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Clarence E. Martin

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IS A CORPORATION A "PERSON"?

CLARENCE E. MARTIN*

The dissenting opinion of Mr. Justice Black in the case of Connecticut General Life Insurance Company v. Johnson,1 and his concurring opinion in the case of United Gas Public Service Company v. Texas,2 both decided at the present term, have excited considerable interest in the legal realm, because of his interpretation of the property clause of the Fourteenth Amendment and his contention that the word "person" there found, does not include corporations.

Because of the high judicial position Mr. Justice Black occupies, it might be wise to discuss and, in part, review the historical setting of the present universal doctrine and determine therefrom whether there is any ground for the effort to overturn what, in this age, was and still is a settled canon of American constitutional law.

When a lawyer enters the field of legal interpretation, unconsciously perhaps, he becomes at once an historian and research worker. He is not content with ascertaining the rule, if established, together with its exceptions, but he tries to ascertain the reason for the rule and its application. He knows that the rules of our substantive law are of constant growth, that they are not the expression of a fleeting conceit of the times but the evolution of centuries of effort upon the part of legislators and lawyers. To be true they must be founded, not alone in wisdom and prudence but in the basic conceptions of ultimate truth and justice.

* Member of the bar of Berkeley County, West Virginia.
1 58 S. Ct. 437, 439 (1938).
2 58 S. Ct. 483, 494 (1938).
The corporation is not of common law origin, nor was the concept, which underlies the rule now under discussion, lifted bodily from another system like, for instance, many of our rules of testamentary law. Whether the corporate idea comes from the Egyptians, the Greeks or the Romans, it was a development of the Grecian and the Roman systems. The idea of distinct and continuing personality was well engrafted and thoroughly understood. Nor was it a crude effort to evolve a necessary phenomenon.

**DEVELOPMENT IN THE GRECIAN AND ROMAN SYSTEMS**

The Greeks had their corporate person well defined. The artificial personality extended to religious societies and trading associations. Certainly from the fourth century B.C. down, the corporate idea with legal and distinct entity, authorized by the state, written about by Aristotle, with contrasting powers as to (a) religious purposes and pleasant pastimes and (b) companies formed for profit, flourished. The element of super-individual personality was clearly apparent.

The Roman student in the Grecian schools must have brought the concept back to Rome. Rome had become the capital of the world. A great system of highways tied the empire together. A class of capitalists existed. All the legal instruments of commerce were used. Money became the medium of exchange. Bankers and money changers lined the Forum. Corporations were numerous.

The best example of the corporate fiction in the Roman law was the family. The *pater familias* was its head, its representative. If he was lord of its possessions, he was merely a trustee for the use and benefit of its members. His rights and duties were as much those of the members of his family as his own. His creditors were the creditors of the family. His demise was an immaterial matter. The family never died, in the eye of the law. It was a continuing personality. Without breach of continuity, the rights and obligations passed from the head and attached to his successor as the family representative. Creditors had the same remedies against that successor. Technically the only difference was one of procedure — the family appeared in court under a slightly modified name.

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3 ZANE, THE STORY OF LAW 124.
4 2 VINogradoff, HISTORICAL JURISPRUDENCE 119 et seq.
5 ZANE, THE STORY OF LAW 172.
6 2 EVOLUTION OF LAW SERIES 558. See also Institutes of Justinian: I, 8 et seq.
Although private corporations were not permitted indiscriminately, and only for such purposes as were sanctioned by the law, the decrees of the Senate, and constitutions of the Emperors, they were expressly authorized for the collection of public taxes, the working of gold, silver and salt mines, for certain guilds in Rome, as for instance those of bakers, and for ship-owners in the provinces. They existed as a municipality and were entitled to have common property, a common treasury and an agent. Even soldiers were permitted, while in camp, to enjoy corporate banking privileges. Dissolution of all corporations was provided for.

The concept of personality was clearly established and defined. In the opinion of Paulus, the agent required to be appointed to bring and defend actions, could act only so long as the permission existed. And Ulpianus declared that where “any thing is owing to a corporation, it is not due to the individual members of the same, nor do the latter owe what the entire association does”.

Nor was the corporate entity or universitas without its regulation in the days of the Roman Emperors. Evidently because of the then existing clamor, the Emperors Valentinian, Theodosius and Arcadius decreed that no one should be permitted to impose any new burden upon the inhabitants of Rome, but they ordered that the privileges of its then existing bodies corporate should remain intact. And persons, who were deans or members of corporate bodies, who did not discharge the duties of their offices or who attempted to evade their obligations, and persons who fraudulently represented they were such deans or members, were the subject of a prohibitive decree of the Emperors Theodosius and Valentinian.

Then came the Northern invader. The Goths spread over Italy and the provinces and almost completely extinguished civilization. Fire destroyed cities and their records. The constant warfare into which the known world was plunged destroyed not alone the corporate idea but the better customs of the early business world. Martial law existed largely upon the maxim, “‘Do this’, and he doeth it”. The state, represented by its military arm, ruled. There was no necessity for, if any remembered, the legal corporate entity.

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7 3 Scott, THE CIVIL LAW 30 et seq.
8 11 id. at 10 et seq.
9 3 id. at 32.
10 15 id. at 179.
11 15 id. at 180.
Centuries passed before civilization dared to raise its head. Many historians call the thirteenth the greatest of centuries, because of the wonderful advance in the arts and sciences suppressed in the years that had gone. The development of law was no exception.

**Development at the Common Law**

Pollock and Maitland say that one of Bracton’s contemporaries, Sinibald Fieschi, who became Pope Innocent IV in 1243, has been called the father of the modern theory of corporations.\(^1\) Holdsworth says that he is the first person to call a group of persons a *persona ficta.*\(^2\) If he was the first person in our modern jurisprudence to apply the principle of distinct personality, it probably proves that he was a better student than his contemporaries, for, as we now know, the modern concept of distinct personality was a recognized theory of the Grecian system and of the Roman law long before and long after the beginning of the Christian era. Certainly it is fair to say that if he did not evolve it, he was the first of our modern lawyers who applied the principle, because, as we shall see, legal necessity required it. And the legal necessity was the church.

Prior to the recognition of the corporate fiction at the common law, we had it in another form, even in Aethelbert’s time. When one gave land to a church or for a church, it was conveyed to the patron saint of the parish. Thus many of the saints, dead centuries before, were the respective owners. Domesday gives us numerous examples—St. Paul, St. Peter and St. Constantine among them. Indeed, it may well be inferred that Aethelbert began the practice when he conveyed “To thee, St. Andrew, and to thy church at Rochester, where Justus the Bishop presides”.\(^3\) The land was held by the parish; the conveyance was for the use and benefit of the particular church. It was not until the introduction of the feudal system that we read of advowsons and, later, of benefices.

While there must have been few religious corporations or abbeys in Bracton’s time, and certainly fewer municipal corporations or boroughs, each must have existed and was recognized in the early common law, for, writing on jurisdiction and venue, Bracton says

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\(^1\) Pollock & Maitland, History of English Law (2d ed. 1923) 494.
\(^2\) Holdsworth, History of English Law (1923) 470.
\(^3\) Pollock & Maitland, History of English Law 499, 500.
that a corporate body "should not be drawn out of the county to make an assize of novel disseynine or of mortdancerester".15

In tracing the history of the corporate entity or juristic person with a separate individuality at the common law, one is charmed and again disappointed at the apparent lack of intuition on the part of the common law lawyer. And yet, say Pollock and Maitland, it would have been surprising had the English lawyers of Bracton's day obtained a firm hold of the notion of a corporation or Roman universitas. Had they done so, they would have been ahead of their Italian contemporaries, who had Code and Digest to set them thinking. Notwithstanding the true theory lay so plainly on the face of the Roman law books that but to read was to grasp the concept. Bracton's master, Azo, had not grasped it; the glossators did not understand it. They stumbled over the difference between an universitas or corporation and the societas or partnership.16

Probably the best historical account of the development of the corporate idea at the common law is in Holdsworth,17 although Pollock and Maitland are interesting.18 The religious corporation or abbey seems to have led the way. The abbot, who was its head by selection of its members or by appointment, was the equivalent of the pater familias of the Roman family. As the monk became legally dead when he entered upon a religious life, his personality became merged — the abbot was his representative. And while the English courts had difficulty in determining whether the corporation could commit a tort, for it could neither sin nor be sinned against, they had little difficulty in evolving the theory that the abbey, represented by the abbot, could be guilty of a tort committed by one of the monks in the abbey. Then, too, there was difficulty in actions pro and con, upon the death of the abbot, until his successor was elected or appointed. It was the abbot, the pater familias, if you will, not the aggregate whole, to whom the law looked and who was the representative of the whole. Depending upon Coke upon Littleton, even Blackstone says that after death of the head and before selection of his successor, the corporation was in a state of suspended animation.19 And yet, we read

15 6 BRACTON, DE LEGIBUS ANGLIÆ (Parliamt ed.) c. xiv, 247.
16 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 494.
17 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 469 et seq.
18 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 486.
19 1 BL. COMM. 478.
that as early as 1333, an abbot was successfully sued upon a bond given by a prior during a vacancy. The canonical theory of the persona ficta was beginning to bear fruit. The corporation sole was being recognized; the church became a "person" in legal parlance. And this idea then spread to the boroughs and to the counties, until finally the corporate personality, distinct from its members, recognized by the law as such, engrafted itself upon our law. If the church or its members had corporate standing before the law, why not collections of persons engaged in commercial pursuits? True the religious corporation existed for various and different reasons. The king finally was recognized as a body corporate in a body natural and a body natural in a body corporate. For certain purposes he was a corporation sole. "The King is dead, long live the King." If to the church, to the King, to the City of London, to the boroughs, why not to persons aggregate? Assumption of corporate powers, with subsequent regal recognition, led to the corporation by prescription, then by royal charter, and finally by act of Parliament; although Blackstone says the King's consent is absolutely necessary to the creation of any corporation.

And the courts were vigilant that no corporation should act beyond its granted powers, nor even then if either violated the rules of the common law.

Holdsworth says that the growth of the law of a juristic personality or a legal entity, while gradual, reached its present development in the fifteenth century. He proves, by the Year Books, that in the reigns of Henry VI and Edward IV, we had gotten well on the way towards that recognition. As early as 21 Edw. IV, the Year Book, in the Abbot of Hulme's case, recognized the corporation to be invisible, of no substance, a mere name, incapable of outlawry or excommunication, and yet a person.

This absorption, development and application of the concept under discussion, at the common law, is illustrated by an opinion rendered in 1613:

"... the opinion of Manwood, Chief Baron, was this, as touching corporations, that they were invisible, immortall, and that they had no soule; ... a corporation, is a body aggregate, none can create soules but God, but the King creates them, and therefore they have no soules ..."
Certainly about the end of the medieval period the *persona ficta* of the canon law, the *universitas* of Rome, our corporate concept, was a well known character in our legal realm. As a corporate aggregate it could take land in fee without the word "successors," although it had to take and grant by deed; for as an artificial being it could act only by deed.

Blackstone, the patron saint of the American lawyer, who wrote in 1765, says, that after the corporation is formed and named, among its powers and capacities, in addition to perpetual succession, to hold land, to have a common seal, and to make by-laws, is "to sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and to do all other acts as natural persons may." It had won legal recognition as a person at common law.

**Colonial and Pre-constitutional Development**

We now accompany the legal personage to American shores.

Five American colonies owed their inception to trading companies. The London Company, chartered in 1606, developed Virginia; Massachusetts Bay Company, a 1629 aggregation, saved Plymouth from destruction and started New England on its course; the Dutch West India Company, established in 1621, laid in New Netherland the basis of a colony which is our present New York; the King of Sweden started his West India Company and placed a settlement on the banks of the Delaware; while Georgia, chartered as late as 1732, as "one body politic and corporate", was founded as an asylum for poor debtors.

But these were not exceptions. England, even prior to 1600, was using the corporate fiction, not alone for purposes of colonial development all over the known world, but also for the development of business in practically every line of industrial activity. It may be that the fundamental difference between the old and new corporate theory — the joint stock capital, had not as yet clearly manifested itself, but fictitious personality was everywhere assumed, including colonial America.

One must remember that there were few lawyers of any consequence during the earlier colonial days. Those who came with

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24 3 CO. LIT., 1. c. 1, 8b 7.
25 Id. at II. c. 5, 94b 3.
26 1 BL, COMM., 475.
27 BEARD, THE RISE OF AMERICAN CIVILIZATION (1930) 35 et seq.
the planters had passed away, there were no law schools and little inducement to study; so that it was not until toward the latter half of the eighteenth century that a few of our men found their way, at great expense, to the Inns of Court to prepare themselves for the work at the bar. Courts were largely made up of laymen, and the right of appeal was at first to the home office of the corporation or palatinate and later to the English courts.

True the assemblies granted charters to or recognized what were in fact municipal corporations, but for these, generally, express authority existed in the charters or grants. Like England, our first corporations seemed to be ecclesiastical — one in 1659, for propagating the Gospel in New England, formed by dissenters; and the other in 1701, by the Church of England. Both held English charters.

In the educational world, also, we have the incorporation by Massachusetts in 1659 of Harvard; William and Mary by the Crown in 1692; and Yale by Connecticut in 1701.

When we come to the business corporation, there was little or no activity. Recognized in England, as trading corporations, the colonies resorted to the right to pass laws upon the theory that their charters contemplated that they might make by-laws. And their laws were likened to corporate by-laws. Hence, the Englishman’s right to self government found what appeared to be a sound legal basis. When Parliament considered a bill, in 1701, to bring under direct control of the throne all of the colonies not already subject thereto, it was urged that, if enacted, the act would establish a precedent to take away the charter of any corporation, without compensation. It was then defeated, but afterwards passed in a different form.

There were voluntary associations in the colonies, with special privileges, like the Undertakers of the Iron Works, in Massachusetts in 1643,28 and for frontier settlement in Virginia, in 1701,29 but these had not the appearance of the true corporate fiction. Several were incorporated in England, it is true, like the Ohio Company in 1749.

The colonies were becoming corporation conscious, however. Maryland incorporated the Patapsco Iron Works Company in 1731. Connecticut granted a charter to the New London Society in 1732.30

29 3 Hening Stats. 1701, 204.
30 Col. Records of Conn. VIII, 390.
Following the grant of several small charters of little consequence, Massachusetts granted a joint stock charter to the Manufacturing Company in 1740, over the protest of the Governor. Parliament then passed the act of 1741, extending to the colonies the “Bubble Act” of 1720. No modern blue sky law, this. It forbade for the future any American grants of corporate privileges for business purposes, under pain of praemunire. Every lawyer knows the penalties and pains of praemunire.

This ended the dream of colonial legislatures for the American development of business; although, it is said, Pennsylvania passed an act in 1768, incorporating a fire insurance company. Evidently the incorporators were told of the act of 1740 by Parliament, and its penalties, for no organization was made thereunder. And, it is said, this was the reason for the clause in the Declaration of Independence: “For taking away our Charters, abolishing our most valuable laws, and altering fundamentally the Forms of our Governments.” Thus passeth the colonial period.

With some exceptions, the War for Independence was a political and not a social revolution. One of these exceptions, as it developed, was the corporate fiction. The English corporation held its franchise as a special favor. It was an irrevocable grant. Ordinarily it was in the nature of a monopoly. The developed American theory, on the other hand, was that the corporation could come into existence only for the public good. Hence the early passage of general incorporation laws by most of the states — notably New York in 1784, Delaware in 1787, and Pennsylvania in 1791. Then began the decline of the old theory of liberality of construction. But the fundamental theory was retained — it was a person, it had all the rights of a person, in the absence of a particular exception or prohibition.

With independence, came the demand for corporate charters. The Bank of North America was chartered by Congress in 1781, and was organized for the purpose of restoring the failing credit of the Confederacy. It is still functioning under its ancillary charter gotten from Pennsylvania in 1787. We have the model Virginia act of 1785, incorporating the Potowmack Company.

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31 Colonial Soc. of Mass. Ill.
32 Read SIMEON E. BALDWIN, 3 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 237.
33 Id. at 254.
34 11 Hening Stats. 1784, 510 et seq.
Maryland passed the same act the next year. Massachusetts chartered The Massachusetts Bank in 1784, and The Proprietors of Charles River Bridge in 1785. Pennsylvania chartered The Mutual Assurance Company in 1786, and New York added its contribution to our inquiry in 1786, by incorporating the Associated Manufacturing Iron Company. In all of these corporations, the doctrine of legal personality is preeminent. Not only was it so intended, but it was necessary, if they were to be successful, to attract foreign capital. And even George Washington made that effort for the Potowmack Company.35

Let us scan for a moment, too, the language of the state constitutions adopted prior to the Constitutional Convention. The protection of life, liberty and property was paramount in the bills of rights of these earlier documents. Virginia led the way with George Mason’s bill of rights — the first enactment of its assembly. The principles of the Virginia act were adhered to in the other colonies, as we know, although Connecticut and Rhode Island existed under their former charters until 1818 and 1842, respectively.

Then, too, the common law was declared to be in force and effect in practically all of the original colonies. Some of them, as for instance New York in 1777, incorporated it in its constitution. Virginia’s fourth act provided for its adoption, and declared, inter alia, that it “shall be the rule of decision (in the courts) and shall be considered as in full force, until the same shall be altered by the legislative power of this colony.”36

Not only, then, at and prior to the adoption of the national Constitution had the states, which had acted, provided for protection of property, but all of them had expressly provided for the continuance of the common law system. Congress, under the Confederation, as we observed, granted a charter in 1781, under its supposed incidental powers; the states, having unquestioned authority, had granted corporate charters, and two of them — New York and Delaware — had enacted general statutes for the incorporation of companies.

And in the Constitutional Convention, imbued with the idea that no incidental powers were being granted, Mr. Madison moved on August 18th, 1787, that several additional powers be vested in


36 9 Hening Stats. 1776, 126.
Congress, among them the power to grant charters of corporations. This effort slept in the committee to which it was referred. On the last day when amendments could be made, he brought up the proposals in a different form. They were defeated. The difference is significant. He is said to have been convinced by some of his fellow delegates, notably Mr. Gouverner Morris of New York, that Congress would have incidental power to carry out its enumerated ones. So on the last day, Mr. Madison contented himself with canals and a university. Mr. Robert Morris wanted an express grant for a bank, but he was silenced by Mr. King, of New York, who stated that banks were not so popular and their inclusion would weaken the chances of adoption. That a large part of the commerce of the world was then carried on by corporations and that the Convention took cognizance of this fact was later recognized by the Court in construing the commerce clause.

And that this incidental power was thoroughly understood is illustrated by the debate in the Virginia convention called to ratify the Constitution. Indeed the Tenth Amendment was intended to obviate this difficulty, but the word "expressly" was omitted. Consequently the courts never doubted that the incidental power existed.

Congress early recognized the reality of the incidental power by incorporating the first bank in 1791. Even before the Fifth Amendment was part of the Constitution then, we had recognition by the common law, by the states, by the Constitutional Convention, and by the first Congress that a corporation was a person.

UNDER THE CONSTITUTION AND THE FIFTH AMENDMENT

We are aware that there is no common law of the United States in the sense of a national customary law, distinct from the law of England.

"There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced

37 1 Elliott, Debates on the Federal Constitution (1836) 247.
38 1 id. at 310.
39 5 id. at 544.
40 Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1869).
41 3 Elliott, Debates on the Federal Constitution 461. Patrick Henry urged that Congress had the incidental right to do all things not expressly prohibited.
42 Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274 (1884); McCulloch v. Maryland, 4 Wheat. 316, 406, 4 L. Ed. 579, 601 (1819).
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by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court, in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority."43

And prior to Smith v. Alabama,44 construing the Court of Claims Act, where the act was silent as to rules of evidence it should adopt or follow, the Court said:

"In our opinion, it must be governed by law; and we know of no system of law by which it should be governed other than the common law. That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many acts of Congress could not be understood without reference to the common law."45

In reality this is true. A distinguished English teacher, whether in praise or in jest, one knows not, says that the Constitution was written by men who had Magna Charta and Coke upon Littleton before their eyes.46

"No person shall be deprived of life, liberty or property without due process of law", says the Fifth Amendment. What is meant by the word "person"?

"Law is the philosophy of life." It is the embodiment of the social reactions of any given age. Hence we approach the subject from the historical setting of the age.

Speaking of the first ten and the Thirteenth, Fourteenth and Fifteenth Amendments, Judge Cooley once remarked "that the first ten took from the Union no power it ought ever to have exercised, and that the last three required of the States the surrender of no power which any free government should ever employ."47

It can be urged that the Fifth Amendment was never directly interpreted by the Court. But, if not, "it has been assumed, if not expressly held, that the provision protects the property of corporations against confiscation equally with that of individuals."48

45 Moore v. United States, 1 Otto 270, 274, 23 L. Ed. 346 (1876).
46 PLUCKNETT, CONCISE HISTORY OF THE COMMON LAW (1929) 40.
47 COOLEY, PRINCIPLES OF CONSTITUTIONAL LAW (1891) 210.
Yet as was said by Judge Carr, the point (that corporations are not persons) may never have been made before, but, when raised, the court must pass upon it.49

"A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles."50

And that the makers of the Constitution knew that Congress had the power to incorporate companies "which shall be necessary and proper for carrying into execution" the enumerated powers, one has but to recall the words of Mr. Chief Justice Marshall:

"This provision is made in a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur."51

Why may not the same character of interpretation be placed upon the inhibitions of the Constitution? Is it not the means to the end? "Let the end be legitimate, let it be within the scope of the constitution," and all means not prohibited, come within its letter and spirit.52

To digress for a paragraph, let us recall a problem that was of moment early in our judicial history. The question arose whether a corporation could sue in the federal courts. Was it a citizen? The Court solved the problem by piercing the corporate veil, as it will do to-day in cases of fraud, and ascertaining the citizenship of the stockholders. If the requisite diverse citizenship existed, the jurisdiction was unquestioned.53 Although corporations had been before the Court from its organization, the question was not raised until 1809. In Bank v. Deveaux, the Court re-

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50 Mr. Chief Justice Marshall in Bank of United States v. Deveaux, 5 Cranch 61, 87, 3 L. Ed. 38, 45 (1809).
51 McCulloch v. Maryland, 4 Wheat. 316, 415, 4 L. Ed. 579, 603 (1819). Italics supplied.
52 Id. at 421.
53 Bank v. Deveaux, 5 Cranch 61, 3 L. Ed. 38 (1809).
sorted to English cases for aid. It found "that corporations have been included within terms of description appropriated to real persons." While it is true that the Court, in this case, to solve the jurisdictional question, asserted that it might ascertain the citizenship of the stockholders of the corporation because they were "substantially and essentially the parties," yet this rule of decision, by subsequent cases was developed until it determined, once and for all, that when a corporation is created by the laws of a state, the legal presumption is that its members are citizens of the state in which alone the corporate body has a legal existence, and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a federal court.\(^5\) It is, therefore, a citizen within the jurisdictional clause of the Constitution. It is not, however, a citizen, as we know, enjoying the rights and privileges of the citizens of the several states, for the reason that, if so, the states would have no control over a foreign corporation.\(^5\) In the state of its creation, however, this inhibition does not exist. This right does not inure in favor of corporations existing under the laws of the District of Columbia or of the territories, because diverse state citizenship does not exist.\(^5\)

In 1823, following the *Dartmouth College* case,\(^7\) hereinafter commented upon, the Supreme Court held that an English eleemosynary corporation was a person within the meaning of the treaty of peace with Great Britain, the fifth article of which provided "there shall be no future confiscations made, . . . against any person or persons", *etc.* Vermont attempted to confiscate the property by act of 1794. The corporation's property rights were protected.\(^8\)

The Court, in 1826, decided that a corporation was a "person" within the purview of a criminal statute. Mr. Justice Story, who wrote the opinion in that case, *inter alia*, said:

"That corporations are, in law, for civil purposes, deemed persons is unquestionable. And the citation from 2 *Inst.* 736, establishes, that they are so deemed within the purview of penal statutes. Lord Coke, there, in commenting on the statute, says:"

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\(^5\) Ohio & Miss. R. R. Co. v. Wheeler, 1 Black 286, 17 L. Ed. 130 (1861).
\(^6\) Paul v. Virginia, 8 Wall. 168, 19 L. Ed. 357 (1869).
\(^7\) Hepburn & Dundas v. Ellzey, 2 Cranch 445, 2 L. Ed. 332 (1804).
\(^8\) Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629 (1819).
\(^8\) Society for Propagation of Gospel, *etc.* v. Town of New Haven, 8 Wheat. 464, 5 L. Ed. 662 (1823).
of 31 Eliz. ch. 7, respecting the erection of cottages, where the word used is ‘no person shall’, &c. says ‘this extends as well to persons politic and incorporate, as to natural persons whatsoever.’

This case has been uniformly followed in the construction of statutes.

“No authority has been adduced to show, that a corporation may not, in the construction of statutes, be regarded as a natural person: while, on the contrary, authorities have been cited which show, that corporations are to be deemed as persons, when the circumstances in which they are placed, are identical with those of natural persons, expressly included in such statutes.”

And in 1839, on appeal from the Alabama circuit, the Court decided that the federal courts were open for the suit by a foreign corporation for the enforcement of a contract authorized to be made by it in its domicile, against a citizen of another state. True it had no legal existence out of the boundaries of its creator and it existed only in contemplation of law; yet it could act by agent just as a natural person and under the law of comity it could sue in a foreign jurisdiction just as a natural person. “It is indeed a mere artificial being, invisible and intangible; yet it is a person, for certain purposes in contemplation of law, and has been recognized as such by the decisions of this Court.” It has the same right as, but no greater constitutional right than a natural person.

Whatever property it owns, it holds as a natural person does. And the franchise itself is property. It is a legal estate vested in the corporation itself as soon as it is in esse. It is a power coupled with an interest. This property right is protected by the Constitution under the contract impairment clause. It “may act as a single individual ... It is no more a State instrument, than a natural person exercising the same powers would be.”

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recognition that it is a "person" within the meaning of the Constitution. And the franchise which it possesses may be taxed. 64

All of these cases, except the last, were decided prior to the submission of the Fourteenth Amendment. This paper is not intended to be an exhaustive treatise on the subject, but merely a cursory examination to satisfy one's mind as to the condition of the law before and at the time of the submission of the Fourteenth Amendment. Sufficient is suggested to prove that the law makers, when the amendment was submitted, could not have been unmindful that a corporation was a "person" under the Constitution, in the treaty of peace with England, in the federal statutes, and in business transactions in which a corporation engaged.

When we go beyond the federal realm and seek confirmation and cumulative assurances in the concurring understanding of the state courts, the evidence is overwhelming. It may be well stated, as a truism, that the word "person" is a generic term and includes both natural and artificial persons, unless the subject matter or context limits the language to natural persons. 65 Consonant with the other states, the early Virginia cases all regarded a corporation as a person. 66 These cases were decided before the division of the state and prior to the submission of the Amendment.

Probably the effect of the inhibition contained in the Fifth Amendment against the deprivation of life, liberty or property without due process of law, in so far as property is concerned, as being limited to natural persons and excluding corporations, is best expressed by Mr. Justice Field:

"But such has not been the construction of the courts. A similar provision is found in nearly all of the state constitutions; and everywhere, and at all times, and in all courts, it has been held, either by tacit assent or express adjudication, to extend, so far as their property is concerned, to corporations. And this has been because the property of a corporation is in fact the property of the corporators. To deprive the

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64 Society of Savings v. Coke, 6 Wall. 594, 18 L. Ed. 897 (1868).
65 2 SUTHERLAND, STATUTORY CONSTRUCTION (2d ed. by Lewis, 1904) 770. See also the word "person" as applied to corporations in 6 WORDS & PHRASES (1904) 532 et seq., and cases cited.
66 As a person it can commit usury, Stibbling v. Bank of Valley, 5 Rand. 132 (Va. 1827); for civil purposes it is a person and is subject to garnishment, B. & O. v. Gallahue's Adm'rs, 12 Gratt. 655, 65 Am. Dec. 254 (Va. 1855); the property of a foreign corporation may be subjected to a debt, Bank of United States v. Merchants Bank, 1 Rob. 573 (Va. 1843); a foreign corporation can be excluded from the state, even though a person in its domicili, Slaughter v. Commonwealth, 13 Gratt. 797 (Va. 1856).
corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value. Their interest, undivided though it be, and constituting only a right during the continuance of the corporation to participate in its dividends, and on its dissolution to receive a proportionate share of its assets, has an appreciable value, and is property in a commercial sense, and whatever affects the property of the corporation necessarily affects the commercial value of their interests.\(^{67}\)

**UNDER THE FOURTEENTH AMENDMENT**

When the Fourteenth Amendment was submitted to Congress on the 30th of April, 1866, the language of the first paragraph is as it was submitted. The debate added to but did not change the language of that section, so far as making applicable to the States the inhibition to deprive one of life, liberty and property without due process of law. The words added established United States citizenship in the first sentence, and "nor deny to any person within its jurisdiction the equal protection of the laws" in the latter part.\(^{68}\) It was submitted on June 16th. With it was introduced a bill, which passed, providing that when any state "lately in insurrection shall have ratified the same and shall have modified its constitution and laws in conformity therewith" such state, upon ratification of the Amendment, should be given representation in Congress.

Now we come to the dissenting opinion of Mr. Justice Black who argues that the word "person" in the Fourteenth Amendment does not include corporations or legal persons.\(^{69}\) He says, when submitted, that "the people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations."

It is true, as Mr. Justice Black argues, that "the history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of the state government". But the same argument can be made with relation to the late lamented so-called Child Labor Amendment, and the powers of Congress under it, upon the pretext that it was a child employment amendment.

\(^{67}\) The Railroad Tax Cases, 13 Fed. 722, 746 (C. C. D. Cal. 1882).

\(^{68}\) 2 Blaine, Twenty Years in Congress (1886) 204, 214.

The fallacy of Mr. Justice Black's argument, however, lies not in comparison but in fact, and is twofold: (a) he assumes that it granted new and revolutionary rights to corporations, and (b) that it removed corporations from the control of state governments. The Amendment granted no "new and revolutionary rights to corporations". It merely restrained the states from depriving the corporation, as well as all other persons, of its property without due process. It created no new legal or fundamental rights, but operated on the legal rights existing at its adoption. Mr. Justice Black is from Alabama. He overlooked the same clause, which has been in every constitution framed by the people of Alabama: "Nor shall he be deprived of his life, liberty or property, but by due process of law." The clause of the Alabama constitution just quoted, as well as the remainder of its bill of rights was the governing and controlling part of the constitution in force in 1838, and all of its general powers were expounded, and their operation extended or restrained, with reference to it. The clause did not prevent a corporation de jure from condemning property. A corporation is a person in Alabama; and the legislature cannot take away vested rights.

The Fourteenth Amendment did not remove corporations from the control of state governments, as suggested by Mr. Justice Black, nor prevent the state courts from interpreting what is equal protection of the laws. This is sustained by the recent cases decided by the supreme court of Alabama.

It cannot be said, whatever may have been the record of hearings before Congress, that only the committee, sitting in secret session, knew the effect of the language of the Amendment, as stated in the opinion. Nor can it be said, that the members of Congress did not know that the word "person", as used in the Amendment, meant and included corporations. There is no word in it that did not undergo the completest scrutiny. There is no

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70 United States v. Cruikshank, 2 Otto 542, 23 L. Ed. 538 (1876).
71 Ala. Const. 1819, art. 1, § 10; 1865, art. 1, § 7; 1867, art. 1, § 8; 1875, art. 1, § 7; 1901, art. 1, § 6.
72 In re Dorsey, 7 Port. 293 (Ala. 1838).
74 Planters' & Merchants' Bank v. Andrews, 8 Port. 404, 426 (Ala. 1839).
75 Coosa River Steamboat Co. v. Barclay, 30 Ala. 120 (1857). These last three cases are from digests and have not been read by the writer.
word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people, who had it in hand, which was not considered. It may be, in the effort to secure the submission and its adoption after submission, that little emphasis was laid upon the interpretation of its language, and that less was said about it.

Constitutional interpretation is interesting the world over. Judicial science has developed and determined various general rules of interpretation. The instrument of the law is language. And language has rules of its own. We must understand the language in which the law is written. And a living language is flexible and changeable. Hence the Court, in its wisdom, as we have seen, has followed the rules of the common law in the interpretation of the Constitution. Those definitions and interpretations, therefore, are as inflexible as possible, so far as language is concerned, and flexible as to application of language. As simplicity is an art the acquirement of which is long to be desired, so, too, is the art of constitutional construction.

Probably best stated, the words of a constitution are to be construed in their most usual signification. No state court has better stated the rules of constitutional construction than that of Alabama. It has held (a) that constitutions are to be construed in the light of the common law and previously existing constitutions and provisions designed for protection of life, liberty and property are to be liberally construed; (b) that the Constitution is not to receive technical construction; and (c) that the history of a constitutional provision, the causes which led to its adoption, and the mischief it was intended to remedy, will not be considered in determining the construction of it, if the language is plain and unambiguous. These cases are in line with the decisions of our courts. The application of them constitutes a complete refutation of the theory sought to be established by Mr. Justice Black.

77 2 Warren, The Supreme Court (1922) 263, quoting Senator George F. Edmunds.
78 Pfamie, Some Aspects of the Problem of Interpretation (1933) 58 A. B. A. Rep. 255.
79 American Sugar Ref. Co. v. Louisiana, 179 U. S. 89, 45 L. Ed. 102 (1900).
80 Henry v. State, 218 Ala. 71, 117 So. 626 (1928).
81 State Docks Co. v. State, 227 Ala. 414, 150 So. 345 (1933).
82 State v. McGough, 118 Ala. 159, 24 So. 395 (1898).
Notwithstanding these cases of the Supreme Court of the United States and of the state of Alabama, to sustain his position, Mr. Justice Black urges that when the *Slaughter-House* cases were before the Court in 1873, less than five years after the proclamation of adoption of the Fourteenth Amendment, the Court had apparently discovered no purpose on the part of the people to construe the word "person" in the amendment to include a corporation. Apparently he did not closely study the language of the opinion of Mr. Justice Miller:

"The argument has not been much pressed in these cases that the defendant's charter deprives the plaintiffs of their property without due process of law, or that it denies to them the equal protection of the law. The first of these paragraphs has been in the Constitution since the adoption of the fifth amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the power of the States. This law then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over the States in this matter in the hands of the Federal government.

"We are not without judicial interpretation, therefore, both State and National, of the meaning of this clause. And it is sufficient to say that under no construction of that provision that we have ever seen, or any that we deem admissible, can the restraint imposed by the State of Louisiana upon the exercise of their trade by the butchers of New Orleans be held to be a deprivation of property within the meaning of that provision."83

In other words, the question of deprivation of property was not an issue; therefore it was immaterial whether the Amendment covered a corporation under the word "person". In the syllabi, the Court said that it was not necessary to inquire into the full force of the clause forbidding a state to enforce any law which deprives a person of life, liberty or property, because it was not applicable to the present case.

When the question did arise, the Court unanimously determined that the word "person" in the Fourteenth Amendment did

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83 *Slaughter-House Cases*, 16 Wall. 36, 80, 21 L. Ed. 395 (1873).
apply to a corporation. This construction it has consistently followed.

The reasoning of Mr. Justice Black, in the case under consideration, is antagonistic to settled principles of constitutional construction. The consistent line of decisions of the Federal courts and of the state courts, is at variance with his proposed judicial doctrine.

With all due deference, it can be justly said that the opinion of Mr. Justice Black is a legal rarity. From a standpoint of judicial interpretation, it is the only modern discordant note upon legalistic and super-individual personality; and, as a contribution to constitutional exposition, it stands alone.

**Effect of Proposed Theory**

Mr. Justice Black, as evidenced by his later concurring opinion, has determined to insist upon his theory to exclude corporations from the protection of the word "person" in the Fifth and Fourteenth Amendments. While not binding as a rule of construction upon state courts, the interpretation, if established, would be persuasive as to the same language in state constitutions. If accomplished, what is the effect? Then a fact, and not a theory, would confront the American lawyer.

The corporate concept has been the greatest legal factor in the expansion of our country. Our development of this corporate fiction has grown until today there are few persons of any wealth who do not own some kind of corporate security. The widow and the orphan are its beneficiaries. Charitable and educational institutions largely depend upon income derived from corporate investments for their operation. All of our railroads and insurance companies are corporate beings. Banking is now generally done by the corporate entity. Over ninety-five percent of the mining and quarrying operations are carried on by it. Practically every public utility business is operated under its guidance. It is estimated that over ninety-four percent of the manufacturing business is done by the corporate form. Rough estimates place over forty percent of wholesale sales made by corporations in 1925, and at the same time corporations conducted about thirty percent of all retail

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85 Pembina C. S. Mining & M. Co. v. Pennsylvania, 125 U. S. 181, 31 L. Ed. 650 (1888), and cases decided since that time.
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sales. Nearly five percent of the farms of the country are operated in like manner. Only the professions have found no use for it. In practically every field into which the corporation has entered it is wholly or partially dominant. It possesses a quality of enterprise which a century ago was only in embryo — the quality of multiple ownership. Add to this statement, the fact that the great percentage of labor is employed by corporations, and you have a fairly concise picture of the corporate entity in American economic life.87

On the other hand, the corporate fiction has often been used as a cloak for unethical practices. There have been evils and many of them, and there will be in the future. Railroad rebates, banking evils, monopolistic practices, labor depression and other baneful disturbances have been exposed from time to time.88 Our law books give us many other instances. Regulation, properly and fairly applied, is not an unmitigated evil. Whether we should go to the extent of licensing all corporations, directly or indirectly interested in interstate commerce, as proposed by Senator O'Mahoney's bill now pending before Congress, is not a matter of discussion here. The trouble lies in determining where the complete rights of private property should end and regulation should begin and how far it should extend. Property rights and duties are co-extensive. It cannot be denied, in other words, that money talks; the thing to be prevented in honest, stable government is that it should talk with more tongues than belong to it. It may be that some of these matters were uppermost in the mind of Mr. Justice Black when he indited this opinion. Applied in the manner suggested by him, it would kill the goose which has added to our economic surplus year after year.

The national government, too, as well as the states, has now adopted the corporate form to execute many of its governmental functions. By this method, the national government is now engaging in private business in competition with its citizens, free from the burden of taxation, and, in many instances, it challenges the right of the state to regulate its activities within the borders of the state. This is an added problem that demands solution.

But the American lawyers are capable of solving these problems. A bar which evolved from all the governmental systems

87 BERLE & MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 10 et seq.
of the world, a plan such as we have, is not unfit in these days to analyze and apply a remedy to those conditions which require rectification. Our anxiety should be to find and declare the proper course of action between the demands of the propertied idealists on the one hand and the apostles of social discontent on the other. It cannot be solved in the manner attempted by Mr. Justice Black. Society demands the continuance and not the elimination of the corporate fiction. Adopt Mr. Justice Black's new theory, unsupported by precedent, antagonistic to the hypotheses of our governmental structure, at war with the fundamental principles of our economic system, introduce it into this caldron, and where are we? The field of argument and deduction is too wide. It is sufficient to say that legal chaos would result and the rights of private property would be relegated to the storehouse of ancient heirlooms.