after ratification in America. Federal case law has dominated scholars' attention. But when we turn our attention to state law, first, we find that states developed their own independent understanding of the law of parties based on English authorities.[257] There, the position that corporators are nonparties (articulated in *Dowdeswell* and eighteenth-century treatises) represented the dominant, but not the exclusive, view of corporators' party status in the late colonial and early antebellum period.[258]

A search turned up cases dealing with the party status of corporators reported between 1760 and 1835 in Maine, Massachusetts, New York, New Hampshire, Vermont, Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Missouri, Ohio, Tennessee, and Kentucky.[259] These cases involved not just witness disqualification but application of the party concept in other procedural and evidentiary contexts—including the exception against hearsay for out-of-court party statements against interest and the bar on service of process by a party to the suit.[260] The latter set of cases involving service did not appear in the eighteenth-century English record because the standard that parties could not serve process was apparently not fully accepted in England until the 1760s in *Weston v. Coulson*.[261]

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255. GILBERT, *supra* note 241, at 128-31.

256. 2 CUNNINGHAM, *supra* note 246, at 822 (as electronically paginated on Eighteenth Century Collections Online (ECCO)). Buller noted the roots of the distinction in *Water-Bailage* but made a marginal note questioning whether that case remains good law. *See* BULLER, *supra* note 251, at 290. Viner reported both approaches without comment (although he reproduced *Water-Bailage*'s reasoning in smaller, marginal print). VINER, *supra* note 244, at 17-18.

257. *See, e.g.*, cases cited *infra* note 262.

258. *See, e.g.*, cases cited *infra* note 262.

259. *See infra* note 264.

260. *See infra* note 264.

261. *See* (1746) 96 Eng. Rep. 292, 292-93, 1 Black. W. 506, 506; President of Merchs. Bank

Following English practice, American courts generally distinguished between parties to the suit and persons "interested" or "concerned in interest."[262] As had been the case before ratification, corporators were invariably described in the latter terms throughout the first four decades after ratification.[263] In 1834,

v. Cook, 21 Mass. (4 Pick.) 405, 412 (1826) (noting uncertainty in England about the sheriff's power to serve process as a party had been resolved in *Weston*).

262. *See* Soc'y for the Propagation of the Gospel v. Hartland, 22 F. Cas. 753, 755 (district and date not given) (No. 13,155) (distinguishing between "litigant parties," whom the case subsists "between," and those "concerned in interest"); Prall v. Patton, 3 N.J.L. 570, 571-72 (N.J. Sup. Ct. 1809) (argument of counsel) (distinguishing "party" from those "concerned in interest"); Sayre v. Grymes, 11 Va. (1 Hen. & M.) 404, 408 (1807) (opinion of Fleming, J.) (distinguishing "party" and those "concerned in interest"); Cook v. Allen, 2 Mass. (1 Tyng) 462, 472 (1807) (distinguishing "parties" and "parties in interest"); Jackson *ex dem.* Youngs v. Vredenburgh, 1 Johns. 159, 162 (N.Y. Sup. Ct. 1806) (distinguishing between a "party in the cause" and "person interested"); Hickock v. Scribner, 3 Johns. Cas. 311, 318-19 (N.Y. Sup. Ct. 1802) (opinion of Kent, J.) (distinguishing between those made "parties" and "part[ies] in interest"); Starkey's Adm'rs v. McClure, 1 N.C. (Mart.) 75, 75 (1797) (reporter's summary) (distinguishing between "parties" and persons disqualified for "interest"); Coursey v. Wright, 1 H. & McH. 394, 400 (Md. 1771) (distinguishing between "parties" and those "concerned in interest"). Consistent with this usage, courts and statutes commonly distinguished persons disqualified from testifying because they were "parties" from those disqualified merely for "interest" and used the term person or party in "interest" in relation to the latter. *See* Steele v. Phoenix Ins. Co., 3 Binn. 306, 311, 314 (Pa. 1811) (opinion of Tilghman, C.J.) (noting that if a person is not a "competent witness, it must be, either because he was interested at the time the action was commenced, or because he was interested at the time he was offered as a witness, or because he was a party to the suit" while qualifying that the latter category embraces only real rather than nominal parties); Cogbill v. Cogbill, 12 Va. (2 Hen. & M.) 467, 476-77 (1808) (distinguishing between disqualification because of "party" status and for "interest" in the case of a party who had disclaimed his interest in order to testify); Hart v. Tallmadge, 2 Day 381, 390 (Conn. 1806) (classifying disqualified persons into two categories—"part[ies], or interested"); Respublica v. Richards, 1 Yeates 480, 480-81 (Pa. 1795) (distinguishing between those who are "parties" or "interested"); *see also supra* note 243 and accompanying text.

263. *See* Smith v. Barber, 1 Root 207, 208 (Conn. 1790) (considering whether members of municipal corporation "could be witnesses on account of their interest" and deciding in the affirmative on grounds of necessity); *Richards*, 1 Yeates at 480-81 (holding that "[w]here a corporation are parties or immediately interested in the question, no freeman can be either a juror or witness" without identifying whether freemen were disqualified on grounds of interest or party status); Shelton v. Tomlinson, 2 Root 132, 132 (Conn. 1794) (characterizing members of corporation as persons "interested" in suits by their corporation but letting their testimony in on the ground of necessity); Starr v. Starr, 2 Root 303, 306 (Conn. 1795) (distinguishing persons who are disqualified because they are "interested" and those disqualified as "party to th[e] suit" and characterizing members of the corporation as "interested" while disqualifying another witness as both "interested" and a "party"); State v. George, 1 Del. Cas. 161, 162 (Del. 1797) (opinion of Bassett, C.J.) (describing cases involving corporator-witnesses for the "corporation" as cases involving disqualification for "interest"); Respublica v. Duquet, 2 Yeates 493, 496, 500-01 (Pa. 1799) (rejecting objection by the

defendant that the court lacked jurisdiction because the judges, members of the municipal corporation, were "parties" to the suit by virtue of their corporate membership); Corp. of N.Y. v. Dawson, 2 Johns. Cas. 335, 336 (N.Y. Sup. Ct. 1801) (per curiam) (characterizing members of municipal corporation as persons concerned in "interest" and refusing to change venue in suit by the city because members of the corporation were jurors); Cornwell v. Isham, 1 Day 35, 42, 89 (Conn. 1802) (rejecting objection that corporator-witnesses were a "party" to a will naming their corporation as a beneficiary); *id.* at 38-40 (argument of counsel); Falls v. Belknap, 1 Johns. 486, 490-91 (N.Y. Sup. Ct. 1806) (per curiam) (allowing witness for town in a suit over the settlement of a pauper and characterizing the witness, a member of the town, as an "interest[ed]" person); Jacobson v. Fountain, 2 Johns. 170, 175-76 (N.Y. Sup. Ct. 1807) (characterizing inhabitant of Staten Island as an "interested" person and distinguishing him from the contending "part[ies]," "plaintiff" and "defendant[ ]," in the course of considering whether he should be disqualified in a suit adjudicating general communal rights); President of Hartford Bank v. Hart, 3 Day 491, 495 (Conn. 1807) (rejecting arguments that statements of members of corporation should be treated as the direct admission of a "party" and characterizing corporators as, at best, "agents" for the corporate party). *Compare id.*, *with id.* (argument of counsel) ("The agents, in this case, could not be witnesses; because they are a party."). *See also* Bloodgood v. Overseers of the Poor of Jam., 12 Johns. 285, 286 (N.Y. Sup. Ct. 1815) (per curiam) (characterizing member of incorporated village as "interest[ed]" in a suit to settle a pauper there and refusing to disqualify his testimony); Tomlinson v. Leavenworth, 2 Conn. 292, 297 (1817) (opinion of Baldwin, J.) (characterizing member of a town as potentially disqualified based on "interest" both in cases where the "town" was "interested" and was itself a "party"); Connecticut v. Bradish, 14 Mass. (1 Tyng) 296, 300 (1817) (opinion of Jackson, J.) (rejecting argument that citizen of a state is a "party" to the suit, and therefore disqualified, because his sovereign is named as a party on the record); Eustis v. Parker, 1 N.H. 273, 274-78 (1818) (per curiam) (noting distinction between persons disqualified as parties and for "interest" and classifying corporators as parties disqualified, if at all, for "interest"); Magill v. Kauffman, 4 Serg. & Rawle 317, 320-21 (Pa. 1818) (analyzing disqualification of member of corporation under rules relating to disqualification of party's "agent" rather than under rules relating to direct party testimony); Adams v. President of Wiscasset Bank, 1 Me. 361, 363-65 (1821) (discussing distinction between "part[ies]" and persons "interested" and rejecting the proposition that members of true corporations are parties to suits in the corporate name); Stuart v. President of Mechs.' & Farmers' Bank, 19 Johns. 496, 496 (N.Y. 1822) (reported decision of Chancellor Kent rejecting arguments that members of a corporation are parties to suit in the corporate name); Grayble v. York & Gettysburg Tpk. Rd. Co., 10 Serg. & Rawle 269, 273-74 (Pa. 1823) (analyzing disqualification of corporator in terms of "interest"); City Bank of Balt. v. Bateman, 7 H. & J. 104, 109-12 (Md. 1826) (noting stockholders, as parties "in [their] corporate capacity" only, are not "part[ies] to the suit"; "[T]he only objection that could have been plausibly raised to his being examined as a witness ... was, that being a stockholder, he was interested in the fund to be affected by the verdict"); *Cook*, 21 Mass. (4 Pick.) at 410-16 (1826) (holding that members of true corporations are persons concerned in interest, not parties to the suit); Mayor of Jonesborough v. McKee, 10 Tenn. (2 Yer.) 167, 168-69 (1826) (analyzing disqualification of corporators as an instance of disqualification on "ground[s] of interest"); Comm'rs of Clermont Cnty. v. Lytle, 3 Ohio 289, 290 (1827) (analyzing disqualification of corporators and members of towns in terms of "interest"); *In re* Kip, 1 Paige Ch. 601, 613-14 (N.Y. Ch. 1829) (holding members of corporations are not "parties" to suits in the corporate name); Bank of Ky. v. M'Williams, 25 Ky. (2 J.J. Marsh.) 256, 260-62 (1829) (analyzing members of corporations in terms of disqualification of "persons possessing an interest"); Methodist Episcopal Church of

in *Town of Essex v. Prentiss*, the Supreme Court of Vermont could identify only one state that "h[e]ld the corporators individually *parties* to those suits against the corporation[ ]"—Massachusetts.[264] Similar to other states, in *Essex*, Vermont rejected that view in favor of the majority position that corporators are not "*parties*" but merely "*interested* in the suits."[265]

This pattern appeared not only in American cases but leading American treatises. Zephaniah Swift's 1810 treatise on evidence—the first American treatise on the topic of party disqualification and the only major treatise on evidence and parties in the first forty years after ratification—distinguished between "parties on record" and persons "interested" and discussed disqualification of members of the corporation as an example of cases in which interested persons were disqualified.[266] In Angell and Ames's treatise on corporate law, published in 1832, they took the same position in their section on the disqualification of corporators' testimonial evidence. They referred to the corporation as the "party" to the suit while referring to members of the corporation as persons "interested" who were

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Cincinnati v. Wood, 5 Ohio 283, 287 (1831) (noting distinction between parties and persons concerned in interest and analyzing corporation as party to record and corporators as persons concerned in "interest"); Town of Essex v. Prentiss, 6 Vt. 47, 51 (1834) (rejecting argument that members of corporations are parties in suits proceeding); Trs. of Watertown v. Cowen, 4 Paige Ch. 510, 513 (N.Y. Ch. 1834) (the corporation, and not its trustees or other members, is the party to the suit); McLoud v. Selby, 10 Conn. 389, 394-97 (1835) (adopting the view of Massachusetts that corporators in true corporations are not parties, but corporators in quasi corporations are parties to the extent they are individually liable for corporate debts); Van Wormer v. Mayor of Albany, 15 Wend. 262, 263 (N.Y. Sup. Ct. 1836), *aff'd*, 18 Wend. 169 (N.Y. 1837) (distinguishing "part[ies]" and those concerned in "interest," and noting that a party sued in their corporate capacity is not a "party to the suit" but instead only disqualifiable for "interest"). An equivocal case is *Graves v. Priest*, 1 Mo. 214, 214 (1822) (calling corporators "parties, in their corporate capacities," while also noting their disqualification depends on the nature of their "interest"). *But see Bateman*, 7 H. & J. at 109 (noting that one who is a party in their corporate capacity is disqualified as a person concerned in interest, rather than as a "party to the suit"); *Van Wormer*, 15 Wend. at 263 (same); Hamilton, *supra* note 175, at 143 (stating that a grant of "corporate capacity, to a number of persons" is a synonym for the endowment of the corporate aggregate with separate "individuality").

264. 6 Vt. at 51; *see also id.* at 48 (argument of counsel) (claiming other states have recognized corporators as parties but citing only Massachusetts authorities).

265. *Id.* at 51 (opinion of Collamer, J.).

266. ZEPHANIAH SWIFT, A DIGEST OF THE LAW OF EVIDENCE, IN CIVIL AND CRIMINAL CASES, AND A TREATISE ON BILLS OF EXCHANGE AND PROMISSORY NOTES 57 (Hartford, Peter B. Gleason 1810); *see also id.* at 79-81 (addressing disqualification and exceptions applicable to parties separately from exceptions applicable to persons with an "interest").

barred from testifying based on the nature of their interest in the corporation's suit.[267]

This classification was also adopted by Simon Greenleaf, the greatest of antebellum American evidence writers, in his 1842 evidence treatise. Corporators were not "parties" in suits by or against their corporation—"real" or otherwise; they were nonparties concerned in interest, unless they were subject to direct liability for their corporations' debts.[268]

C. The Dissenting Authorities Considered

As we have seen, surveying American practice in 1834 in *Essex*, the Vermont Supreme Court noted that some dissented from the view that corporations' members were not the real parties in corporate suits.[269] While *Essex* could identify only Massachusetts as a dissenting state jurisdiction, it actually ignored a brief-lived dissenting holding in New York.[270] And *Deveaux* obviously departed from the consensus above at the federal level.[271]

The existence of these authorities means that corporators' party status at the founding is not entirely free from doubt. In this Section, we survey these authorities and the postratification *reaction* to them. Except at the federal level, these authorities were quickly cabined or abandoned. This reaction suggests that contemporary lawyers found recognition of corporators as parties difficult to reconcile with the bar's conventional understanding of the party concept, and is thus further corroborating evidence that by the end of

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267. ANGELL & AMES, *supra* note 169, at 387-93 (discussing disqualification of corporators in terms of "interest"); *see also id.* at 390 (giving prominent place to *In re Kip*, discussed *infra* notes 333-37 and accompanying text, in which the New York chancellor concluded that corporators are not parties to suits in the corporate name).

268. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 331, at 380-82 (Boston, Charles C. Little & James Brown 1842) (members of "*quasi* corporations" who are "directly liable" are "parties" to the suit); *id.* § 332, at 382 (in "corporations proper[,] ... it is the corporation, and not the individual member, that is party to the record, in all suits by or against it").

269. 6 Vt. at 51.

270. In addition, a year after *Essex*, Connecticut would adopt Massachusetts's postratification approach. McLoud v. Selby, 10 Conn. 390, 395-97 (1835).

271. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 91 (1809).

the eighteenth century, the entity—not its members—was generally understood to be the party in corporate cases.

1. The Fate of Massachusetts's Colonial Cases

The first reported authority treating corporators as parties we found was in Massachusetts. The 1763 colonial-era case *Wrentham Proprietors v. Metcalf*, followed in 1787's *Chadwick v. Proprietors of Haverhill Bridge*,[272] involved the rule against service by a party, which Massachusetts had codified in the early part of the eighteenth century.[273] In each case, the court perfunctorily identified corporators as "parties" without explaining why they were so.[274]

This colonial tradition did not survive ratification. After ratification, when the Massachusetts Supreme Judicial Court turned to explain these cases, it sharply cabined them by adverting to the formal distinction between corporations and quasi corporations suggested in *Men of Devon*. Corporators were "real parties" only in the case of "quasi corporations," in which members were directly liable as individuals for the entity's debts.[275] Corporators were not the parties in cases against true corporations, in which recovery was limited to the corporate estate.[276]

The first clear statement of this view came in 1811's *Hawkes v. Inhabitants of Kennebeck*.[277] There, the Massachusetts Supreme Judicial Court considered corporator party status in a case where

272. 2 NATHAN DANE, A GENERAL ABRIDGMENT AND DIGEST OF AMERICAN LAW, WITH OCCASIONAL NOTES AND COMMENTS 686-88 (Boston, Cummings, Hilliard, & Co. 1824). Dane printed the date of *Chadwick* as 1787, but the discussion in Dane seems to suggest that the case was decided in the 1790s. *Id.* at 686 (noting the declaration of the plaintiff in the case referred to events that had happened in 1794).

273. JOSIAH QUINCY, JR., REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY, BETWEEN 1761 AND 1772, at 37 n.2 (Samuel M. Quincy, ed., Boston, Little, Brown, & Co. 1865).

274. *See id.* at 36-37; 2 DANE, *supra* note 272, at 687-88.

275. *See supra* notes 186-88 and accompanying text.

276. *See supra* notes 186-88 and accompanying text.

277. 7 Mass. (1 Tyng) 461 (1811).

venue depended on the identity of parties to the suit.[278] As *Wrentham* itself alluded to, Massachusetts towns had long been considered personally liable for judgments against the town—an understanding that persisted after a 1785 statutory declaration that "the inhabitors of every town" are "a body politic and corporate."[279] Because "the estate of every inhabitant is liable to be taken by execution to satisfy such judgments," explained the court, each current inhabitant is therefore a party.[280] The court reaffirmed this party-identification rule in 1817's *Inhabitants of Brewer v. Inhabitants of New Gloucester*.[281]

Hawkes and *Brewer* implied the result would be different when corporators were protected from direct liability for the corporation's debts. And that is exactly what the Massachusetts Supreme Judicial Court held when it considered the question in 1826's *President of the Merchants Bank v. Cook*.[282] In *Cook*, Merchants Bank sued for a debt on a promissory note.[283] The defendant attempted to quash service because the deputy sheriff was a shareholder of the bank.[284] Anticipating this argument, the deputy sheriff had divested himself of shares in the Merchant Bank.[285] The defendant argued that divestment did not destroy the deputy sheriff's party status; because the divestment was temporary, the deputy sheriff should be considered a continuing party because of his underlying interest.[286]

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278. *Id.* at 462.

279. Dodd, *supra* note 195, at 1362 (quoting Act of March 23, 1786, ch. 75, 1784-85 Mass. Laws 605).

280. *Hawkes*, 7 Mass. (1 Tyng) at 463.

281. 14 Mass. (1 Tyng) 216 (1817) (per curiam). There, the sheriff was an inhabitant of the town of Gloucester, the named defendant. *Id.* at 216. Following *Hawkes*, the court held that when "execution may be levied upon the property of any inhabitant, each inhabitant must be considered as a party, within the meaning of the statute [governing service], when the suit is by or against the town in its corporate capacity." *Id.* Because the deputy sheriff was an inhabitant of New Gloucester and because municipal inhabitants' property was liable to execution to pay the debts of the municipality, the deputy sheriff was therefore a party, and the coroner should have effectuated service. *Id.* Whether *Hawkes* and *Brewer* were articulating a longstanding party-identification principle in Massachusetts law, or were inventing an explanation in order to cabin earlier authority and bring it in line with prevailing understandings elsewhere, is unclear.

282. 21 Mass. (4 Pick.) 405 (1826).

283. *Id.* at 405-06.

284. *Id.*

285. *Id.* at 407.

286. *Id.* at 408, 410 (oral argument).

However, the court rejected the view that the deputy sheriff and other corporators were the real "parties" in suits brought by or against the company in the corporate name.[287] Moreover, the court did so through an explicitly textualist interpretation of Massachusetts's 1783 service statute, reminiscent of Chief Justice Marshall's originalist reading of Article III in *Osborn*:

> It is plain then we are called upon to decide whether Daniel Dutch, [the deputy sheriff in question] ... is a *party* to the suit; that he is interested in it admits of no question .... We are to ascertain the true meaning of the legislature in the use of the words of their statute, and we are to consider them, when legislating upon subjects relating to courts and legal process, as speaking technically, unless from the statute itself it appears that they made use of the terms in a more popular sense.
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> The word party ... is unquestionably a technical word, and has a precise meaning in legal parlance. By it is understood he or they by or against whom a suit is brought, ... the party plaintiff or defendant, whether composed of one or more individuals, and whether natural or legal persons; they are parties in the writ, and parties on the record, and all others who may be affected by the writ indirectly or consequentially are persons interested, but not parties.[288]

Chief Justice Isaac Parker's decision then turned to the distinction between municipalities and "private" corporations. By 1826 it was settled in Massachusetts that incorporation conferred direct and indirect limited liability absent an express provision in the company's charter to the contrary.[289] Towns were an exception, rendering them what counsel called (explicitly following Kenyon's opinion in *Men of Devon* and the Massachusetts decision of *Riddle*) "quasi corporations."[290]

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287. *See id.* at 411, 413, 416.

288. *Id.* at 410-11.

289. Dodd, *supra* note 195, at 1352-53.

290. *Cook*, 21 Mass. (4 Pick.) at 409-10 (oral argument) ("Towns and counties are very imperfect corporations, and are commonly called *quasi* corporations. In suits in which they are parties, all the inhabitants are parties, because the property of any individual may be taken on execution.").

Chief Justice Parker agreed. Parker explained that "[t]owns, parishes," and other quasi corporations are not real corporations because members are individually liable for the corporate debt.[291] Rather, members of these corporations

> are but a collection of individuals with certain corporate powers for political and civil purposes, without any corporate fund from which a judgment can be satisfied, but each member of the community is liable in his person or estate to the execution which may issue against the body; each individual therefore may well be thought to be a party to a suit brought against them by their collective name.[292]

But with respect to "banks, turnpike and other corporations," said Chief Justice Parker, "the case is different" than with respect to towns.[293] These are real corporations in which "[t]he execution goes against the corporate property, and the individual members can be affected consequentially, only in proportion to their interest in the corporate property."[294] As a result, corporators in these corporations are not "parties" to the suit, making the deputy sheriff's service proper.[295]

2. New York's Brief Experiment

Thus, after ratification, Massachusetts abandoned its colonial cases on corporator party status in favor of a narrow rule for corporator party-recognition in line with conventional understanding elsewhere. In the early 1820s, one New York Chancellor would briefly experiment with a different understanding of corporators' party status: corporators are parties when they have a private

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291. *Id.* at 414 (opinion of Parker, C.J.).
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.* at 416. Chief Justice Parker's position on corporator party status would be adopted by Simon Greenleaf in his treatise on evidence, published sixteen years later. GREENLEAF, *supra* note 268, § 331, at 380-81 (finding that members of "*quasi* corporations" who are "directly liable" are "parties" to the suit); *id.* § 332, at 382 ("[In] corporations proper[,] ... it is the corporation, and not the individual member, that is party to the record, in all suits by or against it.").

"property" interest—a pecuniary interest capable of being traded—in the corporation conferred by dividend-paying stock ownership.

This interpretation treated corporators as parties even when corporators were protected from direct liability. Unlike Massachusetts authority, this interpretation appeared postratification. But like Massachusetts's preratification recognition of corporator-party status, this New York authority was quickly abandoned.

The path to the New York approach was winding—with connections to *The King v. Mayor of London* by way of later glosses on that case by Geoffrey Gilbert's treatise on evidence and, to an even greater degree, Zephaniah Swift's 1810 evidence treatise, and influences by postratification English case law outside the corporate context.[296]

The first link in the chain of cases leading to the brief-lived New York approach came in *Weller v. The Governors of the Foundling Hospital*, decided in 1792.[297] There, the plaintiff, a well digger, sued the Governors of the Foundling Hospital, an incorporated body, for breach of contract.[298] The defendant called individual governors as witnesses.[299] Counsel argued that the corporators were disqualified "not on the ground of interest, but because they were defendants on the record."[300]

Less than a decade earlier, Lord Kenyon had authored *Men of Devon*, which had suggested that a true corporation was a separate person from individuals that made it, and therefore the individuals that composed it were not legal parties subject to direct liability.[301] Here, according to the reporter (Thomas Peake), Lord Kenyon

> was of opinion, that [the individual Governors] were ... good witnesses. His Lordship said they were sued in their corporate, and not in their natural and individual capacities. That this case was different from the case of a *Mayor* and *Citizens* [(apparently the *Case of the Water Bailiff*)], because though sued in their corporate name, they might-still have a great interest in the

296. *See* GILBERT, *supra* note 241, at 128-31. *See generally* SWIFT, *supra* note 266.

297. (1792) 170 Eng. Rep. 131, Peake 206.

298. *Id.* at 131, Peake at 206.

299. *Id.*

300. *Id.*

301. Russell v. Men Dwelling in Devon (1788) 100 Eng. Rep. 359, 362, 2 T.R. 667, 671-73 (Lord Kenyon CJ).

> event of the cause; for instance, a citizen of London had great and important rights to support; but these defendants had not the least personal interest; they were mere trustees of a public charity.[302]

By stating the corporators were "sued," Lord Kenyon was arguably not breaking new ground. Describing someone as "sued" in a "corporate capacity" was shorthand for noting they were not, in fact, parties in the eyes of the law; rather, the artificial corporate person into which their identity was subsumed was the party.[303] Thus, Lord Kenyon simply seemed to be taking Gilbert's view that corporators, because they were not parties in a suit in the corporate name, only could be disqualified based on a "private" or "personal" interest in the action.[304]

But in his treatise on evidence published twelve years later, Peake relied on Lord Kenyon's opinion to hint at a new theory of corporator party status. "[I]n questions" where corporators have a "private interest[ ]," they are "substantially interested in the event of the cause," Peake wrote.[305] The phrase "substantially interested" evoked Lord Mansfield's use of the term "substantial" to describe a "real" party in *Aslin*.[306]

The King's Bench took the next conceptual step—seeming to explain corporators' nonparty status as a function of their underlying interests—in a subsequent English case, *The King v. Inhabitants of*

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302. *Weller*, 170 Eng. Rep. at 131, Peake at 207.

303. *See* City Bank of Balt. v. Bateman, 7 H. & J. 104, 109 (Md. 1826) (noting stockholders, as parties in their "corporate capacity" only, are not "part[ies] to the suit"; "the only objection that could have been plausibly raised to his being examined as a witness ... was, that being a stockholder, he was interested in the fund to be affected by the verdict"); Van Wormer v. Mayor of Albany, 15 Wend. 262, 263 (N.Y. Sup. Ct. 1836), *aff'd*, 18 Wend. 169 (N.Y. 1837) (distinguishing "part[ies]" and those concerned in "interest," and noting that a party sued in their corporate capacity is not a "party to the suit," but instead only disqualifiable for "interest"); 4 Hamilton, *supra* note 175, at 143 (stating that a grant of "corporate capacity, to a number of persons" is a synonym for the endowment of the corporate aggregate with separate "individuality").

304. *See supra* note 255 and accompanying text.

305. THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 102 (Walpole, Thomas & Thomas 1804). In the preceding passage, he characterized the corporators in *Weller* as "nominal part[ies]." *Id.* But in the next passage, he seemed to imply that even "substantially interested" corporators were not "parties." *Id.* at 103.

306. *See* (1758) 97 Eng. Rep. 501, 503, 2 Burr. 665, 667-68.

Woburn, decided in 1808.[307] There, relying in part on *The King v. Mayor of London*, as well as Peake, the justices held that "rateable" members of an *unincorporated* parish (those who contributed to maintenance of paupers settled in the parish under the English poor laws) were the "real parties" in a suit that the overseers of their parish brought challenging the settlement of a pauper there.[308] Lord Ellenborough said the reason was that the members were "directly and immediately interested" because they were on the hook (as taxpayers) for supporting the pauper—unlike, he noted, corporators in suits that would only affect the "common corporate fund."[309]

Notably, this last aside suggested the new idea that the nonparty status of corporators was a function of their interest in the action against their corporation. Corporators in true corporations were not parties because they were not on the hook because recovery against true corporations was limited to corporate assets—and they therefore lacked the "immediate and direct" interest that characterized a "real" party in the action.[310]

The key to justifying corporators' party status after these cases lay in developing a theory of corporator interest that would support treating them as having the kind of personal interest necessary to support real party status. In America, an innovative New York Chancellor would do so in the 1820s.

His opinion built on American glosses on Gilbert's distinction between public and private interests (of *non*parties) in the law of

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307. (1808) 103 Eng. Rep. 825, 10 East. 395.

308. *Id.* at 825 & n.b, 827, 10 East. at 396, 401 (reporter's emendation that this reference was to the discussion of *The King v. Mayor of London* in Peake's *Evidence*).

309. *Id.* at 825-26, 828, 10 East. at 396, 403 ("This differs from the case of a corporator, who may be a witness in any cause in which the corporation are parties, if he be not personally interested in the result, but only in respect of the common corporate fund." (footnote omitted)).

310. S.M. PHILLIPS, A TREATISE ON THE LAW OF EVIDENCE 57 (2d ed., London, A. Strahan 1815). After *Woburn*, the English commentator S.M. Phillips, in his 1815 treatise on evidence, put Peake's theory of corporators' party status in stronger terms. Phillips argued that disqualification of parties was as a subset of the general interest-disqualification principle and (following language in *Woburn*) flowed from the fact that parties have an "immediate and direct" interest in the event of the action. *Id.* He illustrated this observation by discussing *Woburn*'s recognition of the parishioners as the "real[]" parties in that case. *Id.* at 61. But alongside his discussion of *Woburn*, he also discussed old cases involving disqualification of corporators, such as the *Water-Bailage Case* and *The King v. Mayor of London*. *See id.* at 53 n.*, 59. He thought (following *Woburn*) that these were also cases assessing whether corporators should be disqualified as "parties" because of the nature of their interest. *See id.* at 61.

evidence. Gilbert defined public interests as interests shared by *any* large group and private interests as those unique to specific individuals.[311] However, the Connecticut jurist Zephaniah Swift's 1810 treatise on the law of evidence would present Gilbert's distinction between public and private in the more modern sense: as a distinction between state and nonstate interests.

After a brief discussion of *The King v. Mayor of London*, Swift explained that Connecticut law recognized two classes of corporations. There were "corporations which are of a public nature," wrote Swift, which "comprehend the divisions of the *state*, such as counties, towns, societies, and school districts."[312] Their members "are not considered as having a personal, but a corporate interest, which ought to go the credit, and not to the competency," of corporators' testimony.[313] And there are "corporations of a private nature, instituted for special purposes, as banks, and turnpike companies."[314] Their corporators' "interest is so direct, and there being no necessity that they should be witnesses, they have not been allowed to testify."[315]

Swift's distinction was elaborated on in a pair of New Hampshire cases at the close of the nineteenth century's second decade: *Trustees of Dartmouth College v. Woodward* in 1817[316] and then *Eustis v. Parker* in 1818.[317] *Woodward* was a highly-politicized case that all knew would end up in the Supreme Court. The case arose out of a suit by the corporation of Dartmouth College on Contract Clause grounds challenging a New Hampshire statute altering the governance structure of Dartmouth College.[318] By contrast, *Eustis*, decided a year later, was a more prosaic suit interpreting the New York law of witness disqualification for "interest."[319]

311. *See* GILBERT, *supra* note 241, at 128-31.
312. SWIFT, *supra* note 266, at 57 (emphasis added).
313. *Id.*
314. *Id.*
315. *Id.*
316. 1 N.H. 111 (1817), *rev'd*, 17 U.S. 518 (1819).
317. 1 N.H. 273 (1818) (per curiam).
318. *See Woodward*, 1 N.H. at 114.
319. *Eustis*, 1 N.H. at 274.

Each case, however, involved a detailed discussion of public and private corporate interests. Of the two, *Eustis* offered the more extensive discussion of "private" interests:

> It is clear that the members of private corporations have a direct interest in the corporate property. Corporations of this kind are erected for the benefit of the members.... Any gain or loss of corporate property, is the gain or loss of the members....
>
> Publick corporations such as towns, counties, [etc.] are in their nature widely different from private corporations.[ ]They are created, not for private emolument, but for great publick purposes.... No individual has any *direct private interest* in it; no interest that he can release, or convey to another. It is a common concern of all the members, ... but the private interest of individuals is no otherwise affected by the loss or gain of corporate property than as [they] may tend to augment or diminish the contributions which they may be eventually called upon to make for corporate expenses.[320]

Recall *Woburn*'s theory that a "direct" or "immediate" interest made one a "real party."[321] Combined with Swift's and *Eustis*'s characterization of shareholders' interests in a private corporation as "direct," this idea suggested that a corporator might be the "real party" in suits by or against such a corporation.

The case that made the connection came six years later, in New York in 1823's *Washington Insurance Company v. Price*.[322] There, James Kent's successor as chancellor, Nathan Sanford, a stockholder in Washington Insurance Company, considered whether a New York statute required his recusal in the company's suit against Price.[323] The question turned on the meaning of a New York statute that required the Chancellor to recuse himself when he was a "party" to a suit in chancery.[324]

The Chancellor started with a claim about the meaning of the term "party":

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320. *Id.* at 275-76 (emphasis added).
321. *See supra* notes 308-09 and accompanying text.
322. 1 Hopk. Ch. 1 (N.Y. Ch. 1823).
323. *Id.* at 1.
324. *See id.*

> The forms of proceedings in our courts often present nominal parties who have no real interest in the subject of a suit; but when it is necessary for any purpose of justice, that the real parties not named should be brought into view, this is done, and the persons really interested are either made parties in form, or their interests are recognized with the same effect as if their names had appeared in the [pleadings].[325]

Who then are the real parties? Chancellor Sanford's argument hinged on a claim that persons who own stock in a private company have a "proprietary" interest in it: He explained that "[t]he company consists of persons who are joint proprietors of a common fund."[326] That means, said Chancellor Sanford—now echoing language quoted above from *Eustis* (and Gilbert's and Swift's treatises on nonparty testimony before)—that "in various amounts ... the gain or loss which may result from [the suit], will be the gain or loss of each stockholder, according to the extent of his interest in the fund."[327] And so, he concluded, "[t]he corporation is the *party* in form; the stockholders are the parties in substance."[328] Accordingly, Chancellor Sanford, a stockholder in the insurance company, was disqualified from hearing its case.[329]

Although the theory is imprecisely sketched, it seems to assume that because corporators had engaged their property through the corporate form to further their private ends, they had the kind of direct interests at stake—now associated with a private "proprietary" or "ownership" interest—necessary to give them the "substance" of parties in the action.

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325. *Id.* at 3-4.

326. *Id.* at 3. In this, he seemed to take a lead from the New Hampshire superior court in *Woodward*. Justice Richardson wrote that

> *[p]rivate* corporations are those which are created for the immediate benefit and advantage of individuals, and their franchises may be considered as privileges conferred on a number of individuals to be exercised and enjoyed by them in the form of a corporation.... The property of this kind of corporations and the profits arising from the employment of their property and the exercise of their franchises, *in fact belongs* to individuals.

Trs. of Dartmouth Coll. v. Woodward, 1 N.H. 111, 115-16 (1817), *rev'd*, 17 U.S. 518 (1819) (second emphasis added).

327. *Price*, 1 Hopk. Ch. at 3.

328. *Id.* (emphasis added).

329. *Id.* at 6.

Chancellor Sanford's was a strikingly ingenious reinterpretation of party identification in corporate cases. This reinterpretation also disappeared in New York as soon as it was articulated. Chancellor Sanford's opinion was at odds with the interpretation just two years earlier of the same statute by his illustrious predecessor, James Kent, who had held that "party" did *not* include members of corporations, private or public, sued in their corporate name.[330] After Chancellor Sanford resigned the chancellorship—he served as chancellor for just three years before leaving to serve in the U.S. Senate[331]—Chancellor Reuben Walworth promptly abandoned Chancellor Sanford's interpretation in 1829's *In re Kip*, a decision on witness disqualification.[332] The term "parties" did not encompass corporators of an incorporated church, said Chancellor Walworth, even though they had an alienable membership interest and an indirect pecuniary stake in the suit due to a provision for assessment against corporators under the corporate charter.[333] He noted that

> [t]he freemen of our cities are corporators, and have an indirect interest in almost every suit brought by the corporation. But they are admitted as competent witnesses, and are even permitted by statute to serve as jurors, which certainly could not be allowed if they were considered parties to the suit.[334]

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330. Stuart v. President of the Mechs.' & Farmers' Bank, 19 Johns. 496, 501 (N.Y. 1822) (reporter's note) ("[T]he Chancellor suggested, that he was a stockholder in the *Mechanics*' and *Farmers' Bank*; and that it might be doubted whether he had jurisdiction in the case, inasmuch as the statute declares, 'that where the Chancellor shall be a party to a suit in Chancery, the bill shall be filed before the Chief Justice of the state,' ... and upon subsequent consultation with the Chief Justice, he was of opinion, that the Chancellor was not a party to the suit, within the provision of the statute."); *see also Price*, 1 Hopk. Ch. at 5 ("[I]t appears that my immediate predecessor, and the late chief justice, held a different opinion.").

331. *See Sanford, Nathan*, BIOGRAPHICAL DIRECTORY OF THE U.S. CONG., https://bioguide.congress.gov/search/bio/S000052 [https://perma.cc/8DUA-MULJ].

332. 1 Paige Ch. 601 (N.Y. Ch. 1829).

333. *Id.* at 603 (argument of counsel noting that in "the charter of the Dutch church, there is a clause authorizing an assessment to be made upon the members of the church for all expenses," including operating and court costs); *id.* at 607 (argument of counsel) ("[T]he interest of Kip in the pews is both alienable and descendible.").

334. *Id.* at 613. Chancellor Walworth ended on a note that may have been intended to leave room for a different outcome in other contexts in which the pecuniary ripple effect of the suit on the corporator was more substantial. *See id.* at 614 ("I think the witness was not so far a party to the suits *in this case* as to excuse him from testifying." (emphasis added)). But decisions just a few years later would take the same view and put things even more

Walworth then suggested that the same principle applies to "stockholder[s]" of "mone[y]ed" corporations.[335] The decision eviscerated the idea of corporator party status through a consequential pecuniary interest in the outcome.

The New York legislature would go on to ratify the result in *Price* by amending the recusal statute in 1829—but it did so in a way that indicated the legislature, too, thought Sanford's decision did not accord with the ordinary meaning of the term "party" and needed a better textual foundation. It specified that a chancellor is recused if he is a "party" *or* "interested."[336]

In his extensive treatment of disqualification of witnesses, Greenleaf also did not even mention *Price*;[337] nor did other treatises, like Angell and Ames's treatise on corporations, despite their reasonably extensive discussion of corporators' status in the law of procedure.[338] *Price* dropped out of period commentary almost as soon as it appeared and garnered hardly any subsequent citations.

In England, Thomas Peake's suggestion that corporators might be real parties when they had a personal interest also faded away. In the next major King's Bench decision on corporators' disqualification, 1829's *Doe ex dem. Mayor of Stafford v. Tooth*, the justices confined analysis of corporator disqualification to corporators' "interest" in the action and made no reference to their putative status as "parties."[339] Simon Greenleaf's evidence treatise treated the decision as a statement of the establishment view in America and

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emphatically. *See* Trs. of Watertown v. Cowen, 4 Paige Ch. 510, 513 (N.Y. Ch. 1834) ("The corporation, and not the trustee of the corporation, is the party to the suit."); Van Wormer v. Mayor of Albany, 15 Wend. 262, 263 (N.Y. Sup. Ct. 1836), *aff'd*, 18 Wend. 169 (N.Y. 1837) (distinguishing "part[ies]" and those concerned in "interest," and noting that a party sued in their corporate capacity is not a "party to the suit" because he is not "personally liable"); Pack v. Mayor of New York, 3 N.Y. 489, 492 (1850) (noting that "in this state, the cases of *Van Wormer* ... and *The Trustees of Watertown* v. *Cowen* ... are directly in point to show that a corporator, though also an officer of the corporation, is not within the rule which excludes a party to the record" and can only be disqualified as a nonparty concerned in interest (citations omitted)).

335. *Kip*, 1 Paige Ch. at 614.

336. An Act Concerning Courts and Ministers of Justice, and Proceedings in Civil Cases, Part III, ch. 1, tit. 2, art. 1, § 7, 2 N.Y. Rev. Stats. 163, 169 (1829); *In re* Appointment of a Receiver of the Late Dodge & Stevenson Mfg. Co., 77 N.Y. 101, 107-08 (1879) (discussing subsequent authorities).

337. *See generally* GREENLEAF, *supra* note 268.

338. *See generally* ANGELL & AMES, *supra* note 169.

339. (1829) 148 Eng. Rep. 1076, 1077-78, 3 Y. & J. 19, 22-24.

in England—the principle that corporators, while not disqualified as "parties [of] record," can be disqualified like other nonparties based on their "interest" in the action.[340]

3. The Dissenting Federal Authorities

Chief Justice Marshall's opinion in *Deveaux* is the final outlier—and the only one that stuck. Like *Price*, *Deveaux* articulated an associational view of the corporation. But it went farther than even *Price* did in some ways while sweeping far more narrowly in others. Here is the key passage:

> [I]nvisible, 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. If the corporation be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the union.
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> ....
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> ... That name, indeed, cannot be an alien or a citizen; but the persons whom it *represents* may be the one or the other ; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. *Substantially* and *essentially*, the parties in such a case, where the members of the corporation are aliens, or citizens of a different state from the opposite party, come within the spirit and terms of the jurisdiction.[341]

Deveaux was not the first time the Supreme Court had looked behind the corporate form. In 1793's *Chisholm v. Georgia*, Chief

340. GREENLEAF, *supra* note 268, § 333, at 383 & n.2 (citing the case for the position that "the *members* ... [of private corporations, while] not parties to the record, are *not* therefore *admissible as witnesses*; for, in matters, in which the corporation is concerned, they of course have a direct, certain, and vested interest, which necessarily excludes them").

341. Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 86-88 (1809) (emphasis added).

Justice John Jay anticipated *Deveaux* in a short passage: "[W]here a corporation is sued," he said, "all the members of it are *actually* sued, though not *personally*, sued."[342] Chief Justice Jay then reasoned that this meant states did not enjoy sovereign immunity because that was a defense at odds with the egalitarian citizen status of the "actual parties" in state-party cases.[343]

Chisholm provoked a negative reaction and was swiftly overturned through ratification of the Eleventh Amendment.[344] Chief Justice Jay's reasoning was also plainly at odds with Article III's text, which—by distinguishing suits in which states are a party from suits in which citizens are a party—plainly treats a state as a jural unit with a separate identity from its members.

In the passage above, Chief Justice Marshall sensibly ignored *Chisholm*. Instead, similar to Sanford a decade later, Chief Justice Marshall invoked the real party concept (using the language of Mansfield in *Aslin)* and the idea (reflected in contemporaneous opinions like *Lovelass* and English cases like *Leigh* and *Chancey*) of party status through representation.[345]

Chief Justice Marshall also cast back to older authority: not *The King v. Mayor of London*, as *Price* would, but Justice Holt's decision in *City of London v. Wood*. Chief Justice Marshall observed that

> [i]n that case the objection, that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual....
>
> The case of *The Mayor and Commonalty v. Wood*, ... because it is on the point of jurisdiction ... appears to the court to be a full authority for the case now under consideration.[346]

342. 2 U.S. (2 Dall.) 419, 472 (1793) (opinion of Jay, C.J.).

343. *See id.* at 473.

344. *See* Bradford R. Clark & Vicki C. Jackson, *Interpretation & Debate: The Eleventh Amendment*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-xi/interpretations/133 [https://perma.cc/4X22-RACB].

345. *See Deveaux*, 9 U.S. (5 Cranch) at 86-88.

346. *Id.* at 90.

The legal historian Tara Helfman has suggested that *Wood* reflected a common law understanding that the corporate form would be disregarded to enforce principles that had a kind of "constitutional" status.[347] In *Wood*, piercing the veil was necessary to enforce the rule—one that Lord Holt acknowledged had a constitutional status in the British system, meaning it would justify judicial override of parliamentary directions to the contrary—that a judge could not preside over a case in which he was a party.[348] Helfman argues, therefore, that *Wood* also favored piercing the veil to enforce corporators' constitutional rights to a federal forum.[349] *Deveaux* simply followed a long-established rule.

The idea is intriguing. But we can find no support for the theory that *Wood* was understood to authorize piercing the veil in a "constitutional law" context. No later English authorities invoked *Wood* as an authority for treating anonymous shareholders as parties to suits involving their corporation.[350] In 1915, looking back over the development of English law, the King's Bench Division of the High Court of Justice noted that Chief Justice Marshall's opinion in *Deveaux* read the decision far more broadly than any

347. *See* Helfman, *supra* note 13, at 395.

348. *See* City of London v. Wood (1701) 88 Eng. Rep. 1592, 1602, 12 Mod. 669, 687-88 ("[I]t is a very reasonable and true saying, that if an Act of Parliament should ordain that the same person should be party and Judge, or, which is the same thing, Judge in his own cause, it would be a void Act of Parliament; for it is impossible that one should be Judge and party, for the Judge is to determine between party and party, or between the Government and the party; and an Act of Parliament can do no wrong, though it may do several things that look pretty odd; ... but it cannot make one that lives under a Government Judge and party.").

349. *See* Helfman, *supra* note 13, at 395-99 (first citing *Wood*, 88 Eng. Rep. at 1592-1602, 12 Mod. at 669-88; and then citing *Deveaux*, 9 U.S. (5 Cranch) at 90).

350. *See* Cont'l Tyre & Rubber Co. v. Daimler Co. [1915] 1 KB 893 at 909-10, *overruled by* [1916] 2 AC 307 (HL) (appeal taken from Eng.).

English precedent.[351] Rather, *Wood* was interpreted as a narrow holding confined to its facts.[352]

It was the same across the Atlantic. The state cases reviewed in this Article involve assessment of party status for purposes of common law, statutory, *and* state *constitutional* law—and moreover dealt with rules that implicated due process values (namely, the right to an unbiased adjudication). Yet, regardless of the provenance of the rule being applied, courts did not cite *Wood* and resisted the idea that corporators were "parties." For example, *Hawkes* involved application of a provision of Massachusetts *constitutional* law requiring a writ to bear first test of a justice who is not a "party."[353] But the court did not so much as mention *Wood*, much less articulate a broad rule that courts could disregard the corporate form in cases involving constitutional rights. Instead, the court interpreted the term "parties" narrowly, consistent with the conventional understanding of the term, to refer solely to persons who were subject to direct liability in the action.[354]

Other jurists did not enthusiastically receive *Deveaux*. In *In re Kip*, the decision that overturned *Price*, Chancellor Walworth addressed *Deveaux*.[355] The Chancellor noted that Chief Justice Marshall's opinion was rendered over a vigorous objection by Justice Johnson in the court below and, in any event, limited to cases

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351. *Id.* ("It is to be observed that in the decisions of our Courts this case [*Wood*] has not been relied upon, and certainly has not been followed, as an authority" for "so sweeping a proposition."). Lord Reading was referring to the notion articulated in *Deveaux* that courts can disregard the corporate form where the law turns on the character of the parties. *See id.* at 908-09. It was rather "a very special character," limited to cases in which "the Mayor, who was the head of the City, without whom the City had no ability or capacity to sue, was also the very person before whom the action was brought for trial." *Id.* at 909. In a wartime decision on the enemy character of a corporation, the House of Lords reversed the King's Bench Division and sided with Chief Justice Marshall's view of the case the next year, although without any cites to cases since *Wood* supporting Chief Justice Marshall's broad reading. Daimler Co. v. Cont'l Tyre & Rubber Co. [1916] 2 AC 307 (HL) 341, 350, 356 (appeal taken from Eng.).

352. *See Daimler*, 1 KB at 909.

353. Hawkes v. Inhabitants of Kennebeck, 7 Mass. (1 Tyng) 461, 463 (1811) ("[T]he defendants, who, not relying merely on the statutes of the government, have recurred to the constitution of the commonwealth, which is a paramount law: in which it is also declared that all writs shall bear test of the first justice, not a party.").

354. *See id.*

355. *In re* Kip, 1 Paige Ch. 601, 613 (N.Y. Ch. 1829) (citing Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809)).

involving jurisdiction.[356] It "exemplif[ies]," ventured Walworth, "the principle, that in a case of doubt a good judge always decides in favor of his own jurisdiction."[357] By contrast, in *Cook*, Chief Judge Parker ignored *Deveaux* entirely. The statutory meaning of the term "party," thought Parker, was "precise" and determinate enough that he was required to disregard contrary precedent.[358] And its meaning simply did not extend to corporators in true corporations.[359] After Chief Justice Marshall's death, later courts interpreting state statutes employing the party concept would dismiss *Deveaux* as a decision "influenced by considerations of public policy."[360] In *Letson*, Justice James Moore Wayne observed that *Deveaux* "ha[s] never been satisfactory to the bar."[361]

Even Chief Justice Marshall seemed less than confident in the decision. Fifteen years later, in *Bank of the United States v. Planters' Bank of Georgia*, the Bank of the United States sued the Planters' Bank of Georgia, in which the State of Georgia was a shareholder.[362] Planter's Bank argued that Georgia was a real party to the action (citing *Deveaux*) and hence the suit was barred by the Eleventh Amendment.[363] Not so, responded Chief Justice Marshall:

> The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.[364]

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356. *See id.*

357. *Id.*

358. President of Merchs. Bank v. Cook, 21 Mass. (4 Pick.) 405, 411 (1826).

359. *See id.* at 414.

360. *See, e.g.*, Bergen Cnty. Mut. Assurance Ass'n v. Cole, 26 N.J.L. 362, 367-68 (1857) ("[T]he cases are uniform, that a corporator is not a party to an action brought by or against the corporation.... [I]t is obvious that [contrary federal decisions] have turned upon questions of constitutional construction, and have been influenced by considerations of public policy.").

361. Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

362. 22 U.S. (9 Wheat.) 904, 904-05 (1824).

363. *See id.* at 906.

364. *Id.* at 907.

Justice Johnson, who had joined the opinion overturned in *Deveaux*, wryly noted: "The case of *Deveaux* forms, I presume, one of the canons of this Court.... That decision brings [the *Planters' Bank* case] strictly within the letter of the 11th amendment; although I am ready to admit, that, unaffected by that decision, it is not within its purview."[365]

Later, in *President of the Bank of the United States v. Dandridge*, Chief Justice Marshall characterized a corporation as "being one entire impersonal entity, distinct from the individuals who compose it" in his dissenting opinion.[366] The description suggested that corporators were not acted on personally, and were distinct from the artificial person before the court, which ought to imply they were not "parties."

After Chief Justice Marshall's death, Justice Wayne would claim that Chief Justice Marshall regretted his opinion in *Deveau*x.[367] Justice Story repeated this claim too.[368]

IV. THE ORIGINALIST CASE AGAINST CORPORATE DIVERSITY JURISDICTION

What should originalists think of *Deveaux* and corporate diversity jurisdiction? We begin our answer to this question with a summary of the case against the extension of diversity jurisdiction to corporations.

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365. *Id.* at 911, 913 (Johnson, J., dissenting).

366. 25 U.S. (12 Wheat.) 64, 91-92 (1827) (Marshall, C.J., dissenting).

367. Louisville, Cincinnati, & Charleston R.R. Co. v. Letson, 43 U.S. (2 How.) 497, 555 (1844).

368. His version, expressed in private correspondence, was that Chief Justice Marshall, like Justice Story himself, thought ascribing "citizenship" to the corporate entity would have been the more plausible basis for upholding corporate diversity jurisdiction. Letter from Joseph Story, J., Sup. Ct. of the U.S., to James Kent, J. (Aug. 31, 1844), *in* 2 LIFE AND LETTERS OF JOSEPH STORY 469, 469 (William W. Story ed., Boston, Charles C. Little & James Brown 1851). *But see* McGovney, *supra* note 5, at 877-78 (first citing Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 161 (1837); and then citing Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824)) (expressing doubts about Justice Story's reliability); David P. Currie, *The Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835*, 49 U. CHI. L. REV. 646, 677 n.205 (1982) (citing McGovney, *supra* note 5, at 877-78) (noting scholars' doubts).

A. The Case Summarized

There is a distinct temptation to conclude, based on colonial Massachusetts practice and cases like *Price* and *Deveaux* that the concept of "parties" to suits was ambiguous during the 1780s, putting us in the construction zone. That response is particularly tempting given how important corporate diversity jurisdiction is to modern litigation.

After all, if, as our previous research suggests, corporate entities are not original "citizens," then the route to justifying corporate diversity jurisdiction must be the path taken in *Deveaux*.[369] To save the originalist case for corporate diversity jurisdiction, one would have to show that corporators are parties to Article III controversies, just as *Deveaux* held, and then show either (1) that the Fourteenth Amendment implicitly ratified the antebellum legal fiction that corporators are, in their corporate capacity, citizens of the corporations' state of incorporation,[370] or alternatively, (2) that the rule in *State Farm Fire & Casualty Co. v. Tashire* that complete diversity is not required[371] is consistent with Article III's original meaning. Either way, finding that the concept of litigant parties is ambiguous enough to embrace corporators is a necessary step toward saving (in an originalist world) corporate diversity jurisdiction.

So, the stakes are large. But despite the understandable inclination of many lawyers, scholars, and judges to side with those who want to preserve corporate diversity jurisdiction, the evidence developed here throws cold water on the idea that *Deveaux* (and, with it, corporate diversity jurisdiction) was correct as a matter of interpretation and hence an available construction of Article III.

At the outset, even if we were to conclude that the concept of "parties" was, applied to corporations, ambiguous, we may not be able to save corporate diversity jurisdiction. Applicable canons of interpretation and construction provide evidence of the public legal

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369. *See* Moller & Solum, *supra* note 18, at 171 (first citing BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 128-33 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880); and then citing Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61 (1809)).

370. *See* McGovney, *supra* note 5, at 861 & n.26 (exploring whether, in the Supreme Court's view, the Fourteenth Amendment ratified the antebellum legal fiction).

371. *See* 386 U.S. 523, 531 (1967).

meaning of legal terms of art.[372] Anthony Bellia, in turn, shows that eighteenth-century canons directed courts of limited jurisdiction to apply a presumption against finding a case within their jurisdiction.[373] As Bellia explores, that meant federal jurisdiction needed to be clearly demonstrated on the pleadings.[374] More research needs to be done on the application of this presumption to a prior issue—the construction of legal authorizations of federal jurisdiction like Article III. If, though, the canon directed courts to select, in the case of ambiguity, the construction that results in the narrower reach of federal jurisdiction, then the canon coupled with surrounding context (a grant of limited jurisdiction) provides evidence for the selection of the narrower available interpretation of the Diversity Clause, under which corporators are *not* parties.

But we also want to emphasize that originalists should take seriously the even stronger claim that the evidence developed above suggests the concept of parties was, applied to corporations, *un*ambiguous, at least under standard understandings of ambiguity in originalist practice. There may be cases of "irreducible ambiguity," which cannot be resolved even when all the relevant context is considered;[375] for example, the drafters of a constitutional provision might create intentional ambiguity when multiple meanings are baked into the constitutional text, but there is no evidence that Article III is irreducibly ambiguous in this way.

The standard (if often unarticulated) view among originalists is that words are unambiguous if the preponderance of the evidence favors one meaning over the other—a burden that reflects the

372. *See supra* notes 87-89 and accompanying text.

373. Anthony J. Bellia, Jr., *The Origins of Article III "Arising Under" Jurisdiction*, 57 DUKE L.J. 263, 285 (2007); *see also* Turner v. President of the Bank of N. Am., 4 U.S. (4 Dall.) 8, 11 (1799) (in the case of a court of limited jurisdiction, "the fair presumption is (not as with regard to a Court of general jurisdiction, that a cause is within its jurisdiction unless the contrary appears, but rather) that a cause is without its jurisdiction till the contrary appears").

374. Bellia, *supra* note 373, at 285-92.

375. Lawrence B. Solum, *Themes from Fallon on Constitutional Theory*, 18 GEO. J.L. & PUB. POL'Y 287, 313-15 (2020) (discussing irreducible ambiguity).

burdens we apply in everyday conversation and that also aligns with the normative case for a written constitution (to fix meaning).[376] The constitutional meaning is, for public meaning originalists, the sense that readers of the founding period would *most likely* have ascribed to the words in context.[377] That means the constitutional meaning of "parties" is the meaning most period specialists would give to it.

Here, in turn, is a summary of findings developed in this Article:

> (1) The leading practical treatises in the eighteenth century explicitly said corporators were not parties in the corporate actions.[378]
>
> (2) Leading treatises and courts in the eighteenth century described corporators in terms generally reserved for nonparties.[379]
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> (3) These patterns persisted across the overwhelming majority of American jurisdictions after ratification, despite the rise of the "real party" concept.[380]
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> (4) A presumption that shareholders were not directly liable to corporations' judgment creditors arose without controversy immediately after ratification, suggesting that corporators' nonparty status was the conventional view by the closing decades of the eighteenth century.[381]
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> (5) The associational theory struggled to make inroads at the state level after ratification. Massachusetts quickly cabined its preratification recognition of corporators as parties—limiting the recognition to inhabitants of towns operating under a custom of

376. Colby, *supra* note 52, at 601 (first citing Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 649-50 (1999); then citing Kurt T. Lash, *The Lost Original Meaning of the Ninth Amendment*, 83 TEX. L. REV. 331, 339-40 (2004); and then citing Thomas B. McAffee, *Originalism and Indeterminacy*, 19 HARV. J.L. & PUB. POL'Y 429, 431 (1995)).

377. For prior discussion of burdens of proving original public meaning, see *supra* notes 52-54 and accompanying text.

378. *See supra* Part III.B.3.b.

379. *See supra* Part III.B.3.b.

380. *See supra* Part III.B.3.b.

381. *See supra* Part III.B.2.

> individual town citizens' personal responsibility for the debts of their town, which was characterized as a quasi corporation or imperfect artificial person.[382] And Chancellor Sanford's more aggressive view of corporator party status was at odds with prior understandings in his own state and quickly walked back by his successors.[383] The idea was not taken up in any other state jurisdiction in the first forty years after ratification.[384]
>
> (6) Contemporary observers noted that *Deveaux*, the lone surviving outlier, was viewed critically by the bar. Even its author, upon consideration, apparently doubted its merits.[385]

Taken as a whole, the evidence reveals two things. First, state judicial systems were remarkably independent. States (which had more developed legal systems than the federal bench) did not treat federal interpretations of common terms as presumptively authoritative. They made up their own minds rather than follow the federal courts' lead.

Second, the state backdrop suggests the associational view of corporations articulated in *Deveaux*, at least in the earliest decades of the Republic, bucked the conventional wisdom of the bar's rank and file. This is the only interpretation that makes sense of the evidence: the preratification treatises' unanimous insistence that corporators weren't parties in cases proceeding in the corporate name; the description of corporators exclusively in legal terms reserved for nonparties; the persistence of this usage after ratification in spite of the real party concept; the rapid collapse of alternative views at the state level after ratification; the quick and unremarked on rise of corporator immunity from direct liability shortly after ratification; and the criticism of and Chief Justice Marshall's later hand-wringing about *Deveaux*. All this evidence points to the conclusion that corporators were not viewed as real parties in suits proceeding in the corporate name by most ordinary lawyers because they thought true corporations had separate "individuality."

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382. *See supra* Part III.C.1.
383. *See supra* Part III.C.2.
384. *See supra* Part III.C.
385. *See supra* Part III.C.3.

If this is right, the original meaning of litigant parties therefore excludes members of corporations in suits proceeding in the corporate name—and, with them, corporate diversity jurisdiction.

B. Objections Considered

Several objections might be raised. One objection may be that the evidence above shows conventional *opinion*—not the legal *meaning* of "parties," which is what public meaning originalism cares about. Most of the preratification evidence developed above comes from statements by *commentators* on the law of evidence and procedure, principally on admissibility of testimonial evidence.[386] None of the English *cases* on party status in the eighteenth century flatly denied corporators were also parties in the 1780s. In the absence of leading cases squarely rejecting the view that corporators were real parties, modern lawyers would conclude that corporator party status is a question that was, as a formal legal matter, unsettled or underdetermined in 1787.

But the modern way of looking at this evidence is anachronistic. As we have discussed, in the eighteenth century, the common "law" had an existence apart from and external to judicial opinions in any particular jurisdiction.[387] Cases were one source of *evidence* of the law. But they were hardly determinative because case reporting was not standardized and circulation of published case reports was uneven.[388] Lawyers accordingly treated treatises, commentaries, private compilations, and just plain observation of common court practice as roughly equivalent evidence of the common law's content.[389]

And so statements in leading preratification treatises and other noncase indications of professional understandings are not merely evidence of professional opinion about the law in the 1780s. They are evidence of what most lawyers of the framing period were likely to rely on to discern the actual *legal* meaning of the term "party."

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386. *See supra* notes 235-56 and accompanying text.
387. *See* Nelson, *supra* note 90, at 23; *supra* notes 88-95 and accompanying text.
388. *See* Surrency, *supra* note 91, at 50-52.
389. *See* Nelson, *supra* note 90, at 23; *supra* notes 90-95 and accompanying text.

A second objection might be that the meaning of party status incorporates state substantive law standards, allowing the concept, as a matter of federal constitutional law, to differ from jurisdiction to jurisdiction. A party is just whoever the local substantive corporate law says is the party in corporate suits. On this view, the reason the party concept in Massachusetts was different pre- and post-ratification[390] is because Massachusetts changed its substantive law of corporations.

The objection assumes lawyers viewed corporate law like modern positivists—as something that is entirely the product of different sovereign jurisdictions. But lawyers treated common law concepts that intersected with corporate law—like the concept of parties to suits—as universal concepts that were shared across common law jurisdictions.[391] Thus, lawyers of the period would freely consult both English authorities and authorities of different states when assessing the meaning of the party concept.[392] As an aside, this also explains why Massachusetts's preratification authorities do not create ambiguity about the original meaning of "parties"—the meaning of "party," and therefore its meaning as a matter of federal constitutional law, was the most conventional meaning among common law jurisdictions.

In effect, common law lawyers treated some rules as a system-wide given—a basic starting point for the operation of the judicial power. These rules were operational rules that were baked into, and therefore constitutive of, a properly judicial system. The evidence above suggests that such rules were part of the interrelated law of parties and persons. Artificial persons were a fixed category of "party" identified by their attributes, rather than labels assigned by local legislatures. And the existence of artificial persons had fixed consequences for the operation of the legal system that flowed from those attributes.

As we have already seen, this was the view of the New York Supreme Court in *Thomas v. Dakin*:

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390. *See supra* Part III.C.1.

391. *See, e.g.*, ANGELL & AMES, *supra* note 169, at 390.

392. *See, e.g.*, President of Merchs. Bank v. Cook, 21 Mass. (4 Pick.) 405, 415 (1826) (consulting precedent from Maine to interpret Massachusetts law).

> If [associations] have the attributes of corporations, if they are so in the *nature of things*, we can no more refuse to regard them as such, than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species.[393]

The essential property of an artificial person, said Justice Cowen, was "individuality,"[394] and the absence of direct shareholder liability for corporate debts was a basic legal "attribute" of entity individuality.[395] That definition was repeated in cases like *Irwin*, *Riddle*, *Hawkes*, and *Cook* in America in the years immediately after ratification.[396]

The recognition criteria of an artificial person thus made what we would term "substantive corporate law," or "legislative output," relevant to corporators' party status in a special way. Because lawyers in the framing period conceptualized artificial persons as (1) an association or entity (2) whose members enjoyed immunity from direct liability, substantive law needed to be consulted to decide whether an entity had the *attributes* of an original "artificial person." But when the association's membership enjoyed limited liability, the association was, regardless of labels that a legislature might give it, in substance a true artificial person in the original

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393. 22 Wend. 9, 103 (N.Y. Sup. Ct. 1839) (opinion of Cowen, J.) (emphasis added).

394. *See id.* at 100.

395. *See id.* at 73 (opinion of Nelson, C.J.) (noting that the mark of a "corporation" is "perpetual succession," which is characterized by a situation in which "[f]or the entire duration ... of the association, and which may be without limit, ... the whole body of shareholders, though perpetually shifting, constitute the same uniform, artificial being which is to be engaged through the instrumentality of officers and agents in conducting the business of the concern, and no member is personally liable" (citations omitted)); *see also id.* at 88 (opinion of Cowen, J.) (noting that "collective existence" is an essential attribute of a corporation, which means "[i]t recovers judgments for debts due to it, and execution is levied on its property, upon a recovery against it"); *id.* at 89 (defining a "partnership" in opposition to a corporation, and noting that in a partnership, each partner "is individually liable for the whole debts due from the company").

396. *See* Myers v. Irwin, 2 Serg. & Rawle 368, 371 (Pa. 1816); Riddle v. Proprietors of the Locks & Canals on Merrimack River, 7 Mass. (1 Tyng) 169, 187 (1810); Hawkes v. Inhabitants of Kennebeck, 7 Mass. (1 Tyng) 461, 463 (1811); *Cook*, 21 Mass. (4 Pick.) at 410-11, 413, 416.

sense.[397] And when this is true, the entity was also ipso facto the sole "party" to actions by or against it.[398]

A third objection is that our interpretation of the authorities here—both the majority position and minority position in Massachusetts and New York—posits a false division over the meaning of "parties." Perhaps there is no disagreement among these authorities at all about the party concept. Instead, in the view of all of these authorities, parties were, as *Woburn* and *Price* suggested,[399] persons before the court with "personal" or "private" interests directly at issue in the action. Thus, assessing whether corporators were parties depended on how we classify corporators' interests.

On this reading, the division among the cases is really a product of a dispute about applications of the party concept, or about how to characterize corporators' *interests*—whether they are personal to corporators and therefore characteristic of a "real party" or too "general" to make corporators parties to the suit. Perhaps, one might think, the majority of courts that rejected corporators' party status were unable to perceive corporators as persons with a

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397. For the principal evidence supporting this claim, see *supra* Part III.B; *supra* notes 275-95 and accompanying text.

398. Another possible identity criterion for an artificial person may have been "the powers of perpetual succession." *Dakin*, 22 Wend. at 73 (opinion of Nelson, C.J.). In *Dakin*, Chief Justice Nelson defined this as a state in which "[n]either *sale* of shares, or *death* of shareholders affect it; if one should sell his interest or die, the purchaser or representative, by operation of law, immediately takes his place," making "the whole body of shareholders, though perpetually shifting, ... the same uniform, artificial being." *Id.* This definition suggests the essence of a corporation is an entity with rights that exist independently of the fluctuating persons who occupy its membership. This definition is also much broader—it would encompass "quasi corporate" entities, such as Massachusetts towns, in which liability attaches to members by virtue of their occupation of the office of membership (but does not travel with them if they vacate that office). *See, e.g.*, *Riddle*, 7 Mass. (1 Tyng) at 187-88. And it has some obvious connections to the understanding of being acted on "individually" in the general rights cases, which equated being acted on individually or personally—being acted on as a party—with the imposition of liabilities that stick to you and follow you. *See supra* Part III.A.5. Because liabilities stick to the abstract collective rather than its members, it is the individual "party" before the court, not corporators. This broader definition of artificial personhood is less clearly attested in the ratification sources but nonetheless a plausible alternate understanding of the core "attribute" of artificial personhood. If accepted, it would expand the set of situations in which an entity qualifies as an artificial person, in the original sense, thereby disabling federal courts from looking to the citizenship status of entity members.

399. The King v. Inhabitants of Woburn (1808) 103 Eng. Rep. 825, 825-26, 828, 10 East. 395, 396, 403; *supra* notes 322-29 and accompanying text.

"personal" interest due to an older association of corporations with a kind of quasi-state actor pursuing "public" interests. By contrast, *Price* reflected an evolution in the understanding of corporators' "interests" that tracked the rise of the commercial corporation—as corporations became a mode of commercial activity, corporators' interests in for-profit enterprises came to be appreciated as private and "personal," giving corporators the substance of "real parties." On this view, the cases reflect that the *application* of the prevailing meaning of "party" changed as external facts picked out by that meaning—the nature of corporators' interests in the corporate enterprise—changed.

However, the evidence suggests that the disagreement among the majority and *Price* is much deeper. Many of what we are calling the "majority cases" describe the corporators as having a property interest in corporate assets, even as the cases *deny* the corporators are parties. Thus, in Connecticut, state courts into the 1830s described corporators in terms applied to nonparties under the law of disqualification—even as the law described them as having private, property-like interests in some corporate enterprises.[400] The same pattern emerges across the traditionalist jurisdictions during the same period: even as cases increasingly recognized that corporators

400. *See*, *e.g.*, SWIFT, *supra* note 266, at 57 (stating that Connecticut courts had a tradition of assessing both the nature and degree of corporators' interest, as well as necessity, when considering whether to allow their testimony—an inquiry that was not applicable to parties and noting that the distinction between public and private interests was a settled distinction in Connecticut law); *see also id.* at 81-91 (treating disqualification of parties to the cause in a section separate from the section on the disqualification of persons as a result of "interest" where Swift considers members of corporations, and characterizing the disqualification of parties in blanket terms, subject only to an exception for "necessity"); Cornwell v. Isham, 1 Day 35, 59-89 (Conn. 1802) (admitting corporators as witnesses based on an inquiry into the nature of their interest over objection that they should be disqualified only for necessity); Starr v. Starr, 2 Root 303, 306 (Conn. 1795) (distinguishing corporators from a "party to [the] suit" and considering both necessity and interest in the case of corporators). Notably, when Connecticut embraced the idea that corporators were "parties" in some circumstances in the late 1830s and 1840s, *see supra* note 270, it adopted the postratification Massachusetts view, which limited party status to corporators of towns (a type of quasi corporation) when they were subject to execution of judgments for public debts, rather than the broader theory articulated in *Price*. *Compare* Beardsley v. Smith, 16 Conn. 368, 375-78 (1844), *and* McLoud v. Selby, 10 Conn. 389, 396-98 (1835), *with* Wash. Ins. Co. v. Price, 1 Hopk. Ch. 1, 3 (N.Y. Ch. 1823).

have "private" or "personal" interests in the enterprise, they persisted in treating corporators as nonparties.[401]

The only way to make sense of this pattern is by reference to what Ernest Weinrib calls an "ungrounded starting point," or what we will call a "ground rule"—a rule that lawyers, because they take it for granted as a ground or starting point for analysis, don't "look behind" or try to theorize in terms of some other set of rules or principles.[402]

All formalist systems are built on top of ground rules.[403] And the pattern in the majority jurisdictions suggests that lawyers of the period were formalists who saw the distinction between corporate artificial persons and individual natural persons as just such a rule—an operative rule baked into the judicial system. Parties were the base unit of judicial action. And as Chief Justice Parker put it in *Cook*, the word "parties" communicated a subdivision of discrete legal categories: Parties were individual persons, which were either "natural or legal," meaning either (1) real persons carrying individual rights into court, or (2) corporations—artificial persons—carrying their distinct rights into court.[404] There was no blending between the categories. This was, in turn, a basic assumption in the law of parties that ordinary lawyers took for granted rather than interrogating. Lawyers of the period were formalists and conceptualists who treated artificial persons as a natural legal kind.

This conclusion, it bears noting, dovetails with the conclusions of Frederick Pollock and William Holdsworth, who each suggested that common lawyers accepted the separate personhood of corporations as a legal given without thinking too hard about it.[405] This

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401. *Compare supra* note 263 (documenting persistence of cases describing corporators in terms reserved for nonparties into the 1830s), *with supra* notes 150-68 and accompanying text (noting development and expansion of the real party concept in other contexts from the 1760s into the 1840s).

402. *See* Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 974-75, 975 n.55 (1988).

403. *See generally id.*

404. *See* President of Merchs. Bank v. Cook, 21 Mass. (4 Pick.) 405, 411 (1826).

405. Pollock, *supra* note 171, at 220-22 (arguing corporate personhood was "real" not "fiction[al]" to common lawyers, who thought corporations were "artificial" persons in the sense that something created by art or skill, such as a chair, is "artificial" yet still real); Holdsworth, *supra* note 171, at 406 ("This idea that the corporation is to be treated as far as possible like a natural man is the only theory about the personality of corporations that the common law has ever possessed.").

conclusion also links up with general claims about the law of corporations over the sweep of private law by theorists Paul Miller and Andrew Gold, who observe that artificial personhood has long been a basic conceptual "category" in private law, meaning that it is an idea that other doctrines bend to accommodate, rather than the other way around.[406]

A fourth objection might be that common law terms, such as the concept of a "party," were inherently dynamic. The legal historian Bernadette Meyler, for example, argues that at the framing, common law terms were generally understood in flexible terms that conveyed a dynamic meaning.[407]

Other commentators also suggest that this quality pervaded the common law's concept of the corporate entity. For example, Holdsworth, commenting on whether the corporation was a "fiction" or a "real entity," agreed that the common lawyers did not view the corporation as a mere fiction.[408] But, he said, the theoretical thinness of the idea made it "a large and a vague idea, but, on that very account, ... a flexible idea."[409]

More recently, Tara Helfman connects *Deveaux* to R. Kent Newmyer's observations about Chief Justice Marshall's Contract Clause jurisprudence:

> When Marshall applied traditional common-law reasoning to settle the matter, he was not aiming to disguise the doctrinal constitutional innovations he was about to make but instead was doing what he had done since he began the practice of law in the 1780s and what every other American lawyer of the age did: reasoning by common-law analogy and using common-law definitions and principles to interpret the words of the Constitution.[410]

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406. *See generally* Paul B. Miller & Andrew S. Gold, *The Corporation as a Category in Private Law*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 429 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

407. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 551 (2006).

408. Holdsworth, *supra* note 171, at 406.

409. *Id.*

410. *See* Helfman, *supra* note 13, at 397 n.54 (quoting R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 249-50 (2001)).

It is certainly right that *Deveaux* was a clever reinterpretation of previous materials. Chief Justice Marshall's reading of *Wood* was, if not consistent with then-prevailing understandings, not a totally implausible reading of the case, either. This is also true of Chancellor Sanford's rationales for piercing the corporate veil in *Price,* which built on clever rereadings of similarly old cases, *The King v. Mayor of London* and the *Water-Bailage Case*, as well as an equally clever reinterpretation of older distinctions taken from the law of evidence.

Perhaps then, the argument might go, the evolutive nature of common law procedural terms meant that common law terms like "party" communicated an evolutive meaning subject to the loose guideposts of common law argumentation. And, so, even if *Deveaux* and *Price* were "doctrinal ... innovations"[411] that cut against conventional professional understandings at the time of ratification, they were within the range of possible legal meaning of the term because they were justified in a fashion consistent with the common law method (that is, by artful rereadings of old precedent).

The problem with this argument is that it jumps too quickly from an *external* view of the law of parties to a conclusion about the public meaning of the party concept at the fixation point: a question about the internal perspective of participants in the system when the Constitution was ratified. It may be true that common law changed over time and *Deveaux* involved an innovation based on arguments and moves characteristic of participants in the common law system. It may also be true that the theoretical thinness of legal terms in the eighteenth century meant conventional understandings of the party concept were easy to dislodge and change by determined innovators. These are external observations about the intellectual history of the law of the ratification period and the decades immediately after. But original public meaning originalism doesn't care whether *Deveaux* reflected a change in meaning that was characteristic of drifts in legal meaning of the period.[412] It cares about

411. *Id.*

412. For an overview of original public meaning methodology, see *supra* Part I.

whether *Deveaux* fit the internal perspective of participants at the fixation period—that is, what participants actually thought "parties" meant in the 1780s.[413] Did they think it was unsettled and open to specification or evolution, or did they think it had a determinate content?

And the evidence suggests that lawyers thought the term "litigant parties," at least, communicated a fixed meaning. In *Coo*k, counsel argued that "the object of *St.* 1783, *c.* 43, *§* 1," the Massachusetts statute at issue in the case, "in using the term *party*, was to fix a clear rule," a claim that assumed (1) codifying the term fixed its content and (2) the term had, at the time of enactment, a stable meaning capable of being fixed.[414] The court agreed.[415] And the evidence here—particularly the wide resistance to the corporator party concept at the state level—pretty strongly suggests that most participants in the legal community of the period agreed that the party concept had, as Judge Parker put it in *Cook,* a "precise" content that did not reach members of corporations.[416]

The upshot is that there turns out to be a solid case, composed of both direct and supporting circumstantial evidence, that most ordinary lawyers at the end of the eighteenth century thought that the legal meaning of the party concept precluded treating corporators as litigant parties in suits proceeding by or against their corporation.

C. Paths Forward for Defenders of Corporate Diversity Jurisdiction

This doesn't mean there is no originalist case for corporate diversity jurisdiction. But it leaves those who hope to build that case with some limited paths to explore.

One path might focus on burdens of proof to establish original meaning. For example, Heidi Kitrosser argues for a "modest" originalism that recognizes a much broader "construction zone" than

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413. *See supra* Part I.

414. President of Merchs. Bank v. Cook, 21 Mass. (4 Pick.) 405, 407 (1826) (argument of counsel).

415. *Id.* at 411 (opinion of Parker, C.J.) (agreeing that the statutory term had a "precise" meaning).

416. *See id.*

conventional originalism.[417] In her view, originalists are overly confident about their ability to recapture the conventional meaning of legal terms.[418] She argues instead that originalists should limit themselves to identifying a range of "plausible" original meanings—that is, senses that have at least some support in original sources—and then leave it up to modern interpreters to select among these meanings based on practical policy considerations and contemporary values.[419] *Deveaux* is certainly a "plausible" understanding of litigant parties in Kitrosser's sense, in that it can find at least some support from a minority of preratification sources (two Massachusetts preratification precedents and an expansive interpretation of *Wood*), even if the weight of evidence seems to suggest that most conventional lawyers at the end of the eighteenth century either rejected or very narrowly construed these authorities in a way that foreclosed corporator party status.

Kitrosser's argument for interpretive modesty is fundamentally a normative argument. That is, Kitrosser is arguing that judges ought to refrain from following the evidence of original meaning to the conclusion that provides the best explanation for all the facts. Calling this "modesty" is a clever rhetorical ploy because it conceals what is really going on—the assertion of a judicial power to override the original meaning of the constitutional text—behind a veil of pretended modesty. At a deeper level, the normative dispute concerns the Constraint Principle, which originalists affirm,[420] but living constitutionalists, like Kitrosser, ultimately reject. Living constitutionalists may well have reasons to accept Kitrosser's notion of judicial modesty because they reject the Constraint Principle, but originalists cannot join them without rejecting a defining tenet of originalism itself.

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417. Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 467 (2016) ("Adopting only common-denominator meanings (or simply identifying plausible contested meanings where there is no common core of meaning) at the interpretation phase and hashing out the remaining contested meanings through construction has both epistemic and normative advantages.").

418. *Id.* at 477-81.

419. *Id.* at 513-14; *see also* Gary Lawson, *Did Justice Scalia Have a Theory of Interpretation?*, 92 NOTRE DAME L. REV. 2143, 2145-55 (2017) (raising objections to the coherence of a more-likely-than-not standard).

420. *See supra* note 27 and accompanying text.

A second path to rescuing *Deveaux* might rely less on theories about the original meaning of "party" than about framing era stare decisis principles. *Deveaux* may be an edge case of constitutional error—one in which the case claims that current law is wrong and satisfies a preponderance of the evidence standard but not a more demanding burden, such as demonstrable error.[421] Therefore, an argument for keeping *Deveaux* might involve developing evidence that framing era principles of stare decisis require meeting a higher burden of proof than the one that would apply if the Court were considering the case as a matter of first impression.

At the outset, there is some evidence that the framing generation thought that, if accepted for long enough, an erroneous interpretation of enacted law became binding as a matter of stare decisis. *Cook* seemed to hint at this idea—there, Chief Justice Parker reversed earlier Massachusetts precedent on the meaning of the term "party," noting that it was "not *too late* to go back to the true construction."[422] *Cook* suggests *Deveaux* should persist even if the evidence establishes that it amounted to a judicial override of the limits established by Article III.

But the mainstream of originalist scholars and many originalist judges reject the claim that precedent can override the original meaning of the constitutional text.[423] A more widely accepted understanding of framing era stare decisis is suggested by Caleb Nelson, who argues that framing era lawyers thought it was never too late to overturn precedent that is "demonstrably erroneous."[424] If "demonstrably erroneous" means simply that evidence "preponderates" against a prior conclusion, then original understandings of stare

421. For earlier discussion of burdens of proof in originalism, see *supra* notes 51-54 and accompanying text.

422. 21 Mass. (4 Pick.) 405, 415 (1826) (emphasis added).

423. The academic literature on originalism and precedent is vast. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009); Nelson, *supra* note 90, at 2-4; Gary Lawson, *Mostly Unconstitutional: The Case Against Precedent Revisited*, 5 AVE MARIA L. REV. 1, 3-8 (2007); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289, 289-98 (2005); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005). These citations are illustrative, not exhaustive. Judicial discussion of the role of precedent includes Justice Amy Coney Barrett's *Originalism and Stare Decisis*. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

424. Nelson, *supra* note 90, at 28-37.

decisis would not save *Deveaux*. But if "demonstrably erroneous" calls for a higher burden to overturn old precedent (something like clear and convincing evidence), an argument might be mounted for the preservation of *Deveaux*.

How should the question of whether *Deveaux* is demonstrably erroneous be resolved? One approach would focus on the Justices' subjective judgments about the strength of the evidence. The problem with that approach is that in the absence of an objective standard, the Justices may disagree, and their normative judgments about the desirability of corporate diversity may contaminate their subjective assessments. Another approach might focus on the question of whether the decision that *Deveaux* is contrary to the original meaning of the constitutional text is likely to be stable—given the state of the evidence and its assessment by lawyers, judges, and scholars.

Let us call this approach to demonstrable error the "Stability Criterion": *a precedent should be reversed on originalist grounds only if the case for inconsistency of the precedent with original meaning is stable in light of any debate among lawyers, judges, and scholars*. The Stability Criterion suggests that reversal would be inappropriate during the early stages of an originalist critique of precedent. Likewise, reversal would be inappropriate if the evidence was in or close to equipoise such that new evidence or arguments could plausibly create a substantial likelihood that the precedent would be viewed as consistent with original meaning. However, if the evidence and arguments are stable, then the existence of disagreement would not preclude reversal so long as a court is convinced that the preponderance of evidence favors the judgment that the precedent is inconsistent with original meaning.

Application of the Stability Criterion to the constitutionality of corporate diversity jurisdiction would counsel caution at the time this Article is published. Because we have provided the first and only analysis of the question from the perspective of contemporary originalism, our findings have yet to be tested by debate among scholars and adversary presentation by lawyers. If our findings are unchallenged or we answer any objections in a convincing fashion, then at some point, the case against *Deveaux* would meet the Stability Criterion and the Supreme Court should find corporate

diversity jurisdiction unconstitutional. But if critics discover substantial evidence in favor of *Deveaux* and judgments about its correctness continue to shift as the debate continues, then the Justices ought not reverse *Deveaux*, even if they ultimately conclude that a preponderance of the evidence favors reversal at the moment a petition for certiorari is presented or a corporate diversity case reaches the Supreme Court, offering the opportunity to consider the issue sua sponte. In other words, the Stability Criterion suggests that the Supreme Court should wait until the dust has settled before reversing *Deveaux* and holding that corporate diversity jurisdiction is unconstitutional.

A third path to rescuing *Deveaux* would rely on simple pragmatism.[425] Even if originalism itself requires that *Deveaux* be overturned, the Supreme Court might decline to overrule the case given its longevity and the degree of departure from the status quo that overturning it would entail. Following Justice Scalia, we call this the "faint-hearted" originalist approach.[426]

A twist on this approach is that of the New Deal progressives. They thought that corporate diversity jurisdiction was wrong as an original matter.[427] But much water had passed under the bridge. The New Deal Era courts responded by letting corporate diversity jurisdiction lie while also treating corporations' status under the law of diversity jurisdiction as settled but disfavored precedent—refusing opportunities to expand corporate citizenship to new entities like partnerships and unincorporated associations while reining in legislative expansion of jurisdiction under the precedent through interpretive canons directing diversity grants to be construed narrowly.[428] In other words, the "gravitational force of originalism"

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425. *See* Barrett, *supra* note 423, at 1921-22 (first citing Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989); and then citing ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997)) (discussing Justice Scalia's belief that stare decisis is a pragmatic exception to originalism).

426. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989).

427. *See supra* notes 3, 5 and accompanying text for prominent examples of this view.

428. *See* Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 107-09 (1941) (first citing West v. Aurora City, 73 U.S. (6 Wall.) 139 (1867); and then citing Healy v. Ratta, 292 U.S. 263, 270 (1934)) (directing, in case of removal founded on diversity jurisdiction, that removal rights and scope of jurisdiction generally be construed narrowly). For the New Deal Court's hostility to diversity jurisdiction generally, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483-87 (1997) (noting contraction of

restrains what would otherwise be a logical extension of nonoriginalist precedent.[429]

This is what Adrian Vermeule calls a compensating adjustment—a compensation for the Constitution's underenforcement through courts' formulation of "other law" (that is, canons directing that statutory grants of diversity jurisdiction over corporations be interpreted narrowly).[430] If corporate diversity jurisdiction is unconstitutional, the logic of compensating adjustments might even be extended beyond jurisdictional grants to the judicial construction of procedural regimes (federal class action rules, MDLs) that have developed much of their force and significance thanks to the platform provided by corporate diversity jurisdiction. Compensating adjustments might direct that the scope for such procedures *also* be construed narrowly.

Compensating adjustments are controversial, but the case for them may be at their height in edge cases of constitutional error near the line between preponderance and clear and convincing burdens (that is, those where observers think the evidence clearly preponderates in favor of a conclusion but is not quite strong enough to survive a higher clear and convincing standard). There, while we may still be worried about the risk of originalist error if we overturn old precedent, the level of confidence about the wrongness of the old case may nonetheless justify doing something more than simply leaving the old authority on the books. *Deveaux* might be such a case.

What, finally, is the approach of the current Justices on these issues? The opinions in *Gamble v. United States* offer several Justices' thinking.[431] *Gamble* involved a challenge to the dual sovereignty doctrine, which allows parallel state and federal prosecutions[432] despite the Double Jeopardy Clause.[433] Addressing the

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diversity jurisdiction was part of the New Deal Court's legacy); Frankfurter, *supra* note 3, at 523 (arguing cases of corporate diversity jurisdiction are founded on legal fictions and belong exclusively in state courts).

429. For the idea that originalism has gravitational force, see Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411 (2013).

430. Adrian Vermeule, Essay, *Hume's Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 426 (2003).

431. *See* 139 S. Ct. 1960 (2019).

432. *Id.* at 1963-64.

433. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offen[s]e to be

conflict between original meaning and precedent, Justice Alito wrote for the majority:

> This means that something more than "ambiguous historical evidence" is required before we will "flatly overrule a number of major decisions of this Court." And the strength of the case for adhering to such decisions grows in proportion to their "antiquity." Here, as noted, Gamble's historical arguments must overcome *numerous* "major decisions of this Court" spanning *170 years*. In light of these factors, Gamble's historical evidence must, at a minimum, be better than middling.[434]

Applying the "better than middling" standard, Justice Alito concluded:

> And it is not. The English cases are a muddle. Treatises offer spotty support. And early state and federal cases are by turns equivocal and downright harmful to Gamble's position. All told, this evidence does not establish that those who ratified the Fifth Amendment took it to bar successive prosecutions under different sovereigns' laws—much less do so with enough force to break a chain of precedent linking dozens of cases over 170 years.[435]

Because Justice Alito concluded that the evidence did not meet a preponderance standard, his discussion of cases in which there is an actual conflict is dictum, not holding. As we have shown, the evidence that corporate diversity exceeds the limits of Article III is far "better than middling," but Justice Alito does not articulate how much better the evidence must be.

The question not answered by Justice Alito is answered in Justice Thomas's concurrence:

> I write separately to address the proper role of the doctrine of *stare decisis*. In my view, the Court's typical formulation of the

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twice put in jeopardy of life or limb.").

434. *Gamble*, 139 S. Ct. at 1969 (citations omitted) (first quoting Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 479 (1987); and then citing Montejo v. Louisiana, 556 U.S. 778, 792 (2009)).

435. *Id.*

> *stare decisis* standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law. It is always "tempting for judges to confuse our own preferences with the requirements of the law," and the Court's *stare decisis* doctrine exacerbates that temptation by giving the veneer of respectability to our continued application of demonstrably incorrect precedents. By applying demonstrably erroneous precedent instead of the relevant law's text—as the Court is particularly prone to do when expanding federal power or crafting new individual rights—the Court exercises "force" and "will," two attributes the People did not give it.[436]

As applied to the constitutionality of corporate diversity, Justice Thomas's approach would require that *Deveaux* be overruled if it is "demonstrably incorrect."

Finally, consider Justice Gorsuch's dissenting opinion[437]:

> *Stare decisis* has many virtues, but when it comes to enforcing the Constitution this Court must take (and always has taken) special care in the doctrine's application. After all, judges swear to protect and defend the Constitution, not to protect what it prohibits. And while we rightly pay heed to the considered views of those who have come before us, especially in close cases, *stare decisis* isn't supposed to be "the art of being methodically ignorant of what everyone knows." Indeed, blind obedience to *stare decisis* would leave this Court still abiding grotesque errors like *Dred Scott v. Sandford*, *Plessy v. Ferguson*, and *Korematsu v. United States*. As Justice Brandeis explained, "in cases involving the Federal Constitution, where correction through

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436. *Id.* at 1981 (Thomas, J., concurring) (citations omitted) (first quoting Obergefell v. Hodges, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting); and then quoting THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (C. Rossiter ed., 1961)).

437. Justice Ginsburg also dissented, stating:

> The separate-sovereigns doctrine, I acknowledge, has been embraced repeatedly by the Court. But "*[s]tare decisis* is not an inexorable command." Our adherence to precedent is weakest in cases "concerning procedural rules that implicate fundamental constitutional protections." Gamble's case fits that bill. I would lay the "separate-sovereigns" rationale to rest for the aforesaid reasons and those stated below.

Id. at 1993 (Ginsburg, J., dissenting) (citations omitted) (first quoting Payne v. Tennessee, 501 U.S. 808, 828 (1991); and then quoting Alleyne v. United States, 570 U.S. 99, 116 n.5 (2013)).

> legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function."
>
> For all these reasons, while *stare decisis* warrants respect, it has never been "an inexorable command," and it is "at its weakest when we interpret the Constitution." In deciding whether one of our cases should be retained or overruled, this Court has traditionally considered "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." Each of these factors, I believe, suggests we should reject the separate sovereigns exception.[438]

Justice Gorsuch's position seems more deferential to precedent than the "demonstrably erroneous" standard that Justice Thomas articulated. Even a demonstrably erroneous decision might trump precedent on the basis of a multifactor balancing test.

Applied to *Deveaux*, Justice Gorsuch's multifactor approach arguably requires overruling. We have suggested that the "quality" of *Deveaux*'s reasoning was weak, as revealed by its rejection by the lawyers and judges at the time it was rendered. Legal developments since the decision have resisted the extension of the *Deveaux* approach to other entities such as partnerships and unincorporated associations. Reliance on *Deveaux* is strong in corporate diversity cases that are already pending in federal court, but this kind of ex post reliance is always present when overruling is at issue. Ex ante, the case for reliance is relatively weak: at least one state court forum is open for corporate diversity cases.[439] Of course, reversal of

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438. *Id.* at 2005-06 (Gorsuch, J., dissenting) (footnotes omitted) (first quoting RUPERT CROSS & J.W. HARRIS, PRECEDENT IN ENGLISH LAW 1 (4th ed. 1991); then quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting); then quoting Pearson v. Callahan, 555 U.S. 223, 233 (2009); then quoting Agostini v. Felton, 521 U.S. 203, 235 (1997); and then quoting Franchise Tax Bd. of Cal. v. Hyatt, 139 S. Ct. 1485, 1499 (2019)) (first citing Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857); and then citing Plessy v. Ferguson, 163 U.S. 537 (1896)).

439. State courts are courts of general subject matter jurisdiction. Imagining a case in which a federal district court would have personal jurisdiction is very difficult, but personal jurisdiction would not lie in the courts of any state. However, we cannot undertake the

Deveaux would inconvenience the corporate defense bar, but that kind of reliance could not justify a judicial override of Article III if *Deveaux* is "demonstrably erroneous." But as with any multifactor test that requires subjective judgments, a case could be made that *Deveaux*'s long endurance and its codification by Congress combined are sufficient to preclude overruling.

CONCLUSION

In this Article we cannot resolve the deep questions about precedent and original meaning. We note only that our findings will require defenders of corporate diversity jurisdiction to either (1) develop new evidence that framing era rules of stare decisis prevent overruling constitutional errors; or (2) mount a pragmatic, "faint-hearted originalist" case under modern stare decisis standards for simply letting errors lie (while, perhaps, mitigating the error with compensating adjustments).

These are the routes forward for originalist defenses of corporate access to diversity jurisdiction because our evidence suggests corporate diversity jurisdiction is not authorized in Article III. As our prior work demonstrated, corporations are not "citizens" given the original meaning of that word. This Article further demonstrated that shareholders are not parties in controversies proceeding in the corporate name. It follows that the extension of diversity jurisdiction to corporations is inconsistent with the original meaning of the constitutional text.

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analysis required to demonstrate that this is the case in this Article.