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Corporations and the Original Meaning of “Citizens” in Article III

MARK MOLLER[†] AND LAWRENCE B. SOLUM[†]

Article III confers the judicial power of the United States over controversies between “citizens” of different states. In Section 1332(c) of Title 28 of the United States Code, Congress has provided that for the purposes of diversity jurisdiction, corporations are citizens of the state in which they are incorporated and the state in which their principal place of business is located. This raises the question whether corporations are citizens within the original public meaning of Article III of the Constitution. This Article demonstrates that in 1787 the word “citizen” referred only to natural persons and therefore that corporations cannot be considered “citizens” within the original public meaning of Article III. As a consequence, insofar as Congress purports to confer constitutional citizenship on corporations, Section 1332(c) is unconstitutional from an originalist perspective.

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INTRODUCTION

Just before his death in 1875, Benjamin Curtis, the great *Dred Scott* dissenter, lectured Harvard law students on “one of the most . . . difficult questions on the subject of parties”: “jurisdiction over corporations.”¹

In the preceding decades, the Supreme Court had extended diversity jurisdiction over corporate parties.² Yet, noted Curtis, “[i]t has been from first to last admitted that corporations are not citizens” within the meaning of Article III’s Diversity of Citizenship Clause (or any other provision of the Constitution).³ As a work around, the Marshall Court, in *Bank of United States v. Deveaux*, had held that parties suing corporations could rely on the diverse state citizenship of corporate shareholders.⁴ To defang the bite of the complete diversity requirement, the Taney Court later adopted a conclusive presumption that shareholders are citizens of a single state—the one that created the corporation.⁵

That presumption, Curtis told his students, is a “falsehood”—identical to the infamous fictions that the Court of the King’s Bench had used to expand its jurisdiction vis-a-vis Common Pleas centuries earlier.⁶ However, he cautioned, “there is not the slightest reason to suppose it will ever be departed from by the court.”⁷

Despite a post-*Hobby Lobby* surge of scholarly interest in corporate constitutional rights, originalists have not paid much attention to the corporate right to diversity jurisdiction that so perplexed Justice Curtis. The omission begs to be rectified. Corporate diversity jurisdiction is, after all, among the oldest, most practically important, and frequently utilized of corporate constitutional rights. It is, most recently, the foundation for sweeping expansions of federal power over corporate litigation in the Class Action Fairness Act.⁸ What does originalism mean for corporations’ continued access to the federal diversity docket and all that comes with it?

The Article begins to answer that question by investigating the original

1. This lecture, part of a series of lectures on federal jurisdiction, was posthumously published in 1880. See BENJAMIN ROBBINS CURTIS, JURISDICTION, PRACTICE, AND PECULIAR JURISPRUDENCE OF THE COURTS OF THE UNITED STATES 127 (George Ticknor Curtis & Benjamin R. Curtis eds., 1880).

2. *Id.* at 129–33.

3. *Id.* at 128. Indeed, “it may fairly be said that neither the framers of the Constitution nor framers of the Judiciary Act had corporations in view” when they authorized federal courts to hear “controversies between citizens of different states.” *Id.* at 128; see also U.S. CONST. art. III, § 2, cl. 1.

4. CURTIS, *supra* note 1, at 129–32. The case is *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

5. *Id.* at 132–33. The case that adopted this presumption is *Marshall v. Baltimore & Ohio R. Co.*, 57 U.S. 314 (1853). In a prior case, *Louisville, Cincinnati & Charleston R. Co. v. Letson*, 43 U.S. 497 (1844), the Court allowed the corporation to claim the state that was simultaneously its state of incorporation and the place it conducts its business as its state of citizenship on two rationales—a narrower holding that allowed the corporation to borrow the citizenship of shareholders who were citizens of that state, and a broader holding that suggested the corporation itself was a citizen of that state, without regard to the citizenship of any of its members. 43 U.S. at 554–57 (narrower holding); *id.* at 557–58 (broader holding); see also Michael Collins & Ann Woolhandler, *Judicial Federalism Under Marshall and Taney*, 2017 SUP. CT. REV. 337, 347–51, 362–65 (2018).

6. CURTIS, *supra* note 1, at 130–32.

7. *Id.* at 133.

8. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in various sections of 28 U.S.C.).

public meaning of “citizens” in Article III of the United States Constitution.

We say “begins,” because assessing the scope of diversity jurisdiction over corporations requires answering not one but two questions. The first is whether corporations, considered as abstract legal “persons” with an identity separate from their shareholders, are state “citizens” within the meaning of Article III—the proposition Curtis said had “from first to last” been rejected. The second is whether corporations, if not themselves citizens, can rely on the diverse citizenship of the natural persons who “own” the corporation (the shareholders), the route pursued in *Deveaux* and other antebellum cases reviewed by Curtis.

This Article is limited to the first question—were corporations “citizens” within the original meaning of the Diversity of Citizenship Clause? This question requires its own article because it ranges across multiple provisions, each ratified at different times.

One, of course, is Article III’s Diversity of Citizenship Clause itself, ratified in 1788. It provides: “The judicial power shall extend . . . to controversies . . . between citizens of different states.”⁹

However, the Article III term we are concerned with, “citizen,” was modified after the Civil War by the Fourteenth Amendment.¹⁰ In *Dred Scott v. Sandford*, the Taney Court held that African Americans were not “citizens of . . . [a] state[]” within the meaning of the Article III Diversity Clause or the Article IV Privileges and Immunities Clause.¹¹ The Fourteenth Amendment’s Citizenship Clause overturned *Dred Scott* by supplying a master definition of citizen applicable to both of these clauses.

The upshot is that determining whether corporations are citizens for Article III purposes requires an inquiry into the meaning of “citizen” not just at the close of the eighteenth century, when Article III was adopted; but in the middle of the nineteenth century, when the Fourteenth Amendment was adopted.

We will take each period in turn. Below, we will show that at the end of the 1780s, the exact meaning of “citizen” was contested. But the word communicated at least one agreed upon piece of information to ordinary Americans: namely, that a person was a proper object of an expectation of allegiance to a political community, implied from the nature of the person’s connection to the relevant state. Because, in turn, allegiance was an “affective” bond—a moral “sentiment” characteristic only of natural persons—“citizen” at the close of the eighteenth century was a status that was conceptually and linguistically limited to natural persons. This limitation, we show, was pervasively reflected in period usage. Corporations were therefore not textual diversity citizens when the Diversity Clause was ratified.

9. U.S. CONST. art. III, § 2, cl. 1.

10. An earlier modification came through the 1795 ratification of the Eleventh Amendment. A response to *Chisholm v. Georgia*, 2 U.S. 419 (1793), this amendment withdraws Article III jurisdiction over controversies between states, on one hand, and citizens of another state or foreign citizens, on the other. Because it does not directly affect the grant of jurisdiction over controversies confined to citizens of different states, this amendment is not our immediate focus. But because it is practically contemporaneous with ratification of Article III, our evidence about late eighteenth-century usage applies to its use of “citizen,” in any event.

11. *Dred Scott v. Sandford*, 60 U.S. 393, 405–27 (1857).

Next, we turn to the 1860s. The Fourteenth Amendment’s Citizenship Clause offered what the original Constitution had lacked—a master definition of “citizens”: “All persons” “born or naturalized in” and “subject to the jurisdiction” of the United States are citizens of the United States and of the state in which they reside. In 1868, we will show, “born” and “naturalized” “citizens” were terms limited to natural persons. As a result, the Fourteenth Amendment’s definition continued to confine “citizen” to natural persons—while clarifying that the term was open without regard to one arbitrary characteristic of natural persons, their race. Corporations were not citizens in the 1780s and did not become so through the Fourteenth Amendment.¹²

Here is the road map for our argument. Part I briefly outlines our approach, “public meaning originalism.” Part II lays the groundwork for our historical investigation by identifying the nature of the word “citizen” as a “sortal” and reflecting on the theoretical challenges facing our attempt to recover its original meaning. Part III makes the case that corporations cannot be “citizens” as that term was understood by the public in the initial framing period. Part IV shows that the Fourteenth Amendment’s Citizenship Clause continued to define citizenship as a status unique to natural persons. We end with a conclusion that restates our thesis and identifies additional issues that must be resolved in order to formulate an originalist doctrine regarding corporate diversity jurisdiction.

I. PUBLIC MEANING ORIGINALISM

The theoretical framework for our inquiry is provided by “public meaning originalism”—a member of the originalist family of constitutional theories. In this Part of the Article, we outline our theoretical perspective by reviewing the key foundational ideas of public meaning originalism. In addition, we briefly outline the role that original public meaning can play in nonoriginalist constitutional theories such as constitutional pluralism.

12. The words “citizen” and “citizens” appear elsewhere in the Constitution. In Article III, the word “citizens” appears five times other than the Diversity of Citizenship Clause, corresponding to the other distinct forms of subject-matter jurisdiction involving “citizens”: (1) state-citizen diversity jurisdiction, (2) land grant jurisdiction, (3) state-foreign citizen jurisdiction, (4) United States citizen-foreign state jurisdiction, and (5) United States citizen-foreign citizen jurisdiction. U.S. CONST. art. III, § 2, cl. 1. It also appears in the practically contemporaneous Eleventh Amendment *See supra* note 10 and accompanying text. In addition, “citizen” or “citizens” appear in Article I’s specifications of the qualifications for members of the House of Representatives and the Senate, Article II’s specification of qualifications for the President, as well as the Privileges and Immunities Clause of Article IV and the Citizenship Clause and the Privileges or Immunities Clause of the Fourteenth Amendment. *See* U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3; *id.* art. II, § 1, cl. 5; *id.* art. IV, § 2, cl. 1; *see also* U.S. CONST. amend. XIV, § 1. Finally, “citizens” appears in voting rights provisions of the Fourteenth Amendment, Fifteenth Amendment, Nineteenth Amendment, Twenty-Fourth Amendment, and the Twenty-Sixth Amendment. *See* U.S. CONST. amend. XIV, § 2; *id.* amend. XV, § 1; *id.* amend. XIX, § 1; *id.* amend. XXIV, § 1; *id.* amend. XXVI, § 1. The focus of this Article is on the original public meaning of “citizen” in the context of the Diversity of Citizenship Clause of Article III, but our findings extend to the other occurrences of “citizens” in Article III, the Eleventh Amendment, and the Fourteenth Amendment. The original public meaning of “citizen” and “citizens” elsewhere in the Constitution may well be identical to what we describe herein, but that issue is beyond the scope of this Article.

A. THE ORIGINALIST FAMILY OF CONSTITUTIONAL THEORIES

Originalism is best viewed as a family of constitutional theories, almost all of which affirm two ideas:

The Fixation Thesis: The communicative content of the constitutional text is fixed at the time each constitutional provision is framed and ratified.

The Constraint Principle: The legal content of constitutional doctrines and the decision of constitutional cases should, at a minimum, be consistent with and fairly derivable from the communicative content of the constitutional text.

These statements are intended to be precise and they are stated using technical terms, but the intuitive ideas behind the Fixation Thesis and the Constraint Principle are simple. The Fixation Thesis expresses the common-sense idea that the linguistic meaning of a writing is fixed at the time it is authored: even though the words and phrases may acquire new meanings at a later time because of linguistic drift.¹³ The Fixation Thesis pins original meaning to the point in time when a constitutional provision was framed and ratified: Article III and the rest of the unamended Constitution was drafted in 1787 and the ratification process became effective in 1788;¹⁴ the public meaning of Article III was fixed during that period. The Constraint Principle summarizes the idea that the constitutional text is binding: judges may not adopt constitutional constructions that are constitutional amendments in disguise.¹⁵ As applied to Article III diversity jurisdiction, the Constraint Principle would require that constitutional doctrine be made consistent with the original meaning of “citizen,” which, as we shall demonstrate, does not include corporations.

Almost all originalists agree on fixation and constraint, but there are disagreements about other topics. The most significant area of disagreement concerns the nature of original meaning. Although public meaning originalism is the predominant view, original intentions originalism,¹⁶ original methods originalism,¹⁷ and original law originalism also have adherents. Our

13. The case for the Fixation Thesis is stated in Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015).

14. On June 21, 1788, New Hampshire ratified the Constitution, satisfying the Article VII threshold of nine states. Gary Lawson & Guy Seidman, *When Did the Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 1 (2001).

15. A defense of the Constraint Principle is provided in Lawrence B. Solum, *The Constraint Principle: Original Meaning and Constitutional Practice* (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215.

16. See Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226 (1988); Larry Alexander & Saikrishna Prakash, “*Is That English You’re Speaking?*” *Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 969 (2004) (“Full blooded intentionalists consider all available evidence of the actual author’s intended meaning.”). An important variation of original intentions originalism (the “new intentionalism”) emphasizes the communicative intentions of the Framers. See Larry Alexander, *Simple-Minded Originalism*, in *THE CHALLENGE OF ORIGINALISM* 87 (Grant Huscroft & Bradley W. Miller eds., 2011); see also Jeffrey Goldsworthy, *Legislative Intentions, Legislative Supremacy, and Legal Positivism*, 42 SAN DIEGO L. REV. 493, 510 n.57 (2005); John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 72 n.7 (2006).

17. 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, 765–72 (2009); see also John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1332 (2018) (explicating the language-of-the-law thesis as part of Original Methods Originalism).

investigation of “citizens” relies on public meaning originalism, although much of the evidence that we present could also be used to reach similar conclusions from the perspective of alternative versions of originalism.

B. THE INTERPRETATION-CONSTRUCTION DISTINCTION

Public meaning originalism can and should affirm the interpretation-construction distinction,¹⁸ which can be summarized as follows:

Constitutional Interpretation is stipulated to be the activity that discerns the meaning (understood as communicative content conveyed by linguistic meaning in context) of the constitutional text.

Constitutional Construction is stipulated to be the activity that determines the legal effect (including the decision of constitutional cases and the specification of constitutional doctrines) given to the constitutional text.

This distinction expresses the intuitive idea that the meaning of a text is one thing, but the legal effect is another. Thus, constitutional provisions are given legal effect both through the decision of constitutional cases and judicially crafted implementing rules and other constitutional doctrines.

The process of interpretation and construction might involve two steps: first, the judge discovers the meaning of the text (“interpretation”), and second, the judge determines the legal effect of the text.¹⁹ In some cases, the meaning of the text will be sufficiently precise to determine the legal effect. In other cases, the text may be underdeterminate, because the words and phrases are vague or open textured, or for some other reason.²⁰ We can call the set of cases and issues for which the text is underdeterminate the “construction zone”—expressing the idea that in such cases, constitutional construction is necessary to determine legal effect.²¹

C. THE PUBLIC MEANING THESIS

Public meaning originalism affirms the Public Meaning Thesis, which can be stated as follows:

The *Public Meaning Thesis* is the claim that the best understanding of original meaning is the content communicated or made accessible to the public by the

18. On the interpretation-construction distinction, see generally Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010) [hereinafter Solum, *The Interpretation-Construction Distinction*]; Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013). For the history of the distinction in the context of contract law, see Gregory Klass, *Contracts, Constitutions, and Getting the Interpretation-Construction Distinction Right*, 18 GEO. J. L. & PUB. POL’Y 13 (2020).

19. This simple picture does not fully capture the actual process. Judges may begin with construction and then check their view of what the law should be against the text. And as a theoretical matter, the decision as to what meaning (for example, public meaning versus drafter’s intent) should be recovered must precede interpretation. We are grateful to Gregory Klass for emphasizing the importance of this point. See Klass, *supra* note 18, at 15 (“What meaning a text or other speech act has depends on the questions one asks of it.”).

20. In addition to vagueness and open texture, underdeterminacy may result from gaps or contradictions in the text.

21. See Solum, *The Interpretation-Construction Distinction*, *supra* note 18, at 108 (introducing the phrase “construction zone” to refer to the set of cases and issues that are underdetermined by the communicative content of a legal text).

text at the time each constitutional provision was framed and ratified.²²

This thesis is predicated on an understanding of the situation of constitutional communication: the constitutional text was written for the public. For the most part, the text was written in ordinary language, comprehensible to ordinary citizens who spoke American English (at the relevant time). Some constitutional provisions use technical language: the phrase “Letters of Marque and Reprisal” is an example.²³ But so long as the use of specialized language would have been apparent to readers and the technical meaning could be discerned with reasonable effort, the meaning of the Constitution would have been accessible to the public.²⁴

D. ORIGINALIST METHODOLOGY

How can public meaning be recovered? In this Article, we are investigating the meaning of “citizen.” On the one hand, the word “citizen” has a familiar meaning that refers to a status that persons have in relationship to a political community: John Adams was a citizen of the United States and the Commonwealth of Massachusetts. On the other hand, “citizen” is a complex concept used in both law and political philosophy: the status of citizen has eligibility conditions and carries with it a set of rights and responsibilities. Our goal is to recover the original public meaning of the word “citizen” and thereby to recover the concept of citizenship as it was understood in the framing era. In order to accomplish this task, we will use some of the familiar tools of originalist methodology. These tools include: (1) the investigation of semantic meanings using period dictionaries and corpus linguistics, (2) the study of the constitutional record, including both the history of framing and ratification as well as the wider intellectual context that would have been familiar to many who participated in the framing and ratification of Article III, and (3) immersion in the linguistic world of the late eighteenth century. We develop an innovative way to make the third method tractable in this context.²⁵

E. THE ROLE OF ORIGINAL PUBLIC MEANING IN NONORIGINALIST CONSTITUTIONAL THEORIES

Although this Article is written from an originalist perspective, we believe our results are relevant to lawyers, judges, and legal scholars who reject originalism. There are many different forms of living constitutionalism,²⁶ but

22. See Lawrence B. Solum, *The Public Meaning Thesis: Communicative Content Is the Original Meaning of the Constitutional Text* (2020) (unpublished manuscript) (on file with author).

23. U.S. CONST. art. I, § 8, cl. 11.

24. Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 429–31 (2009) (discussing the role of the division of linguistic labor and technical meaning).

25. On originalist methodology, see Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1643, 1649, 1670–71 (2017) [hereinafter Solum, *Triangulating Public Meaning*]; Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 270 (2017).

26. See Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1271–76 (2019).

one of the most important strands of contemporary nonoriginalist constitutional theory is “constitutional pluralism,” the view that there are “multiple modalities” or plural methods of constitutional argument. The list of modalities is contested, but a representative list would include the constitutional text and structure, historical practice, precedent, constitutional values, and workability. For pluralists who believe that the constitutional text is one of the modalities of constitutional interpretation and construction, the original meaning of “citizen” will be relevant to the interpretation of the Diversity Clause—even if it is not a decisive factor.²⁷

Of course, some living constitutionalists may reject the relevance of original meaning altogether.²⁸ We believe, however, that rejection of the constitutional text as a relevant factor is rare among nonoriginalist judges. We are not aware of empirical research on this question, but we believe that very few judges or Justices would affirm the proposition that original meaning is completely irrelevant. For that reason, we believe that our findings are relevant to lawyers and almost all judges—even if some legal scholars would reject original meaning as a factor in constitutional interpretation and construction.

II. THE ORIGINAL MEANING OF “CITIZEN”: CHALLENGES AND SOLUTIONS

“Citizen’s” relationship to corporations is often presented as a simple-to-solve originalist question—too simple to justify the effort we expend below.²⁹ Reality is different. Because the concept of citizenship predated the rise of the modern corporation, assessing how Article III’s original semantic content bears on *modern* corporations’ “citizen” status turns out to pose some thorny challenges.

This Part explains these challenges and how we deal with them. Subpart A starts by introducing some concepts from the philosophy of language that inform our analysis. Subpart B.1 introduces the problem just discussed and then shows why some seemingly promising solutions turn out to be dead ends. Subpart B.2 then identifies the way forward—and, in the process, briefly sketches the basic claim we will develop in later Parts.

Subpart C, finally, ends with an overview of some evidentiary hurdles our investigation will face along the way—as well as our method for surmounting them.

27. There are several versions of constitutional pluralism, see PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–13 (1991); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 *TEX. L. REV.* 1753, 1753 (1994) (“Pluralistic theories of constitutional interpretation hold that there are multiple legitimate methods of interpreting the Constitution.”); Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 *TEX. L. REV.* 1739, 1751–84 (2013); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 *HARV. L. REV.* 1189, 1252–69 (1987).

28. For example, constitutional rejectionism, the view that the constitutional text should play no role in constitutional adjudication, would also seem to reject the relevance of original meaning for constitutional practice. See generally LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012).

29. See *infra* note 38.

A. “SORTALS”

Many words perform a “sorting” function—their semantic meaning allows us to sort individual people or things into a category or conceptual set.³⁰ We will call such terms “sortal” terms or “sortals.”³¹

To perform its sorting function, a sortal’s semantic meaning conveys identity criteria—criteria specifying conditions for assigning an individual object to the set that the sortal describes.³² “Dog,” for example, communicates identity criteria that allow us to distinguish some animals from others by reference to criteria that define the property of being a dog (say, “a four-legged domesticated animal having a long snout that barks” or more technically, “a mammal with a specified set of genetic properties”).

The identity criteria of some sortals (say, “shoe”) limit their set to inanimate objects. Others, like “man” or “woman,” limit that set to animate objects, and others, like “corporation,” describe “abstract objects.”³³ Some sortals, finally, are further restricted—that is, their meaning is limited to a subcategory of a kind. “Bachelor” is such a sortally restrictive word—its meaning not only conveys the state of being unmarried, a quality of an animate object (human beings), but refers only to a restricted kind of human being: historically, *adult males*.³⁴

Citizen is a sortal.³⁵ And it has some obvious identity criteria. For example, all agreed at the relevant time periods that “citizen” was a status limited to “persons.”³⁶ Our task is determining whether the meaning of citizen conveyed additional identity criteria that restricted the term to *natural* persons only or that also reached abstract objects conceptualized as “persons,” like corporations.³⁷

B. IDENTIFYING THE SORTAL CONTENT OF CITIZENSHIP

Having identified our task, we turn to history. In this Part, we begin in

30. This is a characteristic it shares with all “status” concepts. See Paul B. Miller, *The Idea of Status in Fiduciary Law*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* 25, 25 (Paul B. Miller & Andrew S. Gold eds., 2016) (noting that status is a “method of . . . categorization”).

31. In the philosophy of language, sortals are often defined as terms whose semantic meaning supplies criteria for individuating countable kinds, which is consistent with our use of the term. Richard E. Grandy, *Sortals*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Winter 2016), <https://plato.stanford.edu/archives/win2016/entries/sortals/>; Fred Feldman, *Sortal Predicates*, 7 *NOÛS* 268, 269 (1973) (discussing the criteria of sortalhood).

32. In the technical literature, these are sometimes called “counting criteria.” See Grandy, *supra* note 31.

33. For discussion of a corporation as an “abstract object,” see Grandy, *supra* note 31 (discussing “sortals for abstract objects,” which include “ideas,” “governments,” and “corporations”).

34. David Ian Beaver, *Presupposition*, in *THE HANDBOOK OF LOGIC AND LANGUAGE* 939, 944 (Johan van Benthem & Alice ter Meulen eds., 1997) (identifying “bachelor” as a sortally restrictive predicate). It is possible that gendered terms like bachelor are gradually becoming gender neutral and hence that the feminine equivalent term “bachelorette” and the older term “spinster” are falling out use; if so, then “bachelor” may eventually come to refer to unmarried adults irrespective of gender.

35. SORAN READER, *NEEDS AND MORAL NECESSITY* 106 (2007) (noting citizen’s sortal status).

36. See 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *333–36 (1765) (treating of the laws of alienage and subjecthood as legal statuses of “persons”); 1 JOHN BOUVIER, *INSTITUTES OF AMERICAN LAW* 57–84 (1851) (treating statuses of citizen, subject, and alien as statuses of “persons”).

37. 1 BLACKSTONE, *supra* note 36, at *455–73 (considering corporations under the heading of the rights of persons, and classifying corporate entities as “artificial” persons).

Subpart B.1 by identifying a problem: the fact that “citizen” was not applied to corporations in 1787, although relevant, will not suffice to establish that modern corporations stand outside the original meaning of “citizen.”

This Part then surveys some possible solutions to this problem, which turn out to be dead ends, before identifying the path forward in Subpart B.2, which we will then develop in the remainder of the Article.

1. Application Patterns as Pro Tanto Evidence

When we turn to 1787, one intuitive route to investigating this question is to examine whether there is a pattern, in the 1780s, of applying citizen exclusively to human beings. And, indeed, there was just such a pattern, as others have noted.³⁸ We review this pattern later.³⁹ Some will find it, by itself, decisive proof that corporations are not Article III citizens.

These patterns of usage provide powerful evidence that the term “citizens” was conceptually limited to natural persons. But this evidence is pro tanto evidence and not decisive evidence. Evidence is “pro tanto” if it provides genuine support for a proposition, but is, nonetheless, consistent with the possibility that the proposition is false. Evidence is “decisive” if it is conclusive and therefore inconsistent with the possibility that the proposition is false.

The fact that the word “citizen” was solely used to refer to human beings not corporations in the eighteenth century could, at least in theory, be consistent with the conclusion that the original meaning of the term citizens nonetheless embraces *modern* corporations. For this reason, this evidence, although strongly supportive of the conclusion that the word “citizens” is limited to natural persons is not, by itself, decisive.

How is it possible that the original meaning of the word “citizens” could extend to modern corporations despite the fact that “citizens” was only to apply

38. ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 65 (2018) (suggesting in cursory fashion that the title of citizen “was reserved for human beings” in the framing period); Martin H. Redish & Peter B. Siegal, *Constitutional Adjudication, Free Expression, and the Fashionable Art of Corporation Bashing*, 91 TEX. L. REV. 1447, 1456 (2013) (reviewing TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* (2012)) (noting in passing that “no corporation is a citizen in the purely ‘literal’ sense of the term” and characterizing the reasons that corporations have been treated as citizens under the Diversity Clause as purely “instrumental”); Jonathan A. Marcantel, *The Corporation as a “Real” Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 221, 238–45, 261–65 (2011) (collecting evidence that “citizen” was universally applied to “corporeal beings” during the relevant constitutional framing periods); Brandon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 407 (2003) (expressing doubt about whether the framers intended the term “citizen” to encompass corporations); George F. Carpinello, *State Protective Legislation and Nonresident Corporations: The Privileges and Immunities Clause as a Treaty of Nondiscrimination*, 73 IOWA L. REV. 351, 380 (1988) (noting that “[o]ne might conclude . . . that because the framers were not thinking of corporations when they used the term ‘citizen,’ it would be contravening the original intent to include them today,” but disagreeing with this conclusion based on an appeal to the framers’ “goals”); Dudley O. McGovney, *A Supreme Court Fiction: Corporations in the Diverse Citizenship Jurisdiction of the Federal Courts*, 56 HARV. L. REV. 853, 861 (1943) (noting, albeit with a focus on nineteenth century caselaw, that “[the Supreme Court] has from beginning to the end held consistently and persistently that ‘citizen’ connotes a human being”); Charles Warren, *Corporations and Diversity of Citizenship*, 19 VA. L. REV. 661, 662 (1933) (“That the framers . . . ever contemplated that [the grant of diversity jurisdiction in the first Judiciary Act] would apply to corporations is extremely improbable,” given the infrequency of private corporations in the late eighteenth century).

39. See *infra* Part III.B.3.

to natural persons in the late eighteenth century? Consider the following thought experiment. Imagine, for example, that “citizen” meant “all legal persons” who are conceptualized as “private” (that is, having an identity apart from the state) and as “proper objects of a state’s general jurisdiction.” (This is the basic sense in which citizen, as it is used in Article III, is sometimes understood today).⁴⁰ If corporations in the eighteenth century were conceptualized as arms of the state—and thus not a “private” person⁴¹—then we would observe the pattern we see in eighteenth-century linguistic usage. Citizen’s meaning would embrace natural persons in their private capacity, but not eighteenth-century corporations. But it would do no damage to the term’s original meaning to extend it to *modern* corporations, which are both conceptualized as private persons and as proper objects of a state’s general jurisdiction.⁴²

To be clear, we are not arguing that the linguistic evidence shows that this possibility was actually the case. The point of the thought experiment positing this possible state of linguistic affairs in the eighteenth century is to show that the failure to refer to eighteenth-century corporations as “citizens” does not logically entail the conclusion that twenty-first century corporations fall outside the eighteenth-century concept.

To then decisively demonstrate *modern* corporations are not proper objects of the original conventional meaning of “citizen,” we have to cast beyond the pattern of applications of the word “citizen” observed in eighteenth-century practice (of using “citizens” only when referencing natural persons) and recapture the *positive* semantic content of citizen—the concept it conveyed, and the identity criteria entailed by that concept.

The starting point for recovering those identity criteria is the Constitution’s text. Article III uses the term “citizen” without defining it. In 1787, though, other clauses suggested definitional criteria. Article II’s qualifications clause limited the presidency to “natural born citizen[s]” of the “United States.”⁴³ And Article I vested Congress with power over “naturalization.”⁴⁴ Together, both clauses suggested that citizens are persons who are either “natural born” or “naturalized.” Because corporations are abstract entities and cannot be born, it seems to follow that they cannot be “natural born.” And because they cannot be natural born, it might be argued that they are not the sort of entity that can be “naturalized.” Hence, these phrases might be thought to establish that the positive meaning of the word “citizen” only extends to natural persons, for example, human beings or members of the species “*homo sapiens*.”⁴⁵

The complication with treating these express criteria as the identity criteria of “citizen” is that nothing in the antebellum Constitution specifies these were

40. Compare *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), with *Daimler AG v. Bauman*, 571 U.S. 117 (2014).

41. See *infra* notes 145–146 and accompanying text.

42. See *infra* Part III.B.3.

43. U.S. CONST. art. II, § 1, cl. 5 (“No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President.”).

44. *Id.* art. I, § 8, cl. 4.

45. We leave aside the question whether extraterrestrial aliens or an evolved intelligent animal species might be considered natural persons and hence citizens if they were born in the United States.

the only criteria for “citizenship.”⁴⁶ Moreover, the presidential qualification clause relates to citizenship of “the United States.”⁴⁷ And the naturalization clause has long been held to have a similar focus.⁴⁸ Relying on either clause to infer the original 1787 meaning of an Article III “citizen[] of [a] State[]” accordingly implicates a notoriously thorny set of interpretive questions about the relationship between “state” citizenship, “United States” citizenship, and diversity jurisdiction under the antebellum Constitution.⁴⁹

We start at a different place, one that allows us to side-step those questions. The public meaning of the Constitution’s text is its conventional, or popular, meaning—the meaning words convey to ordinary users of English. While some words (“terms of art”) are technical—impossible for ordinary users to understand without reference to a legal specialist—the word “citizen” was widely used in popular sources and conveyed some *implicit* semantic content to ordinary English speakers.

46. Both criteria, to be sure, were the sum of the common law formula for “subjecthood,” which divided full subjects (as opposed to “denizens”) into native born and naturalized. See *infra* notes 70–73, 168 and accompanying text. Even so, Locke and international law writers familiar to the framers suggested contractual criteria distinct from the common law formula might be relevant to “citizenship.” ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 78–80, 130 (1997) (discussing role of Lockean consensualism in theories of citizenship, including its influence on international law theorists like Burlamaqui and Vattel, and noting framers failed to resolve the tension between consensualism and “ascriptive” common law criteria for state membership). Nor is it clear Americans uniformly understood the concepts “born” citizenship or “naturalization,” in the 1780s, in ways consistent with the common law usage of either term. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 231–32 (1978) (noting uncertainty about the power of states and the federal government to distinguish between natives, accepting some as “natural born” citizens and rejecting others); SMITH, *supra*, at 130 (discussing ambiguity of “natural born citizenship,” although noting framers likely used it in the common law sense).

47. See William N. Eskridge, Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 *FORDHAM L. REV.* 1721, 1724 (2001) (“The original Constitution mentions national citizenship only in the presidential qualification clause . . .”).

48. Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67 *STAN. L. REV.* 869, 890 n.90 (2015) (noting the standard view that the naturalization clause regulates admission to national citizenship). But see KETTNER, *supra* note 46, at 231–32 (noting uncertainty, after ratification, about whether the naturalization power was “merely an administrative reform designed to standardize admission to state membership or a recognition that citizenship . . . primarily meant membership in a national community”).

49. In 1787, the relationship between citizens “of” a state and citizens “of the United States,” and the relevance of citizenship “of the United States” to diversity jurisdiction were far from clear. KETTNER, *supra* note 46, at 231–32 (“The framers dealt with the [nature of individual citizenship] tangentially, and, in consequence, the constitutional provisions involving citizenship contained profound ambiguities that would become apparent only long after the new government went into operation.”). That uncertainty played out over the antebellum period, coming to a head in *Dred Scott v. Sandford*, 60 U.S. 393 (1857). There, Chief Justice Taney and Benjamin Curtis both agreed with the basic principle that developed in the early decades of the Republic that “a citizen of the United States, residing in any State of the Union, is, for purposes of jurisdiction, a citizen of that state.” See *id.* at 571 (Curtis, J., dissenting); see also *Prentiss v. Barton*, 19 F. Cas. 1276, 1276–77 (C.C.D. Va. 1819) (Marshall, J.). But they disagreed about the conditions for citizenship in the “United States.” Taney’s infamous opinion contended national citizenship was governed by standards independent of state law, which he contended included race-based criteria. *Scott*, 60 U.S. at 404–07. Justice Curtis advocated the more common antebellum view, that citizenship in the United States was, with respect to natives, entirely derivative of state law. *Id.* at 577–82 (Curtis, J., dissenting); see also DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 71 (1978) (the general antebellum position was to “regard state citizenship as primary, with United States citizenship deriving from it”). Other antebellum commentators took the view that the national citizenship was governed by the non-racial criteria of the common law. See *infra* notes 240–246 and accompanying text; see also *Lynch v. Clarke*, 1 Sand. Ch. 583, 619–20 (N.Y. Ch. 1844) (treating the issue of national citizenship as a judicial question governed by the common law, at least absent national legislation to the contrary).

That implicit content determined what the word “citizen” conveyed to the public in the context of Article III and therefore it provides the constitutional meaning of “citizen.” To enjoy the rights of constitutional citizenship, whether the word is used in relation to “states” or “the United States,” one must meet “citizen’s” original popular identity criteria. If corporations do not meet those criteria, they were not “citizens,” state or federal, within the original public meaning of the Constitution of 1787.⁵⁰

Our focus is on this implicit content. When we turn toward identity criteria implicit in the term’s popular meaning, a common impulse is to focus on what (if anything) “citizen” popularly conveyed about someone’s legal entitlements, and then reason backward from that information to a conclusion about who “belongs” to the set of “citizens.”⁵¹ Thus, if the right to vote is fundamental to the popular concept of citizenship, we could characterize the popular meaning of citizenship as “a person who is entitled to vote.” We might then reason that if corporations are not the kind of thing that is a proper object of the “right to vote,” corporations do not meet the popular identity criteria for “citizens.”

Once again, this evidence provides only pro tanto support for the proposition that only natural persons could be citizens. First, in the 1780s, it was far from clear what rights, exactly, were intrinsic to citizenship. Some 1780s accounts of citizenship associated the word with the enjoyment of a set of fundamental civil, but not political, rights—equal rights to own, convey, and inherit property, or travel freely, for example—some of which seem perfectly coherent to ascribe to corporations.⁵² Others associated citizenship with political

50. As a result, the content of “state citizenship” for purposes of Article III may differ in material ways from the state’s local definition of “citizen.” An environmentally conscious state might, for example, define “trees” as “citizens” of the state. If, however, trees don’t meet the popular identity criteria of original citizenship, they would not qualify as “citizens” of the state for purposes of rights conferred on citizens of a state by the federal constitution. In this, we take a position consistent with Justice Marshall’s construction of Article III in *Prentiss*, 19 F. Cas. at 1276 (holding that Article III “citizenship” is a question of federal law). The concept of state citizenship in Article III may bear some resemblance to a “patterning definition,” under which the original popular meaning of citizen sets baseline criteria for Article III “citizenship,” some of which operate independently of subconstitutional law (limiting constitutional citizenship to natural persons), while others refer to the content of legal backdrops external to the constitution (for example, specifying that to be a state citizen, a natural person must satisfy certain common law or state law requirements, depending on which backdrop relevant legal analysis points us toward.) Cf. Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 893 (2000) (using a patterning definition approach to constitutional “property” and concluding that different definitions attach in different clauses that use the word “property”). See also *infra* note 62 and accompanying text.

51. *Talbot v. Janson*, 3 U.S. 133, 162 (1795) (Iredell, J.) defining citizens as “members of the society,” who “claim rights in society, which it is the duty of the society to protect” and who are “in . . . turn . . . under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member”); CHARLOTTE C. WELLS, *LAW AND CITIZENSHIP IN EARLY MODERN FRANCE*, at xiii (1995) (noting citizenship is generally defined as “membership in a group” that carries with it rights to “civil rights and political rights”); *id.* (noting we typically “distinguish citizens by the rights they possess as members of the state”).

52. This is often termed the “liberal conception” of citizenship. Iseult Honohan, *Liberal and Republican Conceptions of Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 83, 85–94 (Ayalet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink eds., 2017). As Charlotte Wells notes, the liberal conception is, in fact, not modern—its origins lie in the late medieval Roman law. WELLS, *supra* note 51, at xv. A number of examples of usage in the 1780s are consistent with this conception—see, for example, the use of “citizen” as a “synonym” for “subject” in American treaties granting contracting parties’ members reciprocal rights during the Articles of Confederation period. See, e.g., Treaty of Paris of Sept. 3, 1783, 1 MALLOY, *TREATIES* 468 (1910) (referring to the “subjects of Great Britain” and the “citizens of the United States”). These reciprocity clauses,

rights (voting, the right to hold office), which seem improper to associate with corporations.⁵³ As a result, focusing on the information about the type of rights intrinsic to the term citizen does not provide decisive evidence.⁵⁴

More fundamentally, though, focusing simply on whether someone is a “proper” object of whatever rights were “fundamental” to citizenship (1) ignores other important parts of the term’s semantic meaning in a way that (2) may cause us to miss the inclusivity and radicality of the term.

*Scott v. Sandford*⁵⁵ is a particularly terrible example of this kind of analytical error. There, the Taney Court defined “citizen” as the quality of enjoying civil or political privilege.⁵⁶ But it then reasoned from the fact African Americans had been systematically deprived of the privileges of national citizenship to the conclusion that African Americans were not proper objects of that status.⁵⁷

The Court’s tragic mistake here, as Lincoln’s Attorney General Edward Bates noted in 1862, was ignoring that “citizen” communicated identity criteria apart from whatever rights the status conveyed—and those criteria performed the crucial work of sorting who belongs to the “citizen” category and thus is entitled to those rights.⁵⁸ Those identity criteria did not include race.⁵⁹ By

by equating citizens and subjects, clearly use citizen as a term for members of the body politic, inclusive of those who did not, at the time, qualify for the elective franchise. See *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (stating that the Privileges and Immunities Clause secures the “fundamental” rights of citizenship automatically guaranteed by the Privileges and Immunities Clause, “to which may be added the elective franchise,” but only to the extent “established” and “regulated” by state law); see also CHRISTOPHER R. GREEN, *EQUAL CITIZENSHIP, CIVIL RIGHTS, AND THE CONSTITUTION: THE ORIGINAL SENSE OF THE PRIVILEGES OR IMMUNITIES CLAUSE* 43–45 (2015) (noting some doubt about whether Washington included the right to suffrage among fundamental rights of citizenship, but that other cases excluded it from that category); *Chisholm v. Georgia*, 2 U.S. 419, 472 (1793) (“citizens” are “as to civil rights perfectly equal”).

53. This is often termed the civic republican conception of citizenship. Honohan, *supra* note 52, at 85–94. For period examples adopting this definition, see JEAN JACQUES ROUSSEAU, *A TREATISE ON THE SOCIAL COMPACT; OR THE PRINCIPLES OF POLITICAL LAW* 22–23 (T. Becket & P.A. de Hondt eds., 1764) (“With regard to the associates [of a republic or body politic] themselves, they take collectively the name of the *people*, and are separately called *citizens*, as partaking of the sovereign authority, and *subjects*, as subjected to the laws of the state.”); Denis Diderot, *Citizen*, reprinted in *ENCYCLOPÉDIE LIBERTÉ: POLITICAL ARTICLES IN THE DICTIONARY OF DIDEROT AND D’ALEMBERT* 49, 52–53 (Henry C. Clark ed., Henry C. Clark & Christine Dunn Henderson trans., 2016) (1753) (“[O]ne has no clear distinction between subject and *citizen* unless the latter is supposed to be a public man . . .”).

54. This, indeed, may have been a component of the meaning of the term that was largely technical. In any event, we take no firm view on the exact tranche of rights, privileges, or immunities (if any) that were “fundamental” to the concept of citizenship during the 1787 framing period.

55. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

56. *Id.* at 476 (“[T]here is not, it is believed, to be found, in the theories of writers on Government, or in any actual experiment heretofore tried, an exposition of the term *citizen*, which has not been understood as conferring the actual possession and enjoyment, or the perfect right of acquisition and enjoyment, of an entire equality of privileges, civil and political.”).

57. FEHRENBACHER, *supra* note 49, at 350 (noting the circularity of Taney’s argument).

58. *Citizenship*, 10 Op. Att’y Gen. 382, 383–84 (1862) (“In most instances, within my knowledge, in which the matter of citizenship has been discussed, the argument has not turned on the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizen. In this way we are easily led into errors of fact and principle.”).

59. *Id.* at 385 (“The Constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home-birth, and upon the laws of the several States.”); *id.* at 388 (“In my opinion, the Constitution uses the word citizen only to express the political quality of the individual in relation to the nation; to declare he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the

focusing only on the rights associated with the status, and then reasoning about whether those rights “properly” belong to a particular status-claimant, the Taney Court had substituted its own historically and culturally conditioned assumptions about who is a “proper” holder of the privileges of national citizenship for the actual sortal content of “citizenship’s” public meaning.⁶⁰ In other words, the Taney Court mistook pro tanto evidence for decisive evidence.⁶¹

2. *A Way Forward*

We take a different tack by turning from what rights “citizen” conveyed to the duties it communicated. Legal status terms communicate that the status-holder occupies a commonly understood moral position, which the law treats as legally significant. The law in turn cashes out that moral position through workaday legal proxies for ascertaining who occupies that position and then defines a package of legal consequences entailed by occupying it. As a result, legal-status words like “citizen” convey a mix of popular and technical meaning.⁶²

We think “citizen” in 1787 worked much like this. It identified someone as an occupier of a commonly understood moral position involving moral duties to a political community. English-speakers understood, though, that law supplied the exact criteria that sorted people into the position and specified the legal

one side and protection on the other.”); *id.* at 395 (“In every civilized country the individual is born to duties and rights, the duty of allegiance and the right to protection; and these are correlative obligations, the one the price of the other, and they constitute the all-sufficient bond of union between the individual and his country . . .”).

60. The same kind of error can occur in this context (although with far less terrible normative consequences). For example, it seems facially intuitive that if in 1787 voting was intrinsic to citizenship, corporations would not count as such because they are not the type of persons that vote. But that intuition leads us astray—in England, until 1832, the franchise to vote for members of Parliament, in some cases, vested not in individuals, but in local municipal corporations (the so-called “corporation boroughs”), which exercised the vote through the corporate council of burgesses. See *Constituencies 1754-1790*, HISTORY OF PARLIAMENT, <https://www.historyofparliamentonline.org/research/constituencies/constituencies-1754-1790> (last visited Nov. 23, 2020). This points out that even if citizenship means someone “whose status entitles them to vote,” we can’t rely on our historically conditioned intuitions about a “natural category” of persons who can “vote” to decide whether corporations are or are not citizens. Nor can we simply note that corporations weren’t, in fact, given a right to vote for any office in any relevant jurisdiction in 1787 or later—perhaps, if we consult the appropriate identity criteria, we might learn some corporations are in fact “citizens” whose have been disenfranchised. Instead, we need to look more closely at other identity criteria, apart from whatever rights are intrinsic to the status, to figure out who is a proper subject of the citizen category.

61. The Taney Court also made demonstrably false claims about what the pro tanto evidence showed at the relevant fixation period. See, e.g., FEHRENBACHER, *supra* note 49, at 346–54 (noting that Taney’s argument was a “gross perversion of the facts”).

62. For more, see Miller, *supra* note 30, at 27 n.4 (distinguishing between moral and legal statuses, but noting that these statuses are not “mutually exclusive” and that some legal statuses are or ought to be “informed by a proper appreciation of moral status”); *id.* at 33 (“[S]tatuses designate categorically—i.e., they define a normative position, a position to which persons or groups are assigned through the attribution of the status.”); *id.* at 34 n.14 (arguing statuses are “abbreviating concepts” that using simplifying criteria to “sum up” a person’s legal or moral position) (quoting Jeremy Waldron, *Does “Equal Moral Status” Add Anything to Right Reason?* 3 (N.Y.U. School of L. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 11-52, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1898689); *id.* at 35 (“Statuses simplify semantically by giving us a provisional conceptual characterization of the normative position held by a person, . . . thereby relieving us of the burden of fully articulating . . . our conceptualization of that position in each and every case we might have to refer to it.”).

consequences of occupying that position. But the core moral concept and duties the term conveyed were accessible to ordinary users of the English language and drew boundaries, for lawyer and lay people alike, around who could occupy the status.

Specifically, we will show that speakers in the 1780s, while disagreeing about many particulars about the meaning of “citizenship,” agreed that to be a “citizen” was to owe a reciprocal duty of “attachment” (sometimes, but not always, described as “allegiance”) to a republican community in exchange for its protection. This attachment, in turn, was understood as an affective or solidaristic tie. As a result, part of what it meant to be a “citizen” was to be “someone who was a proper object of an expectation of an affective tie to a society or its ideals.”⁶³

To be a proper object of an expectation of solidaristic attachment to a community is to be someone who is *capable* of forming social ties. Because that is a capacity restricted to natural persons, or human beings, “citizen” was a term whose original conventional meaning was limited to a restricted set, *natural persons*. This is the claim we will develop below.

C. THE PROBLEM OF PRESUPPOSED MEANING

Before we do, though, we need to address one last evidentiary challenge and explain how we go about addressing it.

“Citizen,” we are claiming, is a sortally restrictive word—when used in a sentence, it conveys a restriction on the sort of things (“persons”) that are the word’s subject. Because, though, this sortal restriction is part of the term’s meaning, “citizen” often calls for a “presupposition”—an inference that the term’s subject meets its restrictive identity criteria.⁶⁴ If we say that “a person is a citizen,” the meaning of the term “citizen” calls for a presupposition that the “person” I’m referring to is a *natural person*. Or if we say, “the government must respect the rights of citizens,” the term citizen calls for a presupposition that I am talking about the rights of natural persons.

That in turn means that one increasingly common tool for investigating semantic meaning, corpus linguistics (or corpus analytics), turns out to be of somewhat limited use here. Corpus linguistics provides a window into meaning by aggregating data about usage, including information about the company that words keep (with a focus on words that tend to travel in close proximity to the word studied). But when the word is used in sentences like the ones above, the studied term doesn’t need help from surrounding words to convey that the subject of the term meets its restrictive identity criteria because “citizen” implies

63. In this our claim is similar to Attorney General Edward Bates’ characterization of the original meaning of the term. See *Citizenship*, 10 Op. Att’y Gen. 382, 388 (1862) (“In my opinion, the Constitution uses the word citizen only to express . . . [that the individual] is a member of the body politic, and bound to it by a reciprocal obligation of allegiance on the one side and protection on the other.”).

64. See Beaver, *supra* note 34, at 944 (“Sortally restricted predicates presuppose rather than assert that their arguments are of the appropriate sort. For example, . . . predicative use of ‘a bachelor’ presupposes that the predicated individual is adult and male.”).

that restriction.

And so, if the word “citizen” is used in a lot of sentences like the examples just given, where the “citizen’s” natural personhood is presupposed rather than made explicit in immediately surrounding text, aggregating data about words that “travel with” citizen may not be helpful. In linguistics, these words are called “collocates” and corpus linguistics allows us to identify the collocates of the word “citizen” in the late eighteenth century. Collocates of “citizen” may convey that citizen communicates something about “persons” and “rights,” without telling us whether it was a term whose meaning conveys something about the rights of *natural* persons only. A corpus analysis of the collocates of “citizen” can thus provide pro tanto evidence that the conceptual content of “citizen” was limited to natural persons, but it cannot provide decisive evidence.

The same problem recurs when we try to recover the normative content the term conveyed. As a result, uncovering the sortal restrictions embedded in the concept of “citizen” requires what one of us has called “immersion”—that is, careful study of usage in a fuller context than standard tools of corpus analytics, like the compilation of a concordance, allows.⁶⁵ We take a multi-pronged approach to that task.

First, in some contexts, immersion can be aided by historians who have already engaged in the immersive project. Below, we make liberal use of prior historical work, which support our basic claim—that in the eighteenth century, “citizen” conveyed a normative expectation of a kind of affective “tie” to a political community or its creedal ideals, limiting the term to natural persons.

We will also cross-check this historical evidence with contemporaneous statements by the framers as well as corpus-based linguistic analysis of “citizen” in a wider context than traditional corpus analytics databases allow.⁶⁶

We can do the latter linguistic analysis without having to read *everything*. Unlike classic political tracts, which often used the term in an indeterminate, generic way, literary tracts in the 1770s and 1780s use the term “citizen” sparingly. But, when the word “citizen” appears once or twice in a work, the word is usually chosen with intention, because its popular semantic content reinforces the themes of the passage in which it is used. As a result, careful critical reading of the word’s context in a wide array of period literary works turns out to be a valuable window into the popular presuppositions about “citizen’s” normative content.

The forgoing forms of evidence are all what we call “positive.” They combine to paint a picture of citizen’s positive semantic content—the duties and normative expectations the term conveyed as well as the identity criteria embedded in that normative content. We can also, finally, further corroborate

65. Solum, *Triangulating Public Meaning*, *supra* note 25, at 1649–52 (discussing immersion and distinguishing it from intellectual history).

66. For more on the use of cross-checking or triangulation in the investigation of public meaning, see *id.* at 1667–81. In order to marshal a complex array of material into a coherent historical narrative for the reader, we present this “triangulating” evidence synthetically, rather than rigidly corraling each piece of evidence into its own discrete stand-alone section.

our claims with what we call “negative” evidence—an absence of applications of “citizen” at odds with our positive claims. By itself, as we discussed earlier, evidence that citizen was only applied to natural persons in 1787 provides only pro tanto support for our conclusion,⁶⁷ but combined with the positive evidence summarized above, it is decisive.

Together all of this evidence combines to make out a strong case that “citizen” was a term for human beings (natural persons). We turn to that evidence in the next Part.

III. CORPORATIONS AND THE PUBLIC MEANING OF CITIZEN IN 1787–88

Our claim, introduced in the last Part, is that in 1787–88, the crucial period for the fixation of the original public meaning, “citizen” was a status whose positive semantic content communicated its holder’s capacity to form solidaristic or “affective” ties—a sortal criterion that limited the status to natural persons.

After a short overview of our evidentiary case for this claim in Subpart A, Subpart B turns to develop that case in detail.

Subpart B is divided between what the last Part termed “positive” and “negative” evidence.⁶⁸ The “positive evidence”—that is, evidence directly bearing on “citizen’s” positive semantic content—is developed across B.1 and B.2. B.1 presents a synthesis of previous historical accounts and new primary source evidence, in the form of contemporaneous statements by leading framers and jurists. B.2 presents our corroborating corpus-derived data. “Negative evidence,” or evidence that contemporaneous applications “fit” our claims about citizen’s positive content, is then reviewed in B.3.⁶⁹

Subpart C ends by introducing and rejecting a competing claim about the original meaning of “citizen”—one that equates “citizenship” with simple subjection to what we today would call a state’s “general jurisdiction.” We show this claim—while more congenial to the concept of corporate citizenship—involves a sense of the word that arose in American usage after Article III’s ratification. It is, therefore, no part of the Diversity Clause’s original meaning.

A. SETTING THE STAGE

Words can become associated together in word families that form a conceptual genus—they all share some basic semantic content. When new terms are added to that family, they sometimes pick up some of the distinguishing features of their semantic cousins.

This is part of the story of citizenship. It was a term that entered upon a set stage. By the 1780s, English-speaking people had a long tradition of describing the legal and moral relationship between a person and political community. And

67. See *supra* notes 38–42 and accompanying text.

68. See *supra* Part II.C.

69. See *supra* Part II.C for an overview of our use of corpus-derived evidence and negative evidence.

the words describing that relationship—“subject” and “alien”—shared a conceptual boundary, or sortal restriction. They applied only to particular kinds of persons—natural persons.

Natural born subjects were those who, because they were born under the protection of the king, had natural allegiance to him.⁷⁰ “Naturalized” subjects were, in turn, aliens who, because they had been “adopted” through the process of naturalization, enjoyed rights on similar terms as natural born subjects and were also an object of expected allegiance to the king.⁷¹ Unlike natural born subjects, their allegiance was “acquired” or volitional, not “natural born.”⁷² An “alien,” finally, was someone born out of the protection of the king, and who therefore had an allegiance to a “different Society.”⁷³

These common law state membership categories were thus a function of two variables: (1) information about circumstances of “birth” (whether one was born within or without the protection of the relevant sovereign) and (2) related information about the sovereign to whom you owed “allegiance.”

In America, the exact relationship between birth and citizenship

70. ANONYMOUS, A LAW GRAMMAR; OR, AN INTRODUCTION TO THE THEORY AND PRACTICE OF ENGLISH JURISPRUDENCE 208 (London, G. G. J. and J. Robinson; T. Whieldon; W. Clarke; and Ogilvy and Speare 1791) (“Natural-born subjects are such as are born within the dominions of the crown of England, that is within the allegiance of the King . . .”); *id.* at 208–09 (“Allegiance, both express and implied, is distinguished into two species, the one natural, the other local. Natural allegiance is such as is due from all men born within the King’s dominions . . . Local allegiance is such as is due from an alien or stranger for so long time as he continues in the King’s dominion and protection . . .”). Coke noted that birth to a temporary alien sojourner in the dominion of the King was sufficient to make a natural born subject. *Calvin’s Case* (1608) 77 Eng. Rep. 377, 384 (K.B.).

71. ANONYMOUS, *supra* note 70, at 212 (“Naturalization cannot be performed but by Act of Parliament, for by this an alien is put exactly in the same state as if he had been born in the King’s legiance, except only that he is incapable . . . of being a member of the privy council, member of parliament, &c.”). The power to “naturalize” lay exclusively with Parliament. *Id.* The King could not “naturalize” but could ameliorate the disabilities of alienage by making an alien a “denizen”—someone granted permanent residence and, with it, a lesser tranche of property rights (the right to own and convey but not to inherit or transmit property through inheritance, except in carefully defined circumstances). *Id.*; see also ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT: IN SIX BOOKS 165 (1795) (“When a foreigner becomes naturalized, he owes to the country which has adopted him, the same allegiance as a natural born subject . . .”); KETTNER, *supra* note 46, at 30–33.

72. The common law distinguished between “natural allegiance” or “*ligentia naturalis*” of the natural-born; “acquired allegiance” or “*ligentia acquisita*,” which “pertained to those who were subjects not by birth, but conquest, denization or naturalization”; and “local allegiance” or “*ligentia localis*,” the “allegiance” of visiting aliens. See KETTNER, *supra* note 46, at 17 n.18. Natural allegiance was Coke’s focus in *Calvin’s Case*. *Id.* Acquired allegiance gave the alien born subject to another sovereign a fictive “new birth” through consent of the nation and “transferred all the attributes that Coke ascribed to the allegiance owed by native Englishmen . . . [to] the adopted member.” *Id.* at 40, 42. Local allegiance was a more “limited” obligation of “obedience” to local laws during a sojourn in a foreign country under the protection of the local sovereign. *Id.* at 49; see also A GENTLEMAN OF THE INNER TEMPLE, A DIGEST OF THE LAWS OF ENGLAND. BEING A CONTINUATION OF LORD CHIEF BARON COMYN’S DIGEST, BROUGHT DOWN TO THE PRESENT TIME 3 (London, W. Strahan & M. Woodfall 1776) (describing the allegiance of a visiting alien as a “temporary local allegiance,” and contrasting it to the “permanent” natural allegiance of a subject); see also *Calvin’s Case*, 77 Eng. Rep. at 383–84 (characterizing local obedience as “wrought by the law” and “momentary and uncertain”).

73. THOMAS BLOUNT & WILLIAM NELSON, A LAW-DICTIONARY AND GLOSSARY, INTERPRETING SUCH DIFFICULT AND OBSCURE WORDS AND TERMS, AS ARE FOUND EITHER IN OUR COMMON OR STATUTE, ANCIENT OR MODERN, LAWS 29 (3d ed. 1717) (defining an “alien” as “one born in a strange Country” or “born out of the King’s allegiance”); 1 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW BY A GENTLEMAN OF THE MIDDLE TEMPLE 76 (1736) (“An alien is one born in a strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance . . .”); ANONYMOUS, *supra* note 70, at 207 (“[A]liens are such as are born out of [the King’s allegiance].”); 1 RICHARD BURN & JOHN BURN, A NEW LAW DICTIONARY 30 (London, A. Strahan & W. Woodfall 1792) (“Alien is one that is born out of the dominions of the crown of England.”).

crystallized only in the early decades of the nineteenth century.⁷⁴ And so we defer discussing that relationship in detail until Part IV’s treatment of the Fourteenth Amendment’s Citizenship Clause.⁷⁵

In this Part, we focus, instead, on the other identity criterion of common law subjecthood: allegiance. As we develop below, the “allegiance” about which the terms “subject” and “alien” conveyed information was an affective tie—a complex social attachment only real human beings can form.⁷⁶ As a result, “subject” and “alien” conveyed a basic sortal restriction. They were legal statuses of natural persons.

This sortal restriction, the Subparts below show, was ported into the new American state membership term, “citizenship” in the 1770s and 80s. Americans defined “citizens” of a community, first and foremost, persons who were properly expected to possess an affective tie to that community or its creedal values—sometimes describing that tie as “allegiance,” but also describing it using new cognate concepts in an effort to distance the American experiment from the monarchies of the Old World.

The affective tie of individuals to their community was central to citizenship; this central criterion entailed that “citizen” was, like “subject” and “alien” before it, a word for “persons” capable of complex social attachments—that is, real human beings.

B. THE AFFECTIVE TIE: THE ORIGINAL SORTAL CONTENT OF “CITIZEN”

We begin with the movement from “subject” to “citizen” and the role that allegiance plays in the conceptual structure of both terms. We will then turn to corroborating corpus evidence.

1. From the Allegiance of a “Subject” to the Affective “Tie” of a Citizen

Philip Hamburger, in his landmark survey of the English and early American law of allegiance and protection, describes allegiance as rational rule-following behavior.⁷⁷ To be a subject is to owe obedience to the law in exchange for protection—a contract formed on rationally self-interested grounds.⁷⁸

This though is not the only way to conceptualize allegiance. Judith Shklar, in one of her last published works, differentiated allegiance, and related concepts of loyalty and fidelity, from obedience.⁷⁹ Obedience, she said, involves rational rule-following behavior. Allegiance, loyalty, and fidelity are, by contrast, “deeply affective”—they involve complex solidaristic attachments either to abstract associations (loyalty), individuals (fidelity), or a fusion of both

74. See *infra* notes 213–215 and accompanying text.

75. See *infra* notes 213–248 and accompanying text.

76. See *infra* notes 78–126 and accompanying text.

77. Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1838–40 (2009).

78. *Id.* at 1839 (“Underlying the reciprocal nature of allegiance and protection was the logic of consent” and “an understanding of nature”). Blackstone’s *Commentaries*, as Hamburger notes, at times describes allegiance this way: as an obligation founded in “reason and the nature of government.” *Id.* at 1840 (quoting 1 BLACKSTONE, *supra* note 36, at *366).

79. Judith N. Shklar, *Obligation, Loyalty, Exile*, 21 POL. THEORY 181, 182–85 (1993).

(allegiance).⁸⁰

Shklar's unpacking of allegiance, in turn, comes closer than Hamburger's to capturing the rich way the word was used in the common law tradition.⁸¹ To be a subject of Great Britain was to be an object not simply of an obligation of legal obedience, but also an expectation of "affective" or solidaristic attachment to the body politic.

The conception of allegiance as a "moral and affective" bond between king and subject was mirrored, dramatically, in the greatest literature of the sixteenth and seventeenth centuries.⁸² Shakespeare described allegiance as a "love of soul"⁸³ and located allegiance "in" the "hearts" or "bosoms" of men. Thus, in *Henry IV, Part 1*, the titular king schooled Prince Hal on how to "pluck allegiance from men's hearts."⁸⁴ Or in *Henry V*, the Earl of Westmoreland describes "smooth" and duplicitous traitors who act "as if allegiance in their bosom sat, crowned with faith and constant loyalty."⁸⁵

The link between allegiance and sentiment was not, though, just a dramatic conceit. It was central to the formula of common law of subjecthood articulated in Edward Coke's seminal 1608 opinion in *Calvin's Case*.⁸⁶

"[L]igeance, and faith and trust which are her member and parts," Coke wrote, are qualities that the "finger of God" placed in the "soul" and "heart" of men.⁸⁷ As Lord Ellesmere would put in his 1609 summary of *Calvin's Case*, it was accordingly a tie that flowed only from natural persons to natural persons:

80. *Id.* at 184; *see also* NOAH PICKUS, TRUE FAITH AND ALLEGIANCE: IMMIGRATION AND AMERICAN CIVIC NATIONALISM 1 (2005) (noting that the "invocation of faith and allegiance" in the American oath of allegiance "seems to suggest something deeper, a change in one's self and belonging akin to religious conversion").

81. Hamburger's discussion of allegiance is more appropriate to the concept of "ligentia localis" or "local allegiance" or aliens within the United States, which is his primary subject. *See* Hamburger, *supra* note 77, at 1847–66 (analyzing the implications of the concept of allegiance mostly with a focus on the rights of aliens visiting or resident in the United States); *see also* KETTNER, *supra* note 46, at 49 (discussing the "limited" nature of local allegiance); *supra* note 72 and accompanying text (distinguishing forms of allegiance).

82. Elliott Visconsi, *Vinculum Fidei: The Tempest and the Law of Allegiance*, 20 LAW & LITERATURE 1, 6 (2008).

83. WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 5, sc. 1, l. 10 (referring to "[s]wearing allegiance and the love of soul").

84. WILLIAM SHAKESPEARE, HENRY IV, PART 1 act 3, sc. 2, l. 50.

85. WILLIAM SHAKESPEARE, HENRY V act 2, sc. 2, l. 4–5. In other plays, characters warn that "cold hearts freeze allegiance," a metaphor that gains its power from the idea that allegiance is seated within the "heart"; and "pray heaven, the King may never find a heart with less allegiance in it!" WILLIAM SHAKESPEARE & JOHN FLETCHER, HENRY VIII act 1, sc. 2, l. 73–74; *id.* act 5, sc. 2, l. 93–94.

86. *Calvin's Case* (1608) 77 Eng. Rep. 377, 385 (K.B.). The case arose out of controversy of the alienage status of the English and Scottish subjects of James I, who united the crowns of Scotland and England following his accession to the English throne in 1603. Brought on behalf of the infant Robert Calvin, who claimed the right of an English subject, to inherit property in England, it posed a question that Parliament had been unable to resolve—whether James' succession made the Scots subjects of England and the English subjects of Scotland. For an overview of the procedural history of *Calvin's Case*, see Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 YALE J.L. & HUMAN. 73, 80–83 (1997).

87. *Calvin's Case*, 77 Eng. Rep. at 385 ("[L]igeance, and faith and trust which are her members and parts, are qualities of the mind and soul of man . . ."); *id.* at 392 (noting the duty of allegiance "is written with the finger of God in the heart of man"). The link between natural allegiance and the soul of men was part of a broader pattern of describing "natural" or "native" laws that are "such as are implanted in us, being written in our hearts." A GENTLEMAN OF THE MIDDLE TEMPLE, THE GROUNDS AND RUDIMENTS OF LAW AND EQUITY, ALPHABETICALLY DIGESTED: CONTAINING A COLLECTION OF RULES AND MAXIMS 1 (1749) (distinguishing between "native" and positive law).

[Because] [t]his bond of allegiance . . . [or] vinculum fidei [the "bond of faith"] . . . bindeth the soul and conscience of every subject . . . , faith and allegiance cannot be framed by policie, nor put into a politick bodie. An oathe must be sworne by a natural bodie; homage and fealtie must be done by a natural bodie, a politick bodie cannot do it.⁸⁸

Allegiance was, in other words, a *human* sentiment of faith, trust, "love," and loyalty, and only a real flesh and blood person could possess, or attract, those sentiments.⁸⁹ Thus, only the fusion of the politic capacity, or protective power, of kingship, "appropriated to the natural capacity" of human representatives, could "draweth legiance."⁹⁰ And only a "natural bodie" could give it.⁹¹

In the 1780s, the term "citizen" supplanted "subject" as a label for members of the American republic.⁹² In the process, Americans recharacterized the

88. THOMAS EGERTON, LORD ELLESMERE, THE SPEECH OF THE LORD CHANCELLOR OF ENGLAND, IN THE EXCHEQUER CHAMBER, TOUCHING THE POST-NATI 101 (London 1609).

89. BACON, *supra* note 73, at 76 (describing allegiance as "Faith and Love to that Prince and Country" where the subject receives his protection); A GENTLEMAN OF THE MIDDLE TEMPLE, *supra* note 87, at 4 ("The end of kings . . . is the well governing of the people, and their strength is in the hearts of their subjects; protection and allegiance are reciprocal ties.")

90. *Calvin's Case*, 77 Eng. Rep. at 388–89.

91. EGERTON, *supra* note 88, at 101. This concept of allegiance was, in turn, the key to the case, which dealt with the status of the infant Robert Calvin, a Scot born after James assumed the English crown. The fact James wore two crowns proved to be the main barrier to finding that James' succession had made his Scottish subjects English subjects. Scots were born under the protection of the Scottish crown, Calvin's opponents argued, and so had no allegiance to the English crown. Coke, however, held this misapprehended the nature of the king and allegiance. The "king" was more than just a "crown." The king was, rather, the fusion of an "immortal" legal complex of powers and duties (a political capacity), which was personified (given "natural capacity") through progressive embodiment across a succeeding line of human beings. *Calvin's Case*, 77 Eng. Rep. at 389. This idea of the monarchy as an embodied or personified institution and allegiance as a human attachment to that institution, mediated through the real human beings who embodied it, provided the principle that resolved the dispute. The antenati (Scots born before James' accession to the English crown) were born under allegiance of James (then styled James VI, King of Scotland). But because at the time of their birth, James embodied only the Scottish, but not the English monarchy, the antenati lacked a human connection necessary to activate their allegiance to the English crown. Calvin and other postnati (those born after James accession) were in a different situation. They born under the protection of the same natural person, James, but at the time of their birth he embodied the institution of the monarchy of England as well as Scotland. That meant they and English people born under either the protection of James (now also styled James I, King of England) or (far more commonly at the time of the decision) his predecessor Queen Elizabeth, had a human relationship with an embodiment of English monarchy, thus "knit[ting] [them] together" in what the historian James Kettner called a shared "community of allegiance." See *Calvin's Case*, 77 Eng. Rep. at 381 ("As the ligatures or strings do knit together the joints of all the parts of the body, so doth ligeance join together the Sovereign and all his subject."); KETTNER, *supra* note 46, at 23–24.

92. Maximilian Koessler, "Subject," "Citizen," "National," and "Permanent Allegiance", 56 YALE L.J. 58, 58–59 (1946) ("Although the term 'citizen' appears as early as 1777 in the Articles of Confederation, the use of 'subject' as a synonym did not become obsolete before the enactment of the Federal Constitution (1787) . . ." (footnotes omitted)). Even into the early nineteenth century, treatise writers like Chancellor Kent considered the terms citizen and subject "in a degree, convertible," with "subject" a term that described the "citizen," or "republican freeman," considered in his aspect as a person subject to the laws. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258 (E.B. Clayton & James Van Norden eds., 3d ed. 1836) ("[T]he term 'citizen' seems to be appropriate to republican freemen, yet we are all equally, with the inhabitants of other countries 'subjects,' for we are equally bound by allegiance and subjection to the government and the law of the land.") (note). This particular pattern of usage is the outgrowth of a long tradition of associating "citizen" with a member of body politic considered in his "active" capacity, as someone who "serves . . . the city [or polity]," while using "subject" to describe a member of a body politic in his passive capacity, as person subject to an obligation of obedience to the law. See THOMAS HOBBS, MAN AND CITIZEN (*DE HOMINE AND DE CIVE*) 217 (Bernard Gert ed., 1991) ("[H]erein lies the difference between a free subject and a servant, that he is free indeed, who serves only the city . . ."); *id.* at 171 ("Each citizen, as also every subordinate civil person, is called the subject of him who hath the chief command."); see also WELLS, *supra* note 51, at 7–8 (medieval scholastic jurists

allegiance once owed to a monarch as the “tie” of a “citizen.”⁹³

But Gordon Wood writes, “[l]acking our modern appreciation of the force of nationalism, eighteenth-century thinkers,” like their seventeenth-century counterparts, “had difficulty conceiving of” that tie “in anything other than personal terms.”⁹⁴ And so the tie or fidelity expected of a “citizen” was often conceived, as it had long been after *Calvin’s Case*, as a personal commitment of an “individual” to other individuals. Unlike “subjecthood,” though, citizenship involved a tie not to a monarch but to one’s fellow citizens or the wider community or “society” of a republic.⁹⁵

Thus, James Madison, weighing in on a debate over the qualifications of a South Carolina candidate during the first congressional election, noted that “membership” in a republican community depends on “[the] allegiance which [we] owe to that particular society” or “new community.”⁹⁶ The allegiance to the members of that community, he argued, is “primary” and rooted in the “ties of nature.”⁹⁷ The “secondary allegiance we owe to the sovereign established by that society.”⁹⁸

The tie that made a citizen continued to be described in affective terms. In the decades before the revolution, the link between citizenship and affection was perhaps articulated most prominently in Emer de Vattel’s *Law of Nations*, first published in an English translation in 1760.

In his treatment of the duties of “citizens,” Vattel stated that every citizen is “obliged to entertain a sincere love for his country.”⁹⁹ Those who become citizens of a country have promised “to procure its safety and advantage as much as is in his power: and how can he serve it with zeal, fidelity, and courage if he

believed “‘citizen’ and ‘subject’ are not antitheses but simply two different views of human beings acting in a political capacity”; “[t]he word subditi, ‘subjects,’ . . . [did] not mean residents of subordinate territories but rather citizens as seekers of favors from their government or in obedience to the laws they have, whether directly or indirectly, helped to make.”)

93. *Talbot v. Janson*, 3 U.S. 133, 160–64 (1795) (Iredell, J.) (defining a citizen as a “member of the society,” meaning one owing “allegiance” to it); *id.* at 164 (“By allegiance, I mean, that tie by which a citizen of the United States is bound as a member of the society.”); *see also* SWIFT, *supra* note 71, at 163 (“Allegiance [of an American] is defined to be the tie, that binds the subject to the state . . .”).

94. Gordon S. Wood, *Classical Republicanism and the American Revolution*, 66 CHI.-KENT L. REV. 13, 30 (1990).

95. *Id.* (republicans conceived of the “cement” of republican society “in terms of the individual’s relationship to some other individual”); *id.* at 15 (“[R]epublicanism . . . dissolved the older monarchical connections and presented people with alternative kinds of attachments, new sorts of social relationships” that offered “new conceptions of the individual . . . and the individual’s relationship to the family, the state, and other individuals.”).

96. James Madison, *Citizenship*, in 12 THE PAPERS OF JAMES MADISON 180, 182 (Charles F. Hobson & Robert A. Rutland eds., 1979).

97. *Id.*

98. Thus, he argued, birth within a colony established a “primary” allegiance that survived the revolution, making inhabitants of the colony citizens upon the Declaration of Independence. *Id.*

99. 1 EMER DE VATTEL, *THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS* § 123, at 53 (London, J. Newberry et al. 1760) (1758) (emphasis added); *id.* § 120, at 52 (“The love and affection a man feels for the state of which he is a member, as a necessary consequence of the wise and rational love he owes to himself, since his own happiness is connected with that of his country.”). Note Vattel used the term “members” of the state and “citizens” interchangeably. *Id.* § 213, at 92 (defining “citizens” as the “members of the society”).

has not a real love for it?”¹⁰⁰

Vattel echoed a long tradition in medieval Roman law, which, since the fourteenth century, had described “citizenship” as “a *habitus*, a deeply ingrained inclination toward civic duty created by birth and fostered by upbringing.”¹⁰¹ “Born” citizens, in this civil law tradition, were those who exhibited a natural tie of a “free” man to their fellow citizens and a natural inclination to aid and support their native polity, and this natural tie gave rise to a reciprocal moral claim of protection by that polity.¹⁰² Foreigners, natives of another city, presumptively had an inborn inclination to civic attachment to that polity. But naturalization, or adoptive citizenship, could transform that alien *habitus*. “Naturalized citizens,” the historian Charlotte Wells explains, “were bound to serve their new state . . . [and early modern European jurists argued that] [i]n fulfilling [their] duties, they would gradually develop feelings of love and loyalty toward their new home,” thus becoming “true citizens.”¹⁰³

In the 1770s and 1780s, Americans described citizens in similar ways: as persons with “hearts” and “feelings” or “sentiments”¹⁰⁴ who ought to have an affective tie to their country.¹⁰⁵ The existence of this tie (implied from differing

100. *Id.* § 120, at 52.

101. WELLS, *supra* note 51, at 5 (discussing origins of early modern conceptions of citizenship in the work of scholastic Italian jurists, including Bartolus de Saxoferrato and Baldus de Ubaldis).

102. *Id.* at 6.

103. *Id.* at 6; *id.* at 31 (noting the late medieval civilians’ view that “by changing domiciles and devoting themselves to the new state—by behaving as citizens—individuals would, in time, be able to replace or at least overlay the bond to their original homeland”). As Charlotte Wells recounts, the Italian account of citizenship in turn played a formative role in sixteenth century French conceptions of national French citizenship, one that both picked up the late medieval association between citizenship and “amicable, almost familial, relations among citizens.” *Id.* at xvii, 1–15. In the seventeenth century, though, paralleling developments in English law, the French redirected their understanding of the affective ties of a citizen toward the monarch. “The state no longer appeared as a community, like a city; it was now held to be embodied in the person of the monarch. Devotion to the prince [accordingly] became the most important duty of the citizen.” *Id.* at xvii. But, in the eighteenth century, the older conception of the citizen—as someone with an affective tie or *habitus* not just to a monarchy, but to a free “community”—experienced a revival, and “helped create a base for both legal and popular understandings of citizenship in the years that led up to the [French] Revolution.” *Id.* at 130, 138. Importantly, as we will return to later on, the French revolutionaries also cast back to the sixteenth century position that “the intention to remain permanently fixed in France” was an important signal of the prospective citizen’s “loyalty to a community” and, therefore, qualification for citizenship. *Id.* at 140–42; *id.* at 32–34 (discussing role of domicile in early modern French thought); see *infra* note 187 and accompanying text.

104. THE FEDERALIST NO. 27, at 202–03 (James Madison) (Isaac Kramnick ed., 1987) (discussing the need to “familiarize” the national government to the “sight” and “feelings” of the “citizens”); James Wilson in the Pennsylvania Convention (Nov. 24, 1787), in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 138, 140 (Max Farrand ed., 1911) (referring to the “general sentiment of the citizens of America”); 8 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 397 (Worthington Chauncey Ford ed., 1907) (May 29, 1777) (arguing, in a letter directed to “fellow citizens,” that “[i]n free states an unreserved Communication of Sentiments, as well as an Union of Interests should always subsist between those who direct, and those who delegate to them the Direction of public Affairs”).

105. John Adams, Abstract of the Argument (Apr. 1761), in 2 LEGAL PAPERS OF JOHN ADAMS 134, 135 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (“The only principles of public conduct that are worthy a gentleman, or a man are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero.”); John Adams, Letter to Their High Mightiness the States-General of the United Provinces (March 19, 1782), in 5 THE REVOLUTIONARY DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES 251, 251 (Francis Wharton ed., 1888) (“What good citizen in the republic, having at heart the interest of his dear country, can dissemble or represent to himself without dismay, the sad situation to which we are reduced by the attack equally sudden, unjust, and perfidious, of the English?”); see also PICKUS, *supra* note 80, at 15 (“As with the broader discussion of citizenship during the ratification debates, no one [in the ratification and early post-ratification

circumstances, including birth or domicile or participation in the Revolution) was sometimes described as a moral fact that triggered a reciprocal obligation on the part of a republican society to extend membership and the privileges and immunities that flowed from it, and other times as a reciprocal duty that flowed *from* the extension of republican liberty to the republic's members.¹⁰⁶

Sometimes, the “sentiments” of attachment were described as “allegiance.” Writing several decades after the Revolution, for example, John Adams explained that the independence movement was a revolution in what he termed the “sentiments of allegiance”—one that, thanks to the King’s withdrawal of protection, involved a revolution in the “minds and hearts” and “affections” of the American people.¹⁰⁷ Similarly, Justice Iredell in 1795’s *Talbot v. Jansen* characterized the “tie” of a citizen as both “allegiance” and the “fix[ing]” of one’s “heart and affections” on a given country.¹⁰⁸

period] who argued about naturalization, aliens’ rights, or eligibility for officeholding disputed that attachment to America, knowledge of the rights and principles of self-governance, and adoption of the individual habits necessary for engagement in public life were the essential ingredients in forming new citizens.”); Wood, *supra* note 94, at 30 (discussing republicans’ efforts to “replac[e] [monarchy’s] social cements with other more affective, more emotional, more natural ties”). We are not aware of evidence that this conception of citizen was, as it was in France, see *supra* note 101, indebted to civil law traditions, beyond possible diffusion of that tradition by Vattel. Others have argued it reflects a fusion of common law conceptions of allegiance, a revived interest in classical thought, and the sentimentalism of the Anglo-Scottish Enlightenment. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 12 (2009) (discussing the influence of sentimentalism of Lord Shaftesbury, Francis Hutcheson, and Adam Smith on eighteenth century American thought); RICHARD C. SINOPOLI, *THE FOUNDATIONS OF AMERICAN CITIZENSHIP: LIBERALISM, THE CONSTITUTION, AND CIVIC VIRTUE* 53–62 (1992) (discussing the influence of Anglo-Scottish Enlightenment thinkers on American conceptions of citizenship).

106. For statements suggesting citizenship as a status that awarded allegiance, see, for example, Madison, *supra* note 96, at 180 (characterizing the “ties of nature” as the foundation of allegiance, which is in turn the foundation of citizenship, because the sovereign “cannot make a citizen by any act of his own”); JOEL BARLOW, *A LETTER TO THE NATIONAL CONVENTION OF FRANCE, ON THE DEFECTS IN THE CONSTITUTION OF 1791, AND THE EXTENT OF THE AMENDMENTS WHICH OUGHT TO BE APPLIED* 36 (London, J. Johnson 1793) (suggesting that the moral foundation that “entitle[s]” someone to citizenship and its privileges in a given community is the “bond” or sentiment of “brotherhood” that person possesses toward the members of that community). These claims inverted the relationship between protection and allegiance in the common law, which treated allegiance as a “debt of gratitude” for the sovereign’s protection, thus making the sovereign the active party and the subject the passive party in the moral relationship. See WILLIAM BLACKSTONE, *AN ANALYSIS OF THE LAWS OF ENGLAND* 24 (6th ed. 1771) (“Allegiance is the duty of all subjects; being the reciprocal tie of the People to the Prince, *in return for* the protection he affords them . . .” (emphasis added)); JOHN TRUSLER, *A CONCISE VIEW OF THE COMMON AND STATUTE LAW OF ENGLAND* 65 (London, W. Nicoll 1781) (“[Allegiance] is a debt of gratitude, which no change of time, place, or circumstances can cancel.”). Americans, however, also sometimes described the reciprocal relationship of the duties of citizens and republican sovereign in the traditional way, as a reciprocal duty that flowed from the fact of protection. See Alexander Hamilton, *A Second Letter from Phocion* (April 1784), in 3 *THE PAPERS OF ALEXANDER HAMILTON, 1782-1786*, at 530, 532–34 (Harold C. Syrett ed., 1962) (arguing that by accepting “protection” of the state, citizens owe, in turn, a continuing duty of “allegiance,” thus implicitly treating protection as genesis of the duty of allegiance, and allegiance as a debt of gratitude).

107. *Letter from John Adams to Hezekiah Niles, 13 February 1818*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Adams/99-02-02-6854> (last visited Nov. 23, 2020). In the years before and after ratification, Americans disagreed about whether allegiance, as opposed to some other term, was the appropriate label for the “political tie” of a citizen. Compare *Talbot v. Jansen*, 3 U.S. 133, 141 (1795) (argument of counsel for *Talbot*) (“Allegiance and citizenship, differ, indeed, in almost every characteristic. . . . Citizenship is the character of equality; allegiance is a badge of inferiority. Citizenship is constitutional; allegiance is personal. Citizenship is freedom; allegiance is servitude.”), with SWIFT, *supra* note 71, at 163 (allegiance to the United States, “derived to us from the oath of fealty, adopted in the feudal system, is materially varied from it, and instead of being a badge of slavery and vassalage, is an honourable acknowledgement of subjection to legal government”).

108. *Talbot*, 3 U.S. at 163–64 (Iredell, J., concurring).

Some, like Alexander Hamilton would (in ways that paralleled descriptions of the habitus of a citizen in the civil law tradition) describe the "tie" of a "citizen" using (patriarchal) familial metaphors: "A dispassionate and virtuous citizen . . . will regard his own country as a wife, to whom he is bound to be exclusively faithful and affectionate, and he will watch with a jealous attention every propensity of his heart to wander towards a foreign country, which he will regard as a mistress that may pervert his fidelity, and mar his happiness."¹⁰⁹

Similarly, Abigail Adams, a feminist republican, would lay her claim to the equal "character of a citizen" alongside her husband through the following verse, which analogized the affection of a citizen to the affection toward families:

My Passions too can Sometimes Soar above,
The Houshold task assign'd me, can extend
Beyond the Narrow Sphere of families,
And take great States into th' expanded Heart
As well as yours.¹¹⁰

Or, wrote Benjamin Rush, "patriotism is as much a virtue as justice, and is as necessary for the support of societies as natural affection is for support of families."¹¹¹ It is accordingly the "duty of every citizen of the Republic," to "love his fellow creatures in every part of the world, but he must cherish with a more intense and peculiar affection, the citizens [of his own state] and the United States."¹¹²

James Madison described citizenship similarly. "Hearken not to the unnatural voice," wrote Madison in *Federalist* 14, "which tells you that the people of America, knit together as they are by so many cords of affection, can no longer live together as members of the same family . . . can no longer be fellow *citizens* of one great, respectable, and flourishing empire."¹¹³

Others would characterize the tie of a "citizen" as, simply, a social or creedal "affection" or "attachment." Members of a single sovereign "union," or "citizens," wrote John Jay in *Federalist* 2 and 5, are "joined in affection" and share a "sentiment" of "attach[ment] to the same principles of government."¹¹⁴

109. Alexander Hamilton, For the Gazette of the United States (March-April 1793), in 14 THE PAPERS OF ALEXANDER HAMILTON, 1793-1793, at 267, 267 (Harold C. Syrett ed., 1969).

110. Letter from Abigail Adams to John Adams, 10 January 1783, FOUNDERS ONLINE, <http://www.masshist.org/digitaladams/archive/doc?id=L17830110aa&hi=1&query=father&tag=text&archive=all&rec=84&star=t=80&numRecs=222> (last visited Nov. 23, 2020).

111. Benjamin Rush, To His Fellow Countrymen: On Patriotism (Oct. 20, 1773), in 1 LETTERS OF BENJAMIN RUSH 83, 83 (L.H. Butterfield ed., 1951).

112. Benjamin Rush, Of the Mode of Education Proper in a Republic (1798), in THE SELECTED WRITINGS OF BENJAMIN RUSH 84, 87-96 (Dagobert D. Runes ed., 1947).

113. THE FEDERALIST NO. 14, at 144 (James Madison) (Isaac Kramnick ed., 1987) (1788) (emphasis added). For other examples of equating the tie of a citizen-subject and body politic to familial ties, see James Otis, A Vindication of the British Colonies (1765), in COLLECTED POLITICAL WRITINGS OF JAMES OTIS 183, 207 (Richard Samuelson ed., 2015) ("Our allegiance is natural, and if this be admitted of each individual in a colony, as it must be, it would be strange to deny a natural relation between two whole bodies, between all the respective parts of which a natural relation is admitted. Society is certainly natural As there is a natural relation between father and son, so is there between their two families; and so is there between a mother-state or metropolis, and its colonies.")

114. See THE FEDERALIST NO. 2, at 91-94 (John Jay) (Isaac Kramnick ed., 1987) (characterizing the

“A citizen of America may be considered in two points of view,” said James Wilson, “as a citizen of the general government, and as a citizen of the particular state in which he may reside.”¹¹⁵ A citizen of a state is, in turn, one who has formed “*local* habits and attachments.”¹¹⁶ George Mason, similarly, described the “invisible principle” of republican government as “the love, the affection, the attachment of the citizens to their laws, their freedoms, and their country.”¹¹⁷

Still others equated allegiance with “benevolence.” Thus, in *Talbot*, Justice Paterson, after defining a citizen as someone owing allegiance, noted that one of the defendants, Ballard, accused of aiding a foreign country, “was, and still is, a citizen of the United States.”¹¹⁸ “[P]erchance,” though, said Justice Paterson, “he should be a citizen of the world.” That “is a creature of the imagination, and far too refined for any republic of ancient or modern times.”¹¹⁹ “If however, he be a citizen of the *world*, the character bespeaks *universal* benevolence”—not just benevolence to a particular community—which is no less inconsistent with “roving on the ocean in quest of plunder.”¹²⁰

Employing the same association of citizenship with benevolence directed at a community, the American Mary Wollstonecraft, Judith Sergeant Murray, would, in her collection of essays and plays *The Gleaner*, metaphorically equate philanthropy itself with “citizenship” of the world, meaning a “univer[sal]” attachment of the “heart”:

Philanthropy, I know thy form divine,
Godlike benignity and truth are thine;
A citizen of the wide globe thou art,

“citizen” as a member of a “united people” who share a “tie” or “sentiment” of “attachment to the cause of Union” and “attach[ment] to the same principles of government”); THE FEDERALIST NO. 5, at 101 (John Jay) (Isaac Kramnick ed., 1987) (describing the “people” of a united sovereignty, which Jay also characterizes in other papers as the “citizens,” as people “joined in affection”); see, e.g., Noah Pickus, “*Hearken Not to the Unnatural Voice*”: *Publius and the Artifice of Attachment*, in DIVERSITY AND CITIZENSHIP: REDISCOVERING AMERICAN NATIONHOOD 63 (Gary Jeffrey Jacobsohn & Susan Dunn eds., 1996) (discussing the theme of fostering the “attachment” of citizens to a national union in *The Federalist Papers*).

115. Robert Yates’s Minutes of the Secret Debates of the Federal Convention (May 25, 1787), in 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 389, 445–46 (Jonathan Elliot ed., 2d ed. 1901).

116. *Id.* at 446 (emphasis added) (“When the state citizen acts as citizen of the ‘general government,’” he must “lay aside” those local attachments and “act for the general good of the whole.”).

117. Georgia’s first constitution thus recited that “[t]his Congress, therefore, as the representatives of the people, with whom all power originates, and for whose benefit all government is intended, [is] deeply impressed with a sense of duty to their constituents, of love to their country, and inviolable attachment to the liberties of America.” See Constitution of the Provincial Congress of the Colony of Georgia (Apr. 15, 1776), in A TREATISE ON THE CONSTITUTION OF GEORGIA § 52, at 61 (Walter McElreath ed., 1912). Similarly, its naturalization act, required applicants to demonstrate their “attachment to the Liberties and Independence of the United States of America.” An Act for Preventing Improper or Disaffected Persons Emigrating from Other Places, and Becoming Citizens of This State, in 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA pt. 2, at 162, 162–66 (Allen D. Candler ed., 1911); see also Letter from John Brown Cutting to Thomas Jefferson (September 16, 1788), in 13 THE PAPERS OF THOMAS JEFFERSON 608, 608–13 (Julian P. Boyd ed., 1956) (noting no neighboring nation has “ought to fear from us” other than the risk their subjects may “voluntarily . . . commute themselves into free citizens and thus become attached to the first empire that mankind have ever erected on the solid foundation of truth, reason or common sense”).

118. *Talbot v. Janson*, 3 U.S. 133, 153 (1795).

119. *Id.*

120. *Id.* (emphasis added).

Expansive as the universe thy heart¹²¹

Sometimes, the duty of citizen was equated with “devotion.”¹²² Or, the tie was described in new ways that harkened to the classical *vita activa* or public-regarding “virtue” of an ancient Roman citizen.¹²³ Classical sources, though, associated the virtues expected of a citizen with martial virtues—the virtue of the citizen-soldier, courage, and self-sacrifice for the good of the city.¹²⁴ But Americans, notes Gordon Wood, described the “virtue” expected of a citizen as “affability and sociability” toward fellow citizens or (in James Wilson’s words) “the natural and graceful expression of the social virtues.”¹²⁵

To be a “citizen” was thus to occupy of a moral position in relation to a particular community or its creedal values, defined variously as allegiance, benevolence, affection, love, devotion, sociability, or active attachment.

Law, of course, would not (indeed could not) compel this affection in fact, but (in an echo of the Italian civilians’ concept of how participation in republican institutions imparts a *habitus*) republican institutions would help foster it.

This was, indeed, one major theme of *The Federalist Papers*. As Hamilton put it in *Federalist 27*, the object of the new Constitution was, by ensuring sound governance, to “conciliate the respect and attachment” of “citizens” for the new “Union” by “touch[ing] the most sensible chords and put[ting] in motion the most active strings of the *human* heart.”¹²⁶

121. JUDITH SARGENT MURRAY, *No. XVI Eulogium on Philanthropy—A Letter to the Gleaner from Robert Amiticus*, in 1 *THE GLEANER: A MISCELLANEOUS PRODUCTION* 149, 149 (1798). For more on the Enlightenment tradition of equating cosmopolitan “citizenship” with “civic sentiments” of “friendship” directed toward humankind, rather than a portion of it, see Ursula Vogel, *Cosmopolitan Loyalties and Cosmopolitan Citizenship in the Enlightenment*, in *POLITICAL LOYALTY AND THE NATION-STATE* 17, 45–49 (Michael Waller & Andrew Linklater eds., 2003).

122. Thus, wrote Wilson, “[o]n the citizen under a republican government, a third duty . . . is strictly incumbent. Whenever a competition unavoidably takes place between his interest and that of the publick, to the latter the former must be the devoted sacrifice.” James Wilson, *Lectures on Law*, in 2 *THE WORKS OF THE HONOURABLE JAMES WILSON* 438–39 (Bird Wilson ed., 1804); see also Alexander Hamilton, *A Letter from Phocion to the Considerate Citizens of New York* (Jan. 1–27, 1784), in 3 *THE PAPERS OF ALEXANDER HAMILTON*, *supra* note 106, at 483, 483–97 (equating abrogation of “allegiance” to one’s country with “devot[ion] . . . to a foreign jurisdiction”).

123. For a discussion of the influence of classical idea of the *viva activa* of a citizen on early modern citizenship discourse, see WELLS, *supra* note 51, at 1–9; Wood, *supra* note 94, at 23 (the classical “virtue” of the “citizen” required “sacrifice [of] . . . private interests for the sake of the community” and “active” participation in the political life of the state).

124. Wood, *supra* note 94, at 30.

125. *Id.* at 31 (“[The] new modern [republican] virtue was associated with affability and sociability, with love and benevolence, indeed, with a new emphasis on politeness, which James Wilson and his friend William White defined in 1768 as ‘the natural and graceful expression of the social virtues.’”) (quoting Stephen A. Conrad, *Polite Foundation: Citizenship and Common Sense in James Wilson’s Republican Theory*, 1984 *SUP. CT. REV.* 359, 361 (1984)); *id.* at 30 (“These natural affinities, the love and benevolence that men felt toward each other, were akin to traditional classical republican virtue” of ancient “citizens” but “not identical to it.”); see also WOOD, *supra* note 105, at 12 (noting that in revolutionary American thought, “[v]irtue became less the harsh and martial self-sacrifice of antiquity and more the modern willingness to get along with others for the sake of peace and prosperity”).

126. *THE FEDERALIST NO. 27*, at 203 (Alexander Hamilton) (Isaac Kramnick ed., 1987) (emphasis added); see also SINOPOLI, *supra* note 105, at 102 (“Madison and Hamilton contend that the requisite civic dispositions, the sentiments and habits needed to sustain a liberal polity, are reasonably likely to develop under the proposed constitutional government. . . . [I]n time, the sentiments of allegiance, which at present principally accrued to state governments, would be transferred, in some degree, to the national one” thanks to “the soundness and durability” of national administration); PICKUS, *supra* note 80, at 38 (“[Hamilton] sought to foster a national

2. Corroborating Corpus Evidence

The forgoing examples suggest “citizen” conveyed a normative expectation of affective attachment to a body politic, limiting the term to the only class of objects that possess the capacity for such attachment, natural persons.

We employed two methods to corroborate this claim. First, using Brigham Young University’s Corpus of Founding Era American English (“COFEA”) database, we looked for adjectives that collocate to the left of citizen, since these are likely to modify citizen and thus suggest qualities or attributes associated with citizenship.¹²⁷ When we ran such test, and excluded adjectives indicating nationality (like American), the top adjectives that collocate, in a statistically significant fashion, within four words to the left of citizen, include: *Natural-born, naturalized, virtuous, privileged, meritorious, patriotic, reputable, illustrious, respectable, native, wealthy, private, dutiful, industrious, honest, peaceable, ambitious, zealous, obscure, deserving, worthy, free, valuable, modest, and benevolent.*

Of these, several—valuable, useful, patriotic, and zealous—are suggestive of the affective or virtue-oriented concept of citizenship. A number of these words—virtuous, honest, patriotic, zealous—are modifiers for human beings. And some of these terms, like patriotic and zealous, collocate with the words “sentiments” or “attachment.”¹²⁸

We then turned to look at the keywords “virtuous” and “citizen” in context to see if that context reveals what normative expectations, exactly, were associated with citizenship. Here, though, we found the overwhelming majority of KWIC concordance lines were indeterminate. Of two hundred randomly concordance lines, only a little over one-sixth (or thirty-five) of these provided context that allowed a reasonable inference of the “virtue” of a citizen. Of, these, in twenty (or slightly more than half the time) the speaker associated the “virtue” of a citizen with zeal, patriotism, attachment, or affection toward a political community. The remainder associated the citizen’s virtue with being “dispassionate”—in the older sense of other- or public-regarding, as opposed to self-interested—sobriety, courage, or industriousness.

This is all certainly suggestive. But what this evidence also indicates is that

sentiment that supported the Constitution, and less strongly the government in power . . . For Hamilton, the success of the government depended on its capacity to work its way into the daily sensibilities of the citizenry.”). Hamilton’s stated aim echoes Vattel’s advice to statesmen. *See* 1 VATTEL, *supra* note 99, § 119, at 52 (arguing that the great goal of statecraft is “to inspire the citizens with an ardent love for their country”). The link between allegiance, sentiment, and citizenship in eighteenth century discourse, we note, did not go unnoticed by later observers. In *State ex rel. M’Cready v. Hunt*, 2 Hill 1, 209–82 (S.C. App. L. & Eq. 1834), a case that arose out of the Nullification Crisis, Justice O’Neill, on a lengthy disquisition on the origins and history of the link between allegiance and citizenship, grudgingly conceded that “[i]n common discourse, perhaps, there has been some vague notion of a feeling or sentiment connected with this term.” *Id.* at 278.

127. We ran a search for collocate “*/adj” within four words to the left of “citizen*/n” and set minimum frequency to five. We ranked outcomes based on the mutual information score and discarded outcomes with a mutual information score of less than 3.0.

128. Patriotic is one of the top twenty collocates of sentiments, with a mutual information score of 4.17. Attachment is one of the top twenty collocates of zealous, with a mutual information score of 5.36.

citizenship presupposed a rich set of normative content that writers assumed "citizen," by itself, conveyed. The authors accordingly didn't always feel the need to make that content explicit—the word itself could convey normative content without needing to spell them out in surrounding text. The result, though, is that simple collocation and KWIC analysis are suggestive, but hardly decisive, windows into the presuppositions that sentences using "citizen" conveyed.

A different approach is taking an immersive deep dive into use of "citizen" by reading widely in the period. This is a difficult and time-consuming undertaking, but one plausible way to make this tractable is to identify a body of representative texts that are particularly likely, on a closer examination, to reveal the normative presuppositions that ordinary users of the English language would pick up.

Our solution is to turn to literary sources of the period, collected in Gale's Eighteenth Century Online ("ECCO") Literature and Language database. We do so for a counterintuitive reason: "Citizen" appears in a large number of works in this database across the 1770s and 1780s; but in a given work, it was used sparingly—the works we reviewed used the term only a couple of times in a volume. That's actually useful: When used infrequently in a work, the term, when it appears, was used with intention—because its normative or descriptive content reinforced the themes of the passage it occurs in. As a result, literary sources are a valuable window into the presupposed content of citizen.

We examined works in ECCO published in four periods: 1770–71, 1778–80, 1786–87, and 1789. In all, we examined 249 uses across 158 works. Of these, 52 uses, or 20%, appeared in contexts that did not shed light on the normative presuppositions that "citizen" conveyed. (These contexts often involved the use of "citizen" when distinguishing between the geographic origins of two characters. For example, an author would employ "citizen" to communicate someone was a "native" of a different place (most frequently a city) than another character.)

The remaining uses fell into five categories. In the first, citizen was chosen as a descriptor of someone who might also be termed a "burgomeister" or a "bourgeois"—a propertied man of status who lives in a city (generally of London) and is associated with commercial trades. This use of the term traded on its ancient use of "citizen" to mean a freeholder of a medieval city.¹²⁹

Second, citizen was used in passages in which the character or person so described was presented as a proper object of an expectation of loyalty, affection, or patriotic attachment to his or her polity.

Third, citizen appeared in passages conveying that someone possessed certain other virtues. For example, citizen was used in passages describing the status-holder as sober or respectable or "useful" member of society, signaling that citizen was associated with an expectation of performing civic, public-regarding duties.

129. Koessler, *supra* note 92, at 60 (discussing this medieval sense of the term, as an inhabitant of a city or town free from feudal obligations).

Fourth, citizen also appeared in passages emphasizing someone was an enjoyer of rights or privileges of a free man, thus indicating an association of citizen with liberties or legal privilege.

Finally, citizen was used in passages relating to the relative rank or status of different persons. Thus, a passage might distinguish a noble from the “common mass of citizens.” Or the term citizen would be used in a passage that emphasizes that someone was, by virtue of their citizenship, worthy of or due respect.

Of these, one set of uses—to mean a “burgomeister” or propertied urban dweller—is plainly different from the term “citizen” used in Article III. When that use (which appeared 19% of the time) is excluded from the ECCO data set, thereby limiting the set to uses relating to a member of a republic rather than a city, uses linking citizenship and civic virtue amounted to a little over three-quarters of the remaining non-neutral uses. Across all uses indicating the “virtue” of a citizen, though, nearly two-thirds of these appeared in contexts emphasizing citizens were expected to have an affective attachment to their community. In all, uses that communicated an expectation of affective attachment to a community were the most common of all non-neutral uses relating to a member of a republic—appearing with twice the frequency of the next most common use.¹³⁰

The evidence also tends to suggest authors viewed each of the senses relating to a member of a republic—senses communicating an expectation of affective attachment, expectations of other civic virtues, and enjoyment of privileges or generic status—as complementary or related. For example, in works that used the term in more than one sense (about 20% of the works in our data set), every work that used the term to connote enjoyment of privileges also used the term to signify affective attachment to a community. Similarly, in works that used the term in more than one sense, 90% of works that used the term at least once to connote civic virtue other than affective attachment also used the term in an affective sense. The fact it was relatively common for the same author to employ these senses together in a single work tends to suggest authors understood the word to convey, simultaneously, each of these meanings. “Citizen,” when used in relation to a member of a republic, signified an enjoyer of status and rights, who was the subject of a reciprocal expectation of public virtue and social attachment to the right-granting political community.

These findings are consistent with the tentative evidence of concordance-based analysis. And together with the pattern of usage of the framers and other public figures in the 1780s and 1790s, it gives rise to a solid inference: that in common parlance, “citizen,” particularly when used as a term a member of a

130. After excluding neutral uses and uses in the sense of burgomeister from the set, we were left with a set of 150 uses in 97 works. In this set, uses indicating an expectation of affective attachment appeared half the time and at least once in 61% of all remaining works. By contrast, uses conveying an expectation of other virtues appeared 26.5% of the time and at least once in 31% of remaining works; uses communicating the right-conferring nature of citizenship appeared 12.7% of the time and at least once in 17.5% of remaining works; and uses conveying relative status appeared 11% of the time and at least once in 15.4% of remaining works.

republic rather than city, conveyed a normative expectation of an affective tie to a concrete society or political community. It was a tie of “citizens” that English-speakers, in the 1770s and 1780s, hadn’t assigned a commonly accepted label or linguistic formula—but it was nonetheless a core part of the semantic content of “citizen.”

3. “Negative Evidence”

Up to this point, the evidence we’ve offered is positive—evidence of the concept that the citizenship positively conveyed. It was a term that conveyed an aspirational expectation of affective attachment to a community or its creedal values. Because it was a term defined in relation to the capacity for forming complex social ties, its meaning contained a sortal restriction that limited the term to natural persons.

A last line evidence is negative—contemporaneous statements about what citizenship in 1787 is not. Reviewing evidence that the term was not applied to certain objects or categories is essential. Terms can sometimes attract a tradition of figurative usage. The word “kill” is a verb whose root object is an animate object, something that can “live” and “die.” However, we frequently use the term in relation to inanimate objects—we might say that a flaw in an electrical system “killed” (shorted out) an electrical appliance. Thanks to this tradition, “kill” is ambiguous—it can potentially apply not just to animate objects but inanimate ones, as well. As a result, we have to disambiguate the word by looking at the context in which the word is used.

This raises the question whether “citizen” might have been like that—a word that had, in 1787, developed a tradition of figurative application to inanimate or abstract objects.¹³¹ As a result, inquiring whether the term was used *other than* in its literal sense is an important part of our larger inquiry. That evidence can both correlate our claims about its literal meaning and eliminate, at the same time, the possibility the term had developed a tradition of figurative or metaphorical usage.

One context in which speakers may have had occasion to consider applying “citizen” to inanimate or abstract objects involved the relation of the term to corporations. Corporations were sometimes conceived of a “thing” or “franchise,” which shareholders “owned.”¹³² They were simultaneously reified—that is, treated in law as if they were a real “person.”¹³³

The corporation, in the eighteenth century, was even sometimes the object of terms that had accreted a tradition of figurative use—like the term “inhabitant,” meaning an ordinary domiciliary. A corporation was thus an

131. For a discussion of “abstract objects” in the philosophy of language, see Grandy, *supra* note 31 (noting a corporation or a “government” is an “abstract object,” and discussing debates in the philosophy of language about the status of such objects).

132. 2 KENT, *supra* note 92, at 267 (“A corporation is a franchise possessed by one or more individuals, who subsist as a body politic . . .”).

133. *Id.* (the corporate “body politic” is an “invisible and intangible being” that is “vested, by the policy of the law, with the capacity . . . of acting, in several respects . . . as a single individual”).

“inhabitant” of a place it owned land and conducted its affairs.¹³⁴ And, as a result, if we were attempting to divine the original meaning of a text employing “inhabitant,” we would have to investigate whether the term was used in a sense that conveyed a literal or figurative meaning before excluding the possibility the term embraced corporations.

We can find no evidence, however, that *citizen* was used figuratively to describe corporations. In *Calvin’s Case*, Coke defined subjects as persons owing allegiance—and specified that allegiance was a commitment that can only be given by a “natural bodie,” that is, someone with a “soul.”¹³⁵ Corporations, said Coke just a few years later in the *Case of Sutton’s Hospital*, “had no souls,” and therefore “could not commit treason.”¹³⁶ The plain implication was that corporations were not “subjects.”

Fast-forward to the 1780s and early 1790s, and the seventeenth-century refusal to recognize corporations as an object of state membership-related terms, like alien or subject, persisted. Thus, in his debate with Alexander Hamilton over the first national bank, Thomas Jefferson objected that corporations allow foreigners to evade restrictions on alien ownership of property.¹³⁷ Hamilton responded by appealing to ordinary meaning of the “law of alienage”—meaning the law comprehensively governing not just the status and rights of aliens, but the law of subjecthood and citizenship.¹³⁸ That law “does not apply to corporations,” he said, because “they have no country.”¹³⁹

In this, Hamilton was largely talking past Jefferson. Jefferson did not disagree—he wasn’t claiming corporations with alien shareholders were “aliens.” Rather, he was making a practical point that “alien *subscribers*” can evade restrictions on alien property ownership through the device of the corporation, precisely because the corporate person is not subject to the law of alienage.¹⁴⁰ In either case, both speakers assumed that only the natural persons who form the corporation are appropriate recipients of terms dealing with “alienage.”

134. *Rex v. Gardner* (1774) 98 Eng. Rep. 977, 977 (K.B.) (“[C]orporations, having lands, may be rated, and have been considered as inhabitants in respect of such lands.”); 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 697, 703 (1642) (stating that “every corporation and body politicke . . . having lands” are considered inhabitants of such lands).

135. *Calvin’s Case* (1608) 77 Eng. Rep. 377, 385 (K.B.) (“[L]igeance, and faith and trust which are her members and parts, are qualities of the mind and soul of man”); *id.* at 392 (the duty of allegiance is “written with the finger of God in the heart of man”); EGERTON, *supra* note 88, at 101 (explaining that under Coke’s reasoning, only a “natural bodie” can give allegiance).

136. *The Case of Sutton’s Hospital*, (1612) 77 Eng. Rep. 960, 973 (K.B.) (finding that corporations are “invisible, immortal, and rest[] only in the intendment and consideration of the law They cannot commit treason, nor be . . . outlawed, nor excommunicate, for they have no souls”).

137. Thomas Jefferson, *Opinion on the Constitutionality of the Bank of the United States* (Feb. 15, 1791), in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES* 91, 91 (Matthew St. Clair Clark & David A. Hall eds., 1832).

138. Alexander Hamilton, *Opinion on the Constitutionality of the Bank of the United States* (Feb. 23, 1791), in *LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES*, *supra* note 137, at 95, 100.

139. *Id.*

140. Jefferson, *supra* note 137, at 91 (referring to “alien *subscribers*” of the national bank) (emphasis added).

Similarly, every major treatise after subdividing “persons” into “natural” and “artificial” categories presented citizenship or alienage as statuses applicable to natural persons while treating artificial persons, or corporations, as a topic apart from the law of natural persons, including the law of alienage.¹⁴¹ Major eighteenth-century treatments of the law of corporations, like Stewart Kyd’s *Treatise on the Law of Corporations*, also do not discuss the law of subjecthood or citizenship—indicating their writers thought this area of law was inapplicable to corporations.¹⁴²

Treaties between the United States and foreign countries dealt with the duties or rights of corporations apart from the rights of the contracting states’ citizens or subjects.¹⁴³ Similarly, Americans and other English speakers, when enumerating subjects of a law, would carefully distinguish “citizens” from “corporations.”¹⁴⁴

Of course, focusing simply on the application of “citizen” to corporations may be missing important semantic evidence. Corporations in the eighteenth century, after all, were conceptualized differently than modern corporations. As Julian Ku notes, they were sometimes treated as something more akin to “arms of the state”—in effect, a kind of quasi-governmental entity.¹⁴⁵ One, however, could imagine a pattern of figurative use of “citizen” applied to abstractions or things that have been uniformly attributed to the qualities of private persons. If so, it would be a term whose conventional usage would not apply to eighteenth-century corporations, which were often viewed as quasi-governmental entities,

141. See 1 BLACKSTONE, *supra* note 36, at *354–63 (treating of the laws of alienage); *id.* at *455–73 (treating artificial persons, after noting that the treatise’s previous sections, including alienage statuses, “considered persons in their natural capacities”). This tradition persisted long after the Supreme Court began referring to corporations as citizens of states for certain purposes in the antebellum period. See 1 BOUVIER, *supra* note 36, at 57–84 (dividing persons into natural and artificial persons, and then treating statuses of citizen, subject, and alien as statuses of natural persons); 2 KENT, *supra* note 92, at 267–316 (treating corporations under the heading “rights of persons,” but treating corporations separately from natural persons, and confining discussion of alienage statuses to natural persons only).

142. 1 STEWART KYD, *A TREATISE ON THE LAW OF CORPORATIONS*, at vii–xiv (1793) (table of contents).

143. Julian G. Ku, *The Limits of Corporate Rights Under International Law*, 12 CHI. J. INT’L L. 729, 739 (2012) (collecting authorities); see also Marcantel, *supra* note 38, at 239–41 (collecting structural evidence from some early state constitutions suggesting a distinction between citizens and corporations).

144. See, e.g., 1 KYD, *supra* note 142, *passim* (using “citizen” only in relation to members of a corporation—usually a municipal corporation, consistent with the term’s older sense of a freeman of a city—never to the corporation itself).

145. Ku, *supra* note 143, at 738 (“[T]he modern corporation probably traces its origin back only to the mid-nineteenth century. Earlier corporations, such as those [meant] . . . to carry out state monopolies . . . were special dispensations from the government In some ways, those corporations were understood to simply be privately financed arms of the state.”); *id.* at 739 (as a result, in treaties in the early nineteenth century and late eighteenth century, “[c]orporations were not . . . typically considered nationals needing protection, but more like agents acting on behalf of or under state authority”); WINKLER, *supra* note 38, at 48 (“In Blackstone’s day, . . . corporations more clearly straddled the divide between public and private. They had unambiguously private aspects, in that they were financed and managed by private parties. Yet they were also inherently public. They could only be formed by charter granted by the government, and the government would not grant one unless the corporation had a public purpose. . . . Corporations had to serve the commonweal”); Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1443–47, 1452–53, 1482 (1987) (discussing the early concept of the corporation as a “derivative tool of the state”); JAMES WILLARD HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1790*, at 17 (1970) (“From the 1780’s well into the mid-nineteenth century the most frequent and conspicuous use of the business corporation . . . was for one particular type of enterprise, that which we later called the public utility”).

but would embrace the modern corporation, which *is* pervasively described as a wholly private “person.”¹⁴⁶

However, of the 249 uses of “citizen” we reviewed on ECCO, we could not find a single instance applying the term figuratively to any abstract objects or non-human objects. Outside of ECCO, the only figurative use from the framing period that we have identified is Judith Sergeant Murray’s characterization of “philanthropy” as a “citizen of the world,” discussed earlier.¹⁴⁷ Otherwise, every use in which the identity of the term’s referent could be unambiguously ascertained used “citizen” in relation to a specific natural person or individual members of a group of natural persons.¹⁴⁸

The evidence, in other words, suggests popular usage of “citizen” was confined to its literal sense: a status reserved for animate objects capable of forming complex social ties or sentiments, namely human beings.

C. ELIMINATING A COMPETING SENSE OF “CITIZEN”

The previous Subparts showed that citizen’s 1787 meaning included a sortal restriction limiting the term to persons with capacity for social ties, or natural persons. After ratification, American courts articulated another meaning of a state “citizen”—not as a status entitling one to privileges and immunities under the domestic law of a given state, but as a term for a person who, simply, “belongs” to a state in the eyes of international law by virtue of subjection to what we would term the state’s “general jurisdiction.”

This sense is less restrictive—because its sorting criteria is, simply, “subjection to the general jurisdiction of a state,” it can encompass any objects, including artificial persons, which, while lacking sentiments, happen to satisfy the requirements for exercise of “general jurisdiction.” As such, it would do no damage to this sense of the term to extend it to modern corporations, which are, of course, proper objects of the law of general jurisdiction.

In this Subpart, we complete the picture by showing that this use developed in America only after ratification (and even then it remained an obscure specialist sense). The historical and collocation evidence above itself, indeed, tends to demonstrate this—in the 1780s, citizen was pervasively described in terms of affective or solidaristic, not just territorial, ties. And, thus, the word collocated most strongly with terms that were consistent with having either public virtue or a tie or affection to a community, rather than terms that describe

146. Mark, *supra* note 145, at 1447; *id.* at 1442–47 (tracing the emergence, after the rise of general incorporation statutes, of “the conception of the corporation as a real person, which saw the corporation as an autonomous, self-directed entity in which rights inhered”); *id.* at 1464–83 (discussing the post–realist “rhetorical convention” of describing the corporation as such).

147. See MURRAY, *supra* note 121, at 149.

148. In the ECCO database, we coded all uses that associated citizenship with affective attachment to a community as uses of the term to refer to natural persons. We coded other uses as references to natural persons when the passage in which the word appeared either (1) used the term in relation to a specific person or persons, or (2) described the “citizens” at issue as having attributes that could only belong to human beings, including ethnicity, physical characteristics (“hearts” or “blood,” for example), ancestry or progeny, or emotional states. Twenty percent of the uses in the ECCO database were too generic to support any conclusion about the identity of the class of referents.

a simple jurisdictionally relevant relationship.

Below, Subpart C.1 fills in the picture further, by tracing the somewhat unexpected source of the alternative concept of state citizen from a post-ratification line of prize and capture cases in the British Admiralty at the turn of the nineteenth century. As such, this new concept of citizen is not part of the term's pre-ratification public meaning.¹⁴⁹

This is not to say that "citizen," in 1787, had no relationship to the territorial contacts we, today, associate with general jurisdiction. Territorial contacts, we show in Subpart C.2, were legally relevant because they served as a proxy for assessing whether a candidate for "citizenship" had formed the requisite social "attachments" that were citizenship's prerequisite. As a result, the territorial contacts that mattered to citizenship reflected, and were cabined by, the fact that "citizen" was a status restricted to natural persons.

1. *The Post-Ratification Rise of "Domiciliary Citizenship" in Antebellum International Law*

In the eighteenth century, courts commonly adjudicated concepts of citizenship or subjecthood in "prize and capture" cases. During declared wars, states licensed private ships, or "privateers," to confiscate the goods of the enemy. But, in some cases, victims of confiscation disputed whether their property was a proper target of privateering, which reached only the goods with a "hostile" or enemy "character."¹⁵⁰

In England, courts held that the "enemy character will attach to a subject or neutral who carries on business in the enemy's country."¹⁵¹ However, writes William Holdsworth, this principle was not established "as a definite legal principle" until a series of cases authored by Sir William Scott for the British High Court of Admiralty in the late 1790s.¹⁵²

In *The Vigilantia*,¹⁵³ decided in 1798, Scott held someone domiciled in a foreign state for purposes of trade, even if not a naturalized "subject" of that state, was "stamped with the national character" of that state in the eyes of international law and therefore a "subject" of that state under the laws of prize

149. In Great Britain, there was a separate tradition, dating back to the Middle Ages, of using the term citizen as term for a freeman of a city or town located within a state, as opposed to a member of a state; this was a use (because the status of freemen was awarded based on guild membership) that was also associated with tradesmen. Johnson's Dictionary defined these as the exclusive sense of the word in British English in early editions. In the 1785 edition, he suggested it had expanded to encompass not just freemen, but all inhabitants of cities and towns. See 1 SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1785) (adding, for the first time, "inhabitant; dweller of any place" as a sense of citizen, in addition to "freeman of a city" or "man of trade"). We find no evidence this line of usage contributed to the popular or technical meaning of "state" citizens in America during or after the framing period.

150. *The Venus*, 12 U.S. 253, 278–80 (1814).

151. 9 WILLIAM S. HOLDSWORTH, HISTORY OF ENGLISH LAW 101 (1926). Holdsworth traces the evolution of the principle back to precursors in 1677, but notes that it was established only "as a definite legal principle" at the end of the eighteenth century. See *id.* at 101 n.2.

152. *Id.*

153. *The Vigilantia* (1798) 165 Eng. Rep. 74, 79 (Adm.); see also *The Indian Chief* (1801) 165 Eng. Rep. 367, 371 (Adm.) (holding the "national character" of a trading domicile is "adventitious" and easily reverts, upon the merchant's departure with intent to return to his native country).

and war, subjecting their property to lawful confiscation like any other subject of an enemy power.¹⁵⁴

Scott's decision was a workaround a settled piece of English law of subjecthood. Common law allegiance was perpetual—thus, British domiciliaries in foreign countries remained “subjects” of their native land.¹⁵⁵ Yet, if English domiciliaries in enemy foreign countries remained British subjects, their property was not the property of an “enemy” and thus not subject to confiscation during wartime. The concept of an acquired “national character” through a permanent trading domicile abroad created a workaround. It created a form of quasi-expatriation for purposes of the law of prize and capture.

The doctrine of perpetual allegiance, James Kettner notes, clashed with Americans' embrace, during the American Revolution, of citizenship acquired through “volitional [change in] allegiance.”¹⁵⁶ Even so, American courts remained uncertain about the continued vitality of the common law doctrine, at least on the international plane.¹⁵⁷

As a result, the concept of foreign citizenship by domicile for purposes of prize and capture had the same utility for antebellum American courts that it had for their English counterparts. It allowed Americans to reach results consistent with the right of expatriation without formally resolving whether expatriation was possible outside of a revolutionary context.¹⁵⁸

Thus, in *The Venus*,¹⁵⁹ a case involving a challenge to a licensed American privateer's confiscation of goods of naturalized American citizens who were living for trading purposes in Great Britain during the War of 1812,¹⁶⁰ Justice Washington relied on *The Vigilantia* and its progeny to hold that an American domiciled for trading purposes in an enemy state, “while not an enemy, in the

154. *The Vigilantia*, 165 Eng. Rep. at 79.

155. 1 BLACKSTONE, *supra* note 36, at *357 (stating that a subject's natural allegiance is “a debt of gratitude, which cannot be forfeited, canceled, or altered, by any change of time, place, or circumstance”). Even Englishmen naturalized in a foreign country were understood to retain a native allegiance to Great Britain. *Id.* at *358.

156. KETTNER, *supra* note 46, at 268 (“The claim that every man had the right to slough off his allegiance and to discard his citizenship was a direct extrapolation and generalization of the right of election affirmed during the Revolution.”); *see also* 2 WILLIAM BLACKSTONE, BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 96 (St. George Tucker ed., 1803) (“[T]he whole that we have seen, it appears, that the right of emigration is a right strictly natural; and that the restraints which may be imposed upon the exercise of it, are merely creatures of the *juris positivi*, or municipal laws of a state. And consequently that wherever the laws of any country do not prohibit, they permit emigration, or, as I rather chuse to call it, expatriation.”).

157. KETTNER, *supra* note 46, at 271 (“Some judges showed great reluctance to diverge too widely from the old English notion of perpetual allegiance . . .”). 2 KENT, *supra* note 92, at 42 (noting uncertainty about the right of expatriation on the international plane, and concluding that “the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered”).

158. KETTNER, *supra* note 46, at 276 (“Not surprisingly, both state and federal courts frequently preferred to evade adjudicating the question of expatriation instead of confronting it squarely; alternative legal doctrines were available that often allowed the courts to sidestep citizenship questions. Perhaps most useful was the tenet that residence or domicil could establish a person's ‘national character’ for certain purposes . . .”).

159. *See The Venus*, 12 U.S. 253 (1814).

160. *Id.* at 276.

strict sense of the word,” was nonetheless “stamp[ed] . . . with the national character of the state where he resides,” becoming “a citizen of an inferior order” of that state.¹⁶¹ The United States, accordingly, may “seize of so much of his property as is concerned in the trade of the enemy.”¹⁶²

Justice Washington, however, went one step further than Scott, by linking *The Vigilantia* to a passage from Vattel’s *Law of Nations*.¹⁶³ There, Vattel defined “[t]he inhabitants, as distinguished from citizens” to be “foreigners, who are permitted to settle and stay in the country.”¹⁶⁴ However, said Vattel, “The *perpetual inhabitants* are those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united to the society, without participating in all its advantages.”¹⁶⁵ *The Venus* equated Vattel’s concept of “perpetual inhabitants,” who are “citizens of an inferior order,” with Scott’s concept of acquisition of “national character” by domicile.¹⁶⁶

This may be a misreading of Vattel. Vattel used “inhabitant” to refer to someone residing in the state for an indefinite period, the modern test for domicile.¹⁶⁷ By contrast, by “*perpetual inhabitants*” or “citizens of an inferior order,” Vattel appeared to be thinking of beneficiaries of something akin to the English legal process of “denization,”¹⁶⁸ through which aliens and their progeny were granted a legal right of perpetual settlement (but not full rights of state membership) by a royal or some other positive legal grant.¹⁶⁹

161. *Id.* at 279.

162. *Id.* at 279–80.

163. *Id.* at 278 (“The doctrine of the prize Courts, as well as of the Courts of common law, in England, . . . is the same with what is stated by [Vattel]; except that it is less general, and confines the consequences resulting from this acquired character to the property of those persons engaged in the commerce of the country in which they reside.”).

164. 1 VATTEL, *supra* note 99, § 213, at 92.

165. *Id.*

166. *The Venus*, 12 U.S. at 278–79.

167. Thus, in a later section, he distinguishes inhabitants from sojourners, those who are temporarily in the territory of the state for a defined amount of time. 2 VATTEL, *supra* note 99, § 99, at 153 (distinguishing the “inhabitants” from the strangers “who pass or sojourn in a country” for the management of their affairs).

168. Denizens were alien domiciliaries—persons who had taken up a residence with an *animus manendi* (with an intention to remain)—who, along with their progeny, received by an act of positive law permanent protection from the sovereigns’ right to remove aliens. 1 BLACKSTONE, *supra* note 36, at *362. They owed, in turn, a perpetual allegiance. 1 EDWARD COKE, *THE SELECTED WRITINGS AND SPEECHES OF EDWARD COKE* 170 (Steve Sheppard ed., 2003) (characterizing the allegiance of a denizen as “*ligentia acquisita*” or an “acquired allegiance,” the same type of allegiance of naturalized subjects). Denizens were therefore often termed “subjects” in English law, although subjects of an inferior order to naturalized subjects. 1 BLACKSTONE, *supra* note 36, at *362.

169. See 1 VATTEL, *supra* note 99, § 213, at 92 (defining perpetual inhabitants as those “who have received the *right* of perpetual residence” (emphasis added)). Chief Justice Marshall seemed to interpret this passage in a similarly restrictive fashion. See *The Venus*, 12 U.S. at 289–91 (Marshall, J., dissenting) (noting Vattel defined a “perpetual inhabitant” as someone with the intention of “staying always”; and then noting “[t]he right of the citizens or subjects of one country to remain in another, depends on the will of the sovereign”; thus, “[i]f the stranger has not the power of making his residence perpetual, . . . an intention always to stay there ought not, I think, to be fixed” without evidence the domiciliary has been “specially permitted to stay” by the host sovereign). Gordon Sherman argued that Vattel’s concept of perpetual inhabitants had in mind the Swiss *Einwohner*, permanent legal residents granted the right of perpetual residence, who lacked full political rights. Sherman notes that the *Einwohner* were “truly . . . citizen[s] ‘in the sense of the constitution, merely lacking eligibility for public office,’” which was reserved to the Swiss patrician families. See Gordon E. Sherman, *Emancipation and Citizenship*, 15 YALE L.J. 263, 276 n.37 (1906). The German international law theorist Christian Wolff (a major

Regardless, *The Venus* not only suggested the prize law doctrine of “citizenship” was acquired by what amounts to an *ordinary* modern domicile—a mere intent to reside somewhere indefinitely—but it articulated this as a general principle of international law, one that swept well beyond the context of capture during time of war.¹⁷⁰

In the wake of *The Venus* and similar cases in the first two decades in the early nineteenth century, American international law treatises like Joseph Story’s *Conflict of Laws* and Henry Wheaton’s *Elements of International Law*, would characterize the doctrine of international law “citizenship” similarly.¹⁷¹ And in 1853, the State Department made this the official doctrine of the United States in the so-called Kostza Affair, a dispute over Austria’s seizure and imprisonment of a refugee, Martin Koszta, domiciled in America who had not yet become a naturalized American citizen.

In the process, the Secretary of State made explicit an idea that was, arguably, implicit in *The Vigilantia*. Domicile, Scott had said, “stamped” or “impressed” the domiciliary with the national character of his chosen home in the eyes of prize law.¹⁷² The metaphor of “stamping” or “impressing” a character suggested that the status of citizen is not acquired voluntarily, but is simply a label for someone who “belongs” to the state by virtue of being subject to the state’s unalloyed territorial power.¹⁷³

Secretary of State Marcy seized on this implication to justify American

influence on Vattel), by contrast, *did* classify all alien visitors, even those sojourning in the country for a limited time, as “temporary citizens.” 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* [THE LAW OF NATIONS TREATED ACCORDING TO A SCIENTIFIC METHOD] §§ 303–04 (Joseph H. Drake trans., 1934) (1764) (“[F]oreigners, as long as they dwell in alien territory or stay there, are temporary citizens. For when they enter an alien territory they tacitly bind themselves that they wish to subject their acts to the laws of the place, and the laws have the same force over them as over citizens.”). His view was, however, was an outlier among eighteenth century international law writers, and we can find no evidence that it had an impact on American conceptions of citizenship. See GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 12 (1996) (alluding to the fact that Wolff’s definition of “citizen” was broader than other theorists).

170. *The Venus*, 12 U.S. at 278 (characterizing the British prize cases as consistent the general principle of international law, but noting that the British cases operate a “less general” manner confined to prize and capture during wartime).

171. For example, in his 1834 treatise *Conflict of Laws*, Joseph Story declared that while “[p]ersons who are born in a country are generally deemed to be citizens and subjects of that country,” citizens who establish a domicile in foreign country “acquire[]” the “national character” of that country. JOSEPH STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES* § 48, at 47–49 (Boston, Hillard Gray & Co. 1834) (citing *The Venus*, Vattel, and the admiralty decisions by Sir Walter Scott) (discussing the principles of “public law” of “unquestioned authority” relating to domicile in foreign countries). However, citing Scott’s decision in *The Indian Chief*, Story noted the party “reacquires” the character of his native domicile when “has left the country *animo non revertendi* and is on his return to his ‘native country.’” *Id.* The American Henry Wheaton’s *Elements of International Law*, published in 1836, also described these same rules as a general principle of international law. 4 HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* § 319, at 42 (London, B. Fellowes, Ludgate St. 1832) (“Whatever may be the extent of claims of a man’s native country upon his political allegiance, there can be no doubt that the natural-born subject of one country may become the citizen of another, in time of peace, for the purposes of trade” through establishing an “acquired domicile” there).

172. *The Vigilantia* (1798) 165 Eng. Rep. 74, 79 (Adm.).

173. Koessler, *supra* note 92, at 62–63 (discussing this concept and noting modern usage calls it “nationality,” while alluding to earlier use of the term “citizen” to convey the same idea); Dudley O. McGovney, *American Citizenship*, 11 COLUM. L. REV. 231, 235–36, 258–59 (1911) (similarly defining “nationality” as the status of “belonging” to a state, and noting that in its broadest sense it embraces persons who have a simple domicile in a state, while arguing the term should be understood in a narrower sense).

assertion of authority of Kostza, a non-citizen. International law, wrote Secretary Marcy, “has clear and distinct rules of its own,” independent of “municipal codes.”¹⁷⁴ “Foreigners may, and often do, acquire a domicile in a country, even though they have entered it with the avowed intention not to become naturalized citizens[;] . . . and, wherever they acquire a domicile, international law at once impresses upon them the national character of the country of that domicile. . . . [I]t forces it upon him often very much against his will”¹⁷⁵ This impressed “national character” Marcy called “nationality,” and he argued it enjoins other countries to respect the American domiciliary “as an American citizen.”¹⁷⁶ Contemporaneous (and later) commentators noted the Secretary of State’s debt to the turn-of-the-century prize cases.¹⁷⁷

Then, just a few years later, in 1858, the abolitionist lawyer John Codman Hurd, in his magisterial treatise *The Law of Freedom and Bondage in the United States* would explicitly connect Article III citizenship to “international law,” while articulating that law in ways reminiscent of the State Department in the Koszta Affair: In Article III, he would argue, “persons are . . . called citizens in reference to that element in the definition of citizen which ordinarily determines questions of personal jurisdiction in the application of international private law, and . . . has no reference to the civil or political liberty, (privileges and immunities of legal persons,) but simply to their quality of being legal persons, domiciled in this or that forum of jurisdiction.”¹⁷⁸

2. *The Distinct Role of Domicile in the Framing Era Law of Citizenship*

This concept of state “citizenship”—as a “legal person” subject to the general “personal jurisdiction” of a state¹⁷⁹—is essentially the concept of Article III citizenship articulated, in so many words, in the modern law of federal

174. Mr. Marcy to Mr. Hulsemann (Sept. 26, 1853), in CORRESPONDENCE BETWEEN THE SECRETARY OF STATE AND THE CHARGE D’AFFAIRES OF AUSTRIA RELATIVE TO THE CASE OF MARTIN KOSZTA 18 (U.S. Dep’t of State trans., 1853).

175. *Id.*

176. *Id.* (emphasis added).

177. *Id.* In 1858, English international law scholar John Westlake would criticize the Secretary of State for over-generalizing from Scott’s capture cases. Westlake argued instead these cases should be confined to the narrow context of property rights in a declared war. JOHN WESTLAKE, A TREATISE ON PRIVATE INTERNATIONAL LAW, OR THE CONFLICT OF LAWS 49–50 (London, W. Maxwell 1858) (noting in the course of discussing the Hulsemann Letter that while it “may require that the protection enjoyed in time of war by property . . . shall be founded on domicile,” it is “scarcely” the case that “one whose avowed intention it was not to be naturalized should . . . be treated as naturalized when beyond the territory” in other contexts); see also McGovney, *supra* note 173, at 249 (“So far as Secretary Marcy based Kostza’s alleged ‘national character’ upon his domicile in the United States he was applying rules applicable to the entirely different matter of the quasi-nationality recognized in prize law . . .”).

178. 1 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES § 372, at 436 (Boston, Little, Brown & Co. 1858). It would take a century for writers to distinguish the two concepts of citizenship, by reserving the word “national” (the term alternatively suggested by Secretary Marcy) for the status of “belonging to a state” in the eyes of international law, while reserving the term “citizen” for a person entitled to municipal rights and privileges under domestic law. See Koessler, *supra* note 92, at 62–63 (“‘Citizenship,’ in modern usage, is not a synonym of nationality or a term generally used for the status of belonging to a state”; “the trend is to reserve the term ‘national’ for the designation of that status by virtue of which a person, internationally, belongs to a certain state, and to speak of ‘citizenship’ when the local status referred to is one of domestic rather than international law”).

179. HURD, *supra* note 178, at 436.

jurisdiction that gradually emerged in the twentieth century. It can, obviously, embrace modern corporations as well as natural persons. Corporations, qua corporations, don't have sentiments or emotional attachments, but modern corporations can form the type of territorial connections that subject them to a state's general "jurisdiction."¹⁸⁰

As a result, if "citizen" is simply a term for persons conceptualized as having territorial ties that subject them to a state's general "jurisdiction," it is a concept that can extend—as Hurd implied—to any "legal person," including the modern corporation.

Yet, this use of "citizen"—as a term for "belonging" to a state in the eyes of international law through simple subjection to a state's general jurisdiction through a "domicile"—is simply not on display in popular American discourse prior to 1800.

Typically, Americans used "inhabitant" to mean anyone domiciled in a state, a sense that embraced both "citizens" and aliens who had not been naturalized, including but not limited to formal "denizens" (a status whose conferral an order-in-council "effectively halted" in the colonies after 1700, but was revived by some states post-independence).¹⁸¹ Thus, said Delaware's High Court of Errors and Appeals in 1819, the term inhabitant "comprehends the inhabitants generally, citizen and alien."¹⁸²

In *Federalist* 42, in the course of critiquing Article IV of the Articles of Confederation (its "Comity Clause"), James Madison noted this was the more common sense of "inhabitant."¹⁸³ The Articles' "Comity Clause," granted the "privileges and immunities of free citizens of the several states" to the "free inhabitants of each of these states."¹⁸⁴ And, complained Madison, "it seems to be a construction scarcely avoidable . . . that those who come under the denomination of FREE INHABITANTS of a State, although not citizens of such State, are entitled, in every other State, to all the privileges of FREE CITIZENS of the latter; that is, to greater privileges than they may be entitled to in their own State."¹⁸⁵ That construction was "scarcely avoidable" because "inhabitants" ordinarily meant a simple "domiciliary," a term that could embrace not only

180. The concept of corporations as "subject" to a state's power is, indeed, hardly modern. Although corporations were not called "subjects" in ordinary discourse, see *supra* notes 135–144, Thomas Hobbes characterized them as such in *De Cive*, because they, along with "citizens," are "subject of him who hath the chief command." HOBBS, *supra* note 92, ch. 5, §§ 10–11, at 170–71 ("companies of merchants," "convents," and other corporate entities, which Hobbes calls "civil persons subordinate to the city," are formed by the "citizens" of the "city"; and they are called, along with the "citizens" who compose them, "the subject of him who hath the chief command").

181. KETTNER, *supra* note 46, at 95; Alexander Hamilton, Motion on Citizenship Requirement for Membership in the House of Representatives (August 13, 1787), in 4 THE PAPERS OF ALEXANDER HAMILTON, 1787-1788, at 234, 234 (Harold C. Syrett ed., 1962) (moving that the "section be so altered as to require merely citizenship and inhabitancy").

182. *Douglass' Adm'r v. Stevens*, 2 Del. Cas. 489, 500 (1819). The distinction continued well into the antebellum period. See *Quinby v. Duncan*, 4 Del. 383, 384 (Super. Ct. 1846) ("A man may be a citizen, without being an inhabitant, of the State; as a man may be an inhabitant, without being a citizen. This is an obvious distinction . . .").

183. THE FEDERALIST NO. 42, at 277–78 (James Madison) (Isaac Kramnick ed., 1987).

184. *Id.*

185. *Id.*

citizens, but also non-citizens.

However, Madison also noted that “inhabitant” also might mean “citizen alone”—meaning either a native or an alien who had been “naturaliz[ed].”¹⁸⁶ And he noted if “such an exposition of the term ‘inhabitants’ were admitted” it would solve many problems with the Comity Clause of the Articles of Confederation. (And for precisely this reason, Madison explained, the Constitution of 1787 adopted the substance of the Comity Clause, while substituting “citizen” for “inhabitant.”)

The use of “inhabitants” to mean “citizens” was, as Madison suggested, unusual—but it was far from unknown in ordinary discourse in the 1780s. Americans sometimes treated “inhabitant” and “citizen” as interchangeable—but they did so because domicile was one of the common prerequisites for state “member”- or “citizen”-ship in the Articles period.

The reason for this linkage lay in the pre-ratification link between citizenship and social ties or attachments unpacked earlier. To be a citizen was, at a minimum, to be someone who was a proper object of an expectation of affective attachment to a state. Domicile, in turn, was commonly considered one relation between person and state that justified that expectation.

This view of the link between domicile and citizenship spanned both revolutionary movements at the end of the eighteenth century, the American and the French.

The French, in the Constitution of 1791, distinguished between passive and active citizens. Passive citizens enjoyed equal civil rights, but could not vote or hold office, while active citizens also held the elective franchise. As Charlotte Wells writes, qualifying for the entry-level tier of “passive citizenship” in turn required “the individual’s choice to be French as indicated by residence on French soil,” a choice that signaled “loyalty to a community espousing democratic and egalitarian ideals.”¹⁸⁷

The idea that domicile indicated voluntary attachment to a state was equally current in America. For example, Jefferson, writing in 1776 to Edmund Pendleton, noted that he was “for extending the right of suffrage (or in other words the rights of a citizen) to all who had a permanent intention of living in the country.”¹⁸⁸ “Take what circumstances you please as evidence of this,” explained Jefferson, “either the having resided a certain time, or having a family,

186. *Id.*

187. WELLS, *supra* note 51, at 142. As Wells notes, the idea that domicile was essential to forming an attachment to a community had deep roots in Western legal thought. *See id.* at 33 (discussing the influence, in early modern France, of the fifteenth century view that “a change in domicile . . . could eventually alter the inborn *habitus* of ancestral citizenship”).

188. *Letter from Thomas Jefferson to Edmund Pendleton, Philadelphia, Aug. 26, 1776*, YALE L. SCH. LILLIAN GOLDMAN L. LIBRARY: THE AVALON PROJECT, http://avalon.law.yale.edu/18th_century/let9.asp (last visited Nov. 23, 2020). Even those who argued for relaxing domicile or residence periods as test for citizenship conceded that affective attachment was a criterion for citizenship. Instead, radicals of the period, like the Paineite Joel Barlow, contended that residency periods, or even domicile, were no longer necessary to secure emigrants’ attachment to republican communities, because the spread of republican liberty would lead the “citizens of one state [to] consider those of any other state as their brothers,” and so “a mere declaration of their intention of residence will be sufficient to entitle them to all the rights that the natives possess.” *See* BARLOW, *supra* note 106, at 36.

or having property, any or all of them. Whoever intends to live in a country must wish that country well, [and] has a natural right of assisting in the preservation of it.”¹⁸⁹

Consistent with the view that an intention of living in the state indicated attachment to it, most American states, in addition to an oath of allegiance, either required an intention to “settle,” “remain,” or establish a domicile in the state;¹⁹⁰ or satisfaction of “a specific period of residence”¹⁹¹ as a prerequisite to become a naturalized “citizen”¹⁹² during the Articles of Confederation period.¹⁹³ As

189. *Letter from Jefferson*, *supra* note 188.

190. KETTNER, *supra* note 46, at 214–18; *see also* An Act for Preventing Improper or Disaffected Persons, *supra* note 117, at 162–66 (specifying that applicants for naturalization must have an “intent to remain” within the state and demonstrate their “Attachment to the Liberties and Independence of the United States of America”); N.J. HIST. RECS. PROGRAM, GUIDE TO NATURALIZATION RECORDS IN NEW JERSEY 3 (1941) (“[A]ll Inhabitants of this Colony of full age who are worth fifty pounds, Proclamation money, clear Estate in the same, and have resided within the county in which they claim a vote for 12 months immediately preceding the election, shall be entitled to vote for representatives in council and assembly, and also for all other public officers that shall be elected by the people of the county at large.” (quoting Act of July 2, 1776)); PA. CONST. of 1776 § 42, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3081, 3091 (Francis Newton Thorpe, ed., 1909) (“Every foreigner of good character who comes to settle in this state, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer land or other real estate; and after one year’s residence, shall be deemed a free denizen thereof, and entitled to all the rights of a natural born subject of this state, except that he shall not be capable of being elected a representative until after two years residence.”); N.C. CONST. of 1776, art. XL, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2787, 2793–94 (“[E]very foreigner, who comes to settle in this State, having first taken an oath of allegiance to the same, may purchase, or, by other means, acquire, hold, and transfer land, or other real estate; and after one year’s residence, shall be deemed a free citizen.”); N.Y. CONST. of 1777, art. XLII, *in* 5 THE FEDERAL AND STATE CONSTITUTIONS, *supra*, at 2623, 2637–38 (“[I]t shall be in the discretion of the legislature to naturalize all such persons, and in such manner, as they shall think proper. *Provided*, All such of the persons so to be by them naturalized, as being born in parts beyond sea, and out of the United States of America, shall come to settle in and become subjects of this State, shall take an oath of allegiance to this State, and abjure and renounce all allegiance and subjection to all and every foreign king, prince, potentate, and State in all matters, ecclesiastical as well as civil.”); VT. CONST. of 1777, art. XLIII, § XXXVIII, *in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 3737, 3747–48 (Francis Newton Thorpe, ed., 1909) (“Every foreigner of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold, and transfer, land or other real estate; and after one years residence, shall be deemed a free denizen thereof, and intitled to all the rights of a natural born subject of this State; except that he shall not be capable of being elected a representative, until after two years residence.”).

191. *See* Thomas Johnson, An Act for Naturalization, *in* 1 THE LAWS OF MARYLAND 362, 362–64 (Virgil Maxcy, ed., 1811) (declaring the intention of the act of naturalization is to encourage foreigners to “settle” in the state, but requiring only a declaration of “belief in the Christian religion” and an oath that the application will be “faithful and bear true allegiance to the state” to naturalize foreigners, while also requiring residence for a specified period of years to hold public office); An Act Declaring Who Shall Be Deemed Citizens of this Commonwealth, *in* 10 THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 129, 129–130 (William Waller Hening, ed., 1822) (providing “[t]hat all white persons born within the territory of this commonwealth, and all who have resided therein two years next before the passing of this act; and all who shall hereafter migrate into the same, other than alien enemies, and shall before any court of record, given satisfactory proof by their own oath or affirmation that they intend to reside therein; and moreover shall give assurance of fidelity to the commonwealth” are citizens).

192. Some states, like Pennsylvania, Vermont, and New York, used the traditional term subject, rather than “citizen,” which became the preferred term for state membership only in the latter half of the 1780s. *See* Koessler, *supra* note 92, at 58–59. In oral argument in *Respublica v. Chapman*, decided in 1781, the attorney general of Pennsylvania interpreted the appellation to be synonymous with “citizen,” and Justice McKean treated citizens and subjects as interchangeable terms. *See* *Respublica v. Chapman*, 1 U.S. 53, 56 (1781) (comparing Pennsylvania’s provisions to provisions relating to citizenship in other states). Authorities in other states treated their reference to “subjects” similarly. Koessler, *supra* note 92, at 58–59.

193. KETTNER, *supra* note 46, at 218.

Kettner explains,

The assumption underlying residence requirements was that the exercise of political rights required a clear and conscious attachment to and familiarity with republican principles. . . . [T]ime alone could insure that those imbued with “foreign principles” had the opportunity to assimilate the habits, values, and modes of thought necessary for responsible participation in a virtuous, self-governing republican community.¹⁹⁴

In most states, a continued inhabitation in the state after the Declaration of Independence was also a requirement for citizenship of adult *natives*.¹⁹⁵ The reason lay with the common law rule in *Calvin’s Case*, which equated nativity with subjection only to the sovereign under whose protection one was born.¹⁹⁶ Thus, an adult born in the colony prior to the Revolution was not, by virtue of that birth, a citizen in the newly independent states, since their sovereign political authority did not exist at the time of his birth. In a revolutionary setting, some new act demonstrating volitional “allegiance” or “attachment” to a newly constituted body politic was therefore needed to naturalize adult natives of the colonies.¹⁹⁷ States settled on continued “residence” or “inhabitation” (or maintaining a “domicile” in the state) as that act.¹⁹⁸ And so, as the Supreme Court would comment years later, “after the colonies had become the United States, . . . their inhabitants [were] generally citizens of those States.”¹⁹⁹

That led many Americans to use “inhabitant” and “citizen” interchangeably. For example, in 1782 New York enacted a statute staying suits for debts “by, or from any person nor within the enemies power or lines that has remained with, gone into, or has in consequence of any of law this State been sent within the enemies power.”²⁰⁰ The statute’s preamble characterized the

194. *Id.* at 218–19.

195. *Id.* at 183–84 (“[I]n the eyes of ‘patriot’ authorities, the circumstances of [loyalists’] birth, residence, or behavior sufficed in law to prove them citizens of the new states. Their continued residence under the new republican governments after independence evinced their choice of allegiance, and adherence to Great Britain thereafter proved them not loyal subjects but disloyal citizens.”); Hamilton, *supra* note 106, at 533 (“By the declaration of Independence on the 4th of July, in the year 1776, acceded to by our Convention on the ninth, the late colony of New-York became an independent state. All the inhabitants, who were subjects under the former government, and who did not withdraw themselves upon the change which took place, were to be considered as citizens, owing allegiance to the new government. This, at least, is the legal presumption; and this was the principle, in fact, upon which all the measures of our public councils have been grounded.”).

196. *See, e.g.*, Dawson’s Lessee v. Godfrey, 8 U.S. 321, 322–23 (1807) (holding that those who were born under the allegiance of Great Britain and who never changed allegiance to the new American government are aliens); *see also* Bernadette Meyler, *The Gestation of Birthright Citizenship, 1868-1898 States’ Rights, the Law of Nations, and Mutual Consent*, 15 GEO. IMMIGR. L.J. 519, 527–29 (2001) (discussing reliance on *Calvin’s Case* in post-revolutionary litigation concerning the inheritance rights of those born before the revolution).

197. KETTNER, *supra* note 46, at 183–84. The insistence on an act of volitional allegiance may also have reflected the Lockean view, current among some of the framing generation, that citizenship required a voluntary choice of affiliation. Consistent with this view, some in the 1780s believed that “birth” could not confer full citizenship—one had to continue to affiliate with the state upon one’s majority to become an actual “citizen.” *See* SMITH, *supra* note 46, at 130 (noting Locke’s view that “children were not members of any political community”).

198. KETTNER, *supra* note 46, at 183–84, 193–98.

199. *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. 99, 122 (1830).

200. An Act Relative to Debts Due to Persons Within Enemies Lines (July 12, 1782), in LAWS OF THE STATE OF NEW YORK, PASSED AT POUGHKEEPSIE, IN THE FIRST MEETING OF THE SIXTH SESSION OF THE LEGISLATURE 499, 499 (1782).

persons who remained or had gone into enemy lines as “inhabitants” of the state.²⁰¹

After the Revolutionary War, some New Yorkers argued the act affected enforcement actions by *British* creditors who had remained or gone into enemy territory. Alexander Hamilton, however, argued the term “inhabitants” referred, in context, to New York *citizens* who were “within the enemy’s power or lines.” It did not apply to “*British subjects*” in British-controlled territory.²⁰² The text of the statute itself supported his argument, because the statute referred, later in act, to the New York inhabitants at issue as state “citizens.”²⁰³ The statute thus stayed actions for debts by New Yorkers whose attachment or loyalty to New York was in question because they had taken up a domicile in enemy territory but did not reach ordinary British subjects.²⁰⁴ Other examples of similar usage recur during revolutionary and post-revolutionary period.²⁰⁵

The upshot was that in 1787 citizenship and domicile were associated terms. But citizenship in 1787 remained a concept that communicated an expectation of attachment or social ties. Domicile, in turn, mattered to citizenship as a legal matter because it was a common legal proxy for affective attachment to a community on which the status of citizen was predicated.

It’s likely that the link between domicile and social attachment also played a role, at least initially, in the nineteenth-century prize cases themselves. The link between domicile and affective attachment, after all, extended well into the late antebellum period. Even as late as 1858, the influential English international law scholar John Westlake would characterize the test for changing a legal domicile in “international private law” (the term, at the time, for the principles of conflict of laws) as a test for assessing whether one has “transfer[red] the sentiments of home” by forming “attachments” to a new locality.²⁰⁶

As a result, at the turn of the nineteenth century, domicile in a foreign state may have suggested the American abroad had formed enough of an actual, functional attachment to a foreign territory to justify confiscation of an American citizen’s property as the property of an “enemy,” although not enough

201. *Id.* (“Whereas many of the inhabitants of this State who have not remained within the enemies [sic] power, and who were indebted to others who did so remain . . .”).

202. Alexander Hamilton, Philo Camillus No. 3 (August 12, 1795), in 19 THE PAPERS OF ALEXANDER HAMILTON, 1795-1795, at 124, 134 (Harold C. Syrett ed., 1973) (“It was natural too to understand the word inhabitants as equivalent to citizens” and in contradistinction to “British subjects”). Hamilton also noted that this was a narrow construction of the term, implying the usual sense of inhabitant was broader than citizen.

203. An Act Relative to Debts Due to Persons, *supra* note 200, at 499 (referring to the “relief of such Citizens of this State”).

204. Hamilton, *supra* note 106, at 533 (“By the declaration of Independence on the 4th of July, in the year 1776, acceded to by our Convention on the ninth, the late colony of New-York became an independent state. All the inhabitants, who were subjects under the former government, and who did not withdraw themselves upon the change which took place, were to be considered as citizens, owing allegiance to the new government. This, at least, is the legal presumption; and this was the principle, in fact, upon which all the measures of our public councils have been grounded.”).

205. *See* 8 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 104, at 397 (May 29, 1777) (letter addressed to the “Inhabitants of the United States of America,” with the salutation “Friends and Fellow-Citizens”); 22 JOURNALS OF THE CONTINENTAL CONGRESS, at 341 (Gaillard Hunt ed., 1914) (June 21, 1782) (referring interchangeably to “citizens” and “inhabitants” of the United States).

206. WESTLAKE, *supra* note 177, at 41.

to justify a criminal prosecution.²⁰⁷ (This was exactly the same result—vulnerability to confiscation in times of war, but no criminal jeopardy—that would obtain if America, at the time, had recognized a formal right of expatriation).²⁰⁸

The result was that, in early nineteenth-century international law, the word “citizen” was drafted to convey a presumption of a functional attachment to a foreign political community through a change in domicile, serving as a make-shift bridge to Congress’s eventual recognition of a formal right of expatriation in American law after the Civil War.²⁰⁹

On a parallel track (and perhaps influenced both by the typical pre-ratification requirements for state citizenship as well as evolving international law standards), the concept of citizenship through domicile helped select a unique state to which each American was attached, in a way that made coherent sense of the Constitution’s language and structure. The Privileges and Immunities Clause prospectively qualified each native or naturalized citizen of the United States for the enjoyment of rights of citizenship in every state²¹⁰—but it would take an act of purposeful attachment to a given state, indicated by a choice of domicile, to make one a “citizen” of a particular state within the meaning of Article III.²¹¹

In either case, these new uses of the term preserved continuity with a legal and popular view, in the decade after the revolution, that “citizenship” communicated an expectation that one had formed a voluntary “attachment” or the “sentiments of home” in relation to a particular political community.

IV. CORPORATIONS AND THE FOURTEENTH AMENDMENT CITIZENSHIP CLAUSE

The end of the eighteenth century isn’t the only period with which originalists must be concerned. In 1868, the Fourteenth Amendment added what the original constitution lacked—a general definition of national and state citizenship.

Because each term in the Fourteenth Amendment’s Citizenship Clause

207. This conception of the role of domicile seemed to animate Justice Marshall’s dissent (his longest) in *The Venus*. See *The Venus*, 12 U.S. 253, 291–92 (1814) (Marshall, J., dissenting) (“The stranger merely residing in a country during peace, however long his stay, and whatever his employment, provided it be such as strangers may engage in, cannot, on the principles of national law, be considered as incorporated into that society, so as, immediately on a declaration of war, to become the enemy of his own.”).

208. KETTNER, *supra* note 46, at 277–78.

209. Expatriation Act of 1868, 15 Stat. 223 (1868) (current version at 8 U.S.C. § 1841).

210. *Prentiss v. Barton*, 19 F. Cas. 1276, 1276 (C.C.D. Va. 1819) (noting that the privileges-and-immunities clause makes the citizens of each state to a degree “citizens of the several states,” but noting the judiciary article nonetheless makes “a distinction between them, in their right to sue in Courts of the union,” since, otherwise, citizens of the states could never qualify for diversity jurisdiction).

211. Chief Justice Marshall, who articulated the basic criteria for Article III citizenship in *Prentiss v. Barton*, seemed to allude to this view of the domicile requirement for Article III citizenship. He described establishing a domicile in the state as being “incorporated into the body of the state.” *Prentiss*, 19 F. Cas. at 1276–77. *But see* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 631 (Boston, Hillard, Gray, & Co. 1833) (suggesting that a change in inhabitation changes state citizenship through the operation of the Privileges and Immunities Clause, rather than through a change in allegiance).

employs operative sortal terms—“born” and “naturalized”—applicable only to real human beings, the Citizenship Clause, while settling profound questions about who is part of the American political community, didn’t expand the term beyond its original natural person boundary. Rather, it ratified a continuing popular association of citizens with natural persons.

Below we review the evidence.

A. “BORN” AND “NATURALIZED”: THE OPERATIVE TERMS OF THE CITIZENSHIP CLAUSE

Under the unique demands of the immediate post-revolutionary period, Americans, we showed above,²¹² employed the solidaristic concept of volitional allegiance as the principal mechanism for sorting between American “citizens” and “non-citizens.” After the revolution, citizens were those who formed a solidaristic attachment to the new republic by tacitly or expressly pledging their faith to the newly independent American states.

In the common law formula for subjecthood, though, subjects were either “born” or “naturalized.” Those born under the protection of a new political community presumptively had a natural attachment—“faith and love”—toward the community of their birth, making them “natural” subjects.²¹³ Those who acquired an attachment not native to them through continued residence could be rewarded with subjecthood via naturalization.

While these common law criteria appeared inconsistently in linguistic evidence for the meaning of citizen in the lead up to 1787, the Constitution, by making “natural born citizenship” of the United States a qualification for the Presidency while giving Congress the power of “naturalization,” seemed to ratify both parts of the common law formula.²¹⁴

And after 1787, “birth in the allegiance” of the United States and naturalization became popularly understood as the two paths to American “citizenship.”²¹⁵ Yet, for those Americans bent on excluding free blacks from equal rights, awarding citizenship based on native birth would not do. Accordingly, in the early decades of the nineteenth century, pro-slavery forces supplemented the common law criteria for citizenship in order to exclude African Americans from the equality that American citizenship promised. That

212. See *supra* notes 190–199 and accompanying text.

213. See 1 BACON, *supra* note 73, at 76 (“[E]very man is presumed to bear Faith and Love to that Prince and Country where he first received Protection during his Infancy”); 1 Vattel, *supra* note 99, §119 at 52 (“[L]ove of our country is natural to all men. The good and wife author of nature has taken care to bind them, by a kind of instinct, to the places where they received their first breath, and they love their own nation, as a thing with which they are intimately connected.”).

214. See *supra* note 43 and accompanying text.

215. KETTNER, *supra* note 46, at 287 (noting that after ratification, “[n]o one appeared to reexamine and justify Coke’s idea of the ‘natural born citizen.’ Americans merely continued to assume ‘birth within the allegiance’ conferred the status and its accompanying rights”); MEYER, *supra* note 196, at 528–30 (surveying American courts’ reliance on Coke’s opinion before and after the revolution).

effort reached its awful nadir in *Dred Scott v. Sandford*,²¹⁶ which posited additional race-based identity criteria that limited “natural born citizenship” to whites.²¹⁷

The Fourteenth Amendment’s Citizenship Clause undid *Dred Scott*, by specifying that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside.”²¹⁸ This is a general definitional clause that collectively clarifies all of the Constitution’s citizenship provisions using the operative terms “born” and “naturalized.”

And, precisely because the common law “assumptions about the origins, character, and effects of citizenship were so pervasive” during antebellum debates about immigration and racial equality, birth and naturalization had, in the context of antebellum citizenship-talk, a well-understood meaning, which we turn to explore in the next Subparts.²¹⁹

B. “BORN” CITIZENS WERE NATURAL PERSONS

Birth, of course, has a literal and a figurative sense. But as *Webster’s Dictionary* (1828) noted, birth was generally used to mean “[t]he act of coming into life, or of being born” and “[e]xcept in poetry, it is generally applied to human beings; as the *birth* of a son.”²²⁰

The literal meaning of birth played a constitutive role in the common law test for subjecthood. Those “born” into subjecthood were literally born, thanks to the simple syllogism at the heart of *Calvin’s Case*: Born subjects had a duty of allegiance. The ascription of a duty of allegiance was declarative.²²¹ It reflected in the law the internal state of mind of born subjects, because “God” had placed the natural sentiment of allegiance in the “soul” of men born under the king’s protection.²²² To have a soul, is to be embodied—to be a real, not a legally constructed, person.²²³ And so, the formula that linked birth to allegiance identified the possessor of natural allegiance as someone who had experienced a natural birth—a natural person, not a legal construct.²²⁴

Following the common law tradition, the popular debates over the relation

216. *Dred Scott v. Sandford*, 60 U.S. 393, 405–27 (1857).

217. Taney’s opinion also excluded native born African Americans from the scope of the Naturalization Clause, thereby relegating them, absent a constitutional amendment, to a perpetually inferior caste status. See FEHRENBACHER, *supra* note 49, at 356–57.

218. U.S. CONST. amend. XIV, § 1, cl. 1 (emphasis added).

219. KETTNER, *supra* note 46, at 287–88.

220. 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 23 (New York, S. Converse 1828) (defining “birth”); *see also id.* at 198 (defining “born”).

221. ANONYMOUS, *supra* note 70, at 208 (natural allegiance is “intrinsic and primitive”).

222. *Calvin’s Case* (1608) 77 Eng. Rep. 377, 385 (K.B.) (“[L]igeance, and faith and trust which are her members and parts, are qualities of the mind and soul of man”); *id.* at 392 (the duty of allegiance “is written with the finger of God in the heart of man”).

223. *See Case of Sutton’s Hospital* (1612) 77 Eng. Rep. 960 (K.B.).

224. The same implication, of course, followed from the decision’s affective conception of allegiance. As Ellesmere put it in his summary of the case, allegiance is a human sentiment and therefore is only ever given by a “natural body” to a “natural body.” EGERTON, *supra* note 88, at 101. Since natural bodies—real people born to real parents—are the only ones who exhibit the allegiance that makes a “subject,” “natural born” subjects are, *a fortiori*, also persons who are literally “born.”

of birth to American citizenship in the 1840s and 1850s over immigration and abolition would also associate “born” citizenship exclusively with literal birth.²²⁵

To take one example: in 1845, at the start of the influx of refugees from Ireland’s great potato famine, Massachusetts congressman Robert Winthrop introduced a resolution urging Congress to consider “an immediate and thorough revision” to the federal naturalization statutes in order to protect the “purity of the ballot box.”²²⁶ Rep. Lewis Levin then urged Congress to increase the statutory residency period for naturalization (to an astounding twenty-one years) and consider other reforms targeted at reducing the “influence of foreigners.”²²⁷ The advocates of naturalization reform, in turn, sounded nativist themes that would become central to the xenophobic Know Nothing movement that raged over the next decade.

Their arguments emphasized the “fact of alien birth . . . in connection with the known feelings of the human heart toward the spot of native home,”²²⁸ in a way that showcased the dark side of affective republicanism.²²⁹ The “foreign born,” nativists argued, are raised in a foreign culture without familiarity for republican values or institutions.²³⁰ As a result, the “naturalized” citizen lacks “affection” and “attachment” for America that characterizes a true “citizen.”²³¹ (The argument was a euphemistic cover for religious bigotry against Catholics).²³²

The anti-nativists²³³ countered that “our whole experience teaches us

225. I BOUVIER, *supra* note 36, at 72 (defining “birth,” for purposes of assigning legal statuses, as not only having a “mother” but also being “brought wholly into the world independent of one’s mother”—for example, viability outside the mother’s womb).

226. CONG. GLOBE, 29th Cong., 1st Sess. 67 (1845) (opening debate on Massachusetts resolution); CONG. GLOBE, 29th Cong., 1st Sess. 52 (1845) (introduction of Massachusetts resolution by Winthrop).

227. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 46–50 (1845) (speech of Rep. Levin). Rep. Lucien Chase suggested that Rep. Winthrop and that “delegation from his State coincided in opinion with the Native Americans.” CONG. GLOBE, 29th Cong., 1st Sess. Appendix 67 (1845).

228. See CONG. GLOBE, 29th Cong., 1st Sess. Appendix 63–64 (1845) (Rep. Sims) (characterizing the position of the nativists).

229. See Shklar, *supra* note 79, at 195 (“The approval of group-based loyalty and arguments for and against political obligation based on such loyalty tends, however, to mute, indeed to forget, that exclusion is an unavoidable and essential feature of such loyalty.”); Jacob T. Levy, *Against Fraternity: Democracy Without Solidarity*, in *THE STRAINS OF COMMITMENT: THE POLITICAL SOURCES OF SOLIDARITY IN DIVERSE SOCIETIES* 107, 119 (Keith Banting & Will Kymlicka eds., 2017) (noting the “persistent” theme of “solidaristic unity” in the American and French republican traditions and arguing we would be better off discarding this part of that tradition); Linda Bosniak, *Constitutional Citizenship Through the Prism of Alienage*, 63 OHIO ST. L.J. 1285, 1316–24 (2002) (noting the exclusionary implications of the tradition of associating equal citizenship with national solidarity).

230. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 46–50 (1845) (Rep. Levin).

231. *Id.*; see also CONG. GLOBE, 29th Cong., 1st Sess. Appendix 88 (1845) (Rep. Bedinger) (characterizing nativists as questioning the “attachment” of emigrants to American principles); CONG. GLOBE, 29th Cong., 1st Sess. Appendix 44–45 (1845) (Rep. Bowlin) (characterizing nativists as questioning the “affection” of emigrants for the American project); CONG. GLOBE, 29th Cong., 1st Sess. Appendix 67–68 (1845) (Rep. Chase) (agreeing with opponents that the “existence of our government depends on the attachment of its citizens,” but arguing that “for a zealous attachment” to American institutions, the foreign born are “unsurpassed”).

232. ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 226–60 (2d ed. 1995).

233. In the debates in the mid-1840s cited above, many of the advocates of immigration were southern Democrats and their pro-“equality” and anti-“oppression” rhetoric was by turns explicitly and implicitly racialized—it extended equality and inclusion only to white immigrants. For more on the complicated ways that

that . . . [naturalized citizens] are equally, as much attached to [American institutions], if not more so.”²³⁴ The native-born citizen, explained Representatives Lucien Chase, Henry Bedinger, and James Bowlin, often lacks the “appreciation for the equality of rights” of the original revolutionary generation, which risked their lives on “the tented field.”²³⁵ By contrast, the very fact of foreign birth made emigrants *more* patriotic than the home born—because of their birth in a foreign land, they have a “fresh” and “living and breathing” experience of the “pain” of “oppressive” foreign government.²³⁶ And so, while the “ties of kindred and blood will often call [an emigrant’s] memories back” to the “land of his birth,” “the same memory . . . will “fire his heart with indignation against the system of oppression which drove him away” while fueling “appreciation” or “gratitude” for the American “practice of justice.”²³⁷

In this and other debates, nativists and immigration advocates agreed that the birth that mattered to citizenship was literal, not figurative. To be “born” in a way that mattered to citizenship was *also* to develop attachments based on lived social experience—that is, to live a life. For nativists, birth in the United States meant one had been “presumably educated from infancy in the values and habits . . . [of] self-government,” and therefore presumptively attached to republican society.²³⁸ For immigration advocates, to be *foreign born* or a “naturalized” emigrant meant you had presumably suffered oppression and love justice, tangible human sentiments born of lived experience that were an even stronger qualification for citizenship.²³⁹ All agreed that the labels citizen and alien applied to persons who were literally born somewhere.

The normative importance of literal “birth” to citizenship-talk would also figure prominently in the abolitionist movement. One challenge for abolitionists was persuading moderates alienated by attacks, like William Lloyd Garrison’s, on the legitimacy of the antebellum Constitution. In response, abolitionist legal theorists developed arguments that abolition was, in fact, constitutionally required.

These arguments were developed across the works of William Yates,²⁴⁰

debates over immigration, racism, and slavery intersected in the antebellum period, see FONER, *supra* note 232, at 226–60.

234. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 88 (1845) (Rep. Bedinger).

235. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 68 (1845) (Rep. Chase).

236. *Id.*

237. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 88 (1845) (Rep. Bedinger); *see also* CONG. GLOBE, 29th Cong., 1st Sess. Appendix 44–45 (1845) (Rep. Bowlin); CONG. GLOBE, 29th Cong., 1st Sess. Appendix 64 (1845) (Rep. Sims) (arguing it is the American “practice of justice” that kindles the “feeling” of patriotic attachment to the country).

238. KETTNER, *supra* note 46, at 287 (characterizing the traditional understanding of the link between birth and allegiance); *see* CONG. GLOBE, 29th Cong., 1st Sess. Appendix 46–50 (1845) (Rep. Levin) (arguing for extension of residency requirements for naturalization based on claims the foreign-born lack the attachment of the “natives” or “native-born”).

239. CONG. GLOBE, 29th Cong., 1st Sess. Appendix 67–68 (1845) (Rep. Chase) (agreeing that the “existence of our government depends on the attachment of our citizens,” but arguing that “for a zealous attachment” to American institutions, the foreign born are “unsurpassed”).

240. *See* WILLIAM YATES, THE RIGHTS OF COLORED MEN TO SUFFRAGE, CITIZENSHIP AND TRIAL BY JURY (Philadelphia, Merrihew & Gunn 1838).

Lysander Spooner,²⁴¹ and Joel Tiffany.²⁴² “Citizen,” Yates argued, is a category that vests recipients with equal rights. And, Yates noted, “the foundation of [citizenship is] allegiance.”²⁴³ The foundation of natural allegiance, however, was not race. It was, simply, “birth” within “the jurisdiction of” the United States. And thus, under the common law, “all who are born within the jurisdiction of the State,” including free blacks, owe natural “allegiance” to the United States, making them “full citizens.”²⁴⁴ Lysander Spooner and Joel Tiffany would go on to link the argument to the original public meaning of “citizen” in the text of the Constitution, and push the argument to its logical conclusion: native born slaves, too, were “citizens,” making them free men who had been unlawfully enslaved by the southern states.²⁴⁵

As Martha Jones extensively recounts, the argument for birthright citizenship became a rallying cry for free black civil rights activists in the 1830s, 1840s, and 1850s.²⁴⁶ “If we are asked what evidence we bring to sustain our qualifications for citizenship, we will offer them certificates of our BIRTH and NATIVITY,” declared activists in Pennsylvania. “[T]he vote was ‘OUR RIGHT,’” said a delegation of Connecticut free blacks, “as native born MEN, Citizens of the great Republic.”²⁴⁷

These legal claims were morally potent precisely because being “born” into equal citizenship was not figurative. When we refer to “natural born citizens,” Lincoln’s Attorney General Edward Bates would write in his widely published 1862 opinion arguing in favor of the citizenship of free blacks, we mean those who are “*not made by law or otherwise, but born*” into a state of equality. Like the rest of us, free blacks, he wrote, “became citizens in the *natural way, by birth.*”²⁴⁸

The argument’s force lay precisely in the fact that the legal status of natural “born” citizen did not belong to fictive “persons.” It was legal and moral status that, because it belongs to human beings who are “born” in a state of legal and moral equality, refuted the dehumanizing premises of chattel slavery. Extending

241. See LYSANDER SPOONER, *THE UNCONSTITUTIONALITY OF SLAVERY* (Boston, Bela Marsh 1845).

242. See JOEL TIFFANY, *A TREATISE ON THE UNCONSTITUTIONALITY OF SLAVERY* (1849). The argument from birthright citizenship to racial equality predated the Revolution—it has its origins in the works of revolutionary thinker James Otis. James Otis, *The Rights of the British Colonies Asserted and Proved*, in *THE AMERICAN REPUBLIC: PRIMARY SOURCES* 119, 122 (Bruce Frohnen ed., 2002) (“That the colonists, black and white, born here, are free born British subjects, and entitled to all the essential civil rights of such, is a truth . . . manifest . . . from the principles of the common law . . .”).

243. YATES, *supra* note 240, at 37.

244. *Id.* at 36–37 (“In all the writers on public law there is one ancient and universal classification of the people of a country; all who are born within the jurisdiction of a State are natives, and all others are aliens. This classification grows out of the doctrine of natural allegiance, a tie created by birth.”).

245. See SPOONER, *supra* note 241, at 156 (“The constitution of the United States recognizes that all men are born free; for it recognizes the principle that natural birth in the country gives citizenship. . . . And no exception is made to the rule.”); TIFFANY, *supra* note 242, at 86–97 (“[U]pon every principles of reasoning, all colored persons, as well as others, who have been born within the jurisdiction of the United States, whether they have been deemed slaves, of freemen, *are citizens thereof*, and as such . . . entitled to all the privileges and immunities of Citizenship.”).

246. MARTHA S. JONES, *BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA* (2018).

247. *Id.* at 64.

248. Citizenship, 10 Op. Att’y Gen. 382, 389 (1862) (emphasis added).

citizenship based on birth, explained the Baltimore abolitionist and suffragette Frances E.W. Harper, acknowledges that “we are all bound up together in one great bundle of humanity.”²⁴⁹

We, finally, confirmed that the preceding examples of usage were standard by reviewing articles in the Library of Congress’s searchable “Chronicling America” database of American newspapers. We reviewed 200 unique newspaper pages published between 1855–60 and 1866–68 using the word “born” as a qualifier of “citizen.” We classified references to born citizens as references to human beings based on descriptions attributing to the citizens at issue behavior or characteristics limited to human beings, including parents, familial status, ethnicity, physical traits, military service, party registration, and voting.

In 18.5% of the pages, the terms “born” and “citizen” were used generically in an indeterminate context. Every other page we examined employed the term “born” citizen to refer to real human beings. We could find no example of the use of either term in relation to corporations or other abstract objects, other than one article noting that corporations are *not* “natural born” citizens.²⁵⁰

C. “NATURALIZED” CITIZENS WERE NATURAL PERSONS

The Citizenship Clause also defines “naturalized” persons as citizens of the United States and of the states in which they reside. Although “naturalized” was sometimes used figuratively,²⁵¹ the word was always employed in antebellum discussions of citizenship to convey a legal status of “*born*” or natural persons.

249. FRANCES E.W. HARPER, PROCEEDINGS OF THE ELEVENTH NATIONAL WOMEN’S RIGHTS CONVENTION 45–46 (1866); *see also* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 260 n.* (1998) (discussing how the Civil Rights Act of 1866 formed the backdrop for the Eleventh Women’s Rights Convention). Congress spent little time discussing the meaning of the term “born” in the Citizenship Clause (suggestive that the word, in context, had an obvious meaning). *But see* CONG. GLOBE, 39th Cong., 1st Sess. 3032 (1866) (Sen. Henderson) (characterizing “born” persons as “born of . . . parents”). Proponents of the Amendment, or its precursor, the Civil Rights Act of 1866, embraced this sense when explaining the Clause’s effect. The Citizenship Clause and its statutory precursor would secure for African Americans the privileges and immunities of citizenship. These were equal “civil” or “personal” rights, which were in turn variously equated with “human rights,” the rights that “appertain to every free man,” or the “natural rights of man” that government was formed to protect and secure. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1117 (1866) (Rep. Wilson) (“civil rights” are the “natural rights of man”); CONG. GLOBE, 39th Cong., 1st Sess. 344 (1866) (Sen. Wilson) (“We stand as the champions of human rights . . .”); CONG. GLOBE, 39th Cong., 1st Sess. 474, 476 (1866) (Sen. Trumbull) (stating that the Civil Rights Act secures “natural liberty, so far as restrained by human laws . . . for the general advantage of the public”). For further discussion of the meaning of “men,” which was a term reserved for “human beings,” *see infra* note 268 and accompanying text; *see also* Marcantel, *supra* note 38, at 263 & n.259 (collecting additional evidence that the Fourteenth Amendment’s framers associated citizenship and human rights).

250. *See* “Who Are Disenfranchised?”, RAFTSMAN’S JOURNAL (Clearfield, Pa.), Oct. 4, 1865, https://chroniclingamerica.loc.gov/data/batches/pst_lasch_ver01/data/sn85054616/00212477813/1865100401/0020.pdf (stating that a person is a citizen of the United States by “birth or naturalization” and “the word ‘citizen’ was well understood, as it is now understood, to mean a human being—a natural person . . . of whom allegiance is predicable”) (third column).

251. *See*, for example, Lord Mansfield’s opinion in *Berens v. Rucker*, in which he characterized the act of permitting a foreign ship to trade with all the privileges of a domestic ship as “naturaliz[ing]” the ship. *Berens v. Rucker* (1761) 96 Eng. Rep. 175, 176 (K.B.) (“The rule is, that if a neutral ship trade to a French colony, with all the privileges of a French ship, and is thus adopted and naturalized, it must be looked upon as a French ship . . .”).

In this, usage again followed the pattern set in the seventeenth and eighteenth centuries.

The eighteenth-century editions of Coke's *Institutes* defined naturalization as a status conferred on "aliens," or persons "*born in a strange country*" and therefore "out of the ligeance" of the King.²⁵² In his *Commentaries*, Blackstone similarly defined "naturalization" exclusively as a status awarded to aliens.²⁵³ "By [naturalization,]" he wrote, "an alien is put in exactly the same state as if he had been born in the king's ligeance."²⁵⁴ An "alien," in turn, was "one *born out of the King's dominions*."²⁵⁵

Similarly, Webster's dictionary defined naturalization in its legal sense, as the "confer[ral] on an alien the rights and privileges of a native subject or citizen; to adopt foreigners into a nation or state, and place them in the condition of natural born subjects."²⁵⁶ "Foreigners," in turn, were "person[s] born in a foreign country, or without the country or jurisdiction of which one speaks."²⁵⁷ Thus, "[a] naturalized person is a citizen; but we still call him a *foreigner by birth*."²⁵⁸

Antebellum treatises would define naturalization the same way. Thus William Alexander Duer's textbook on American constitutional law (sometimes credited as the first of its kind) explained:

The Constitution contains no definition of the character of a citizen; but the term is used in plain reference to the Common Law, which . . . in many instances must be resorted to as the interpreter of its meaning. . . . At the time the Constitution was adopted, the Citizens of each State, collectively, constituted the citizens of the United States; and were either native Citizens, or those born within the United States, or naturalized Citizens, or persons *born* elsewhere, but who, upon assuming the allegiance, had become entitled to, the privileges of native Citizens.²⁵⁹

Similarly, the vast majority of antebellum naturalization acts "pre-suppose[d] that all who are to be benefited by their provisions were born abroad."²⁶⁰ And, in *Dred Scott v. Sandford* both Justice Taney, in his opinion for

252. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWE OF ENGLAND 129a (Hargrave & Butler, rev. 1832) (1628).

253. 1 BLACKSTONE, *supra* note 36, at *362.

254. *Id.*

255. *Id.* at *361 (emphasis added); see also 1 BOUVIER, *supra* note 36, at 66 ("There must be a union of birth abroad, and subjection to some other power to make an alien . . ."); 1 BURN & BURN, *supra* note 73, at 30 ("Alien is one born out of the dominions of the crown of England."); GILES JACOB, A NEW LAW DICTIONARY CONTAINING THE INTERPRETATION AND DEFINITION OF WORDS USED IN THE LAW 444 (6th ed. 1750) (defining an alien as "[o]ne born in a Strange Country, and out of the Allegiance of the King"); 1 BACON, *supra* note 73, at 76 ("An alien is one born in a Strange Country and different Society, to which he is presumed to have a natural and necessary Allegiance . . .").

256. 2 NOAH WEBSTER, THE AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 162 (1828).

257. 1 WEBSTER, *supra* note 220, at 684.

258. *Id.* (emphasis added).

259. WILLIAM ALEXANDER DUER, OUTLINES OF THE CONSTITUTIONAL JURISPRUDENCE OF THE UNITED STATES 165 (New York, Collins & Hannay 1833) (emphasis added); 1 BOUVIER, *supra* note 36, at 64 ("A naturalized citizen is one who, born an alien, has acquired the right of a citizen . . .").

260. *Lynch v. Clarke*, 1 Sand. Ch. 583, 664 (N.Y. Ch. 1844). Thus, noted New York Vice Chancellor Sandford in *Lynch v. Clarke*, "The [federal naturalization statutes] abound in expressions of this sort, viz.: the country 'from which he came;' all 'persons who may arrive in the United States;' the country whence they migrated is to be stated, and the like. This language is inappropriate to a person who was born here, and wholly

the Court, and dissenter Justice Curtis agreed that naturalization was a power limited to altering the status of “persons born in a foreign country.”²⁶¹ Wrote Curtis:

It is not doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on foreign birth. To hold that it extends further than this, would do violence to the meaning of the term naturalization, fixed in the common law, and in the minds of those who concurred in framing and adopting the Constitution. . . . [T]he only power expressly granted to Congress to legislate concerning citizenship, is confined to the removal of the disabilities of foreign birth.²⁶²

The public debate over slavery was also concerned with “naturalization.” William Yates’ treatise on the rights of free blacks suggested that naturalization was a power limited to granting citizenship to the foreign born.²⁶³ That fact requires treating native born African Americans as “already citizens,” since, otherwise, an absurdity would result: since they are home born, and therefore not within the scope of the naturalization power, African Americans “[could] not be made [citizens] by Congress” and so would be “worse than foreigners.”²⁶⁴

Attorney General Bates, in his opinion on the citizenship of free blacks, also defined “naturalization” the same way—by reference to the circumstances of actual birth. The naturalization power, he wrote, is power of “legal . . . adoption” of the “foreign born.”²⁶⁵ Citizens are thus either “home born” or “alien—foreign-born” who have, by process of law, been “naturalized,” or made in the eyes of the law equal to the “home born.”²⁶⁶

Many abolitionists, however, denied that birth in a *foreign* jurisdiction was always a prerequisite. In debates over the Civil Rights Act of 1866, which granted freed slaves the privileges and immunities of citizenship, opponents cited Justice Curtis for the proposition that Congress lacked the power to “naturalize” native born freed blacks, because they were not “foreign born.”²⁶⁷

Senator Trumbull and his allies, following abolitionists like Spooner,²⁶⁸ argued the naturalization power was not limited simply to the foreign born. However, they continued to describe the class of persons to whom naturalization

inapplicable to one who has always resided in the country.” *Id.*

261. *Dred Scott v. Sandford*, 60 U.S. 393, 417 (1857) (citations omitted).

262. *Id.* at 578 (Curtis, J., dissenting).

263. YATES, *supra* note 240, at 71.

264. *Id.* (excerpting arguments in the case of Prudence Crandall). Yates did not make the argument himself but excerpted this argument in his book.

265. *Citizenship*, 10 Op. Att’y Gen. 382, 389 (1862).

266. *Id.* (“The Constitution itself does not make the citizens (it is in fact made by them). It only intends and recognizes such of them as are natural—home-born—and provides for the naturalization of such as them as are alien—foreign-born, making the latter, as far as nature will allow, like the former”).

267. CONG. GLOBE, 39th Cong., 1st Sess., 524–25 (1866) (Sen. Davis) (When “naturalization” is used in its ordinary sense—that is, when applied “to a man”—“[t]he subject upon which alone and exclusively the naturalization [power] . . . can operate is a foreigner”); CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866) (Rep. Rogers) (“It is well settled that the laws in regard to naturalization have no reference except to foreigners, and are not intended to include persons who were born here.”); CONG. GLOBE, 39th Cong., 1st Sess. 1163 (1866) (Rep. Rogers) (citing Curtis, J.).

268. SPOONER, *supra* note 241, at 112 (arguing naturalization is the “undoubted power to offer . . . citizenship to every person in the country, whether foreigner or native, who is not already a citizen”).

applied as human beings. Naturalization, said Senator Thayer, was properly defined as a power over either foreigners “born abroad” or those “born in this country”;²⁶⁹ or, alternatively, as the power to give to “a man, or any class of men, the same rights the same rights of citizenship which belong to a natural-born citizen of the country.”²⁷⁰ “Men”—the term used to describe the class to which naturalization is applicable—was a term that, in the nineteenth century, described “members of the human race” or “mankind.”²⁷¹

And, again, examining the use of the term “naturalize” or “naturalization” in the context of discussions of citizenship in the *Chronicling America* database confirmed this pattern of usage. We reviewed 200 unique newspaper pages published between 1855–60 and 1866–68 using the word “naturalized” as a qualifier of “citizen.” We classified references to naturalized citizens as references to natural persons based on descriptions attributing to the citizens at issue behavior or characteristics limited to human beings, including parents, familial status, ethnicity, physical traits, military service, party registration, and voting. In 16% of the pages, the terms naturalized citizen was used generically in an indeterminate context. Every other page we examined employed the term “naturalized” citizen to refer to real human beings. We could find no uses of the term “naturalized” to refer corporations.

* * *

The upshot: By defining citizen using terms—birth and naturalization—limited to natural persons, the Citizenship Clause did not expand the term “citizen” to encompass corporations. Article III citizens were natural persons in 1787, and they remained so after passage of the Fourteenth Amendment.

CONCLUSION

A few years after the ratification of the Fourteenth Amendment, Justice Curtis argued that corporations are not Article III citizens as an original matter.²⁷² A decade earlier, John Codman Hurd had suggested that Article III uses the term “citizen” in a different sense, drawn from international law, that has nothing to do with the conferral of rights and immunities under domestic law. It is a term, he argued, for “belonging” to a state in the eyes of international law—one that encompasses corporations and other “legal persons” subject to a state’s “personal jurisdiction” by virtue of a domicile.²⁷³

Justice Curtis’s claim is the correct one. At the two relevant fixation periods, 1787–88 and 1866–68, the evidence overwhelmingly shows that clauses employing the term “citizen” were limited to natural persons.

In 1787–88, the public meaning of citizen communicated, at a minimum,

269. CONG. GLOBE, 39th Cong., 1st Sess. 1152 (1866) (Sen. Thayer).

270. *Id.*; CONG. GLOBE, 39th Cong., 1st Sess. 500 (1866) (Sen. Trumbull) (Congress has the power to make “every inhabitant” a citizen “no matter where born”).

271. See 1 BOUVIER, *supra* note 36, at 57 (“Any human being is a man . . .”).

272. See *supra* notes 3–7 and accompanying text.

273. See *supra* notes 178 and accompanying text.

that the status holder was expected to have a solidaristic tie to the status-granting community, a tie which only real human beings can form. In 1787–88, citizenship thus had a sortal boundary—it was a term that did not extend beyond the set of human beings.

The Fourteenth Amendment added monumentally important content to the meaning of “citizen” across the Constitution. It overturned *Dred Scott*, affirming the set of citizens is not restricted with regard to race—it is a term open to “all” human beings who meet its race-neutral definitional criteria. And, in the process, it shifted the conception of citizenship away from its original emphasis on a community of allegiance toward an understanding of citizenship as a community of equal human rights and equal human dignity.²⁷⁴ But because it defined citizenship in terms—“birth” and “naturalization”—reserved for human beings, it did not expand the set of citizens beyond the boundaries set down in 1787–88.

Hurd’s new concept of Article III citizenship was an obscure specialist sense that developed between ratification of Article III and the Fourteenth Amendment. But that sense was not part of the word’s popular meaning and was never ratified by amendments to the Constitution’s text.

“Citizen,” as the term was defined and used in the Constitution, is conceptually tied to humanity. The original public meaning of the word “citizen” communicated powerful normative ideas relating to human political relationships and human rights, but did not encompass abstract objects, like corporations.

Recovering and implementing the original public meaning of “citizen” could have profound implications for contemporary constitutional doctrine. It also has interesting implications for bigger picture debates about originalism. A full exploration of those implications is beyond the scope of this Article, but in this conclusion, we will sketch some of the most likely possibilities.

First, modern diversity doctrine, applied to corporations, cannot be squared with the original public meaning of Article III. Section (c) of the statutory grant of original diversity jurisdiction (28 U.S.C. § 1332) treats corporations as citizens of the states in which they are incorporated and in which they operate their “principal place of business.”²⁷⁵ This reflects Hurd’s conception of Article III citizens, not the text’s original meaning.

Because as an original matter, corporation qua corporations are not Article III citizens, the current statutory grant of diversity jurisdiction exceeds Congress’s authority. Congress does not have the power to change the constitutional meaning of “citizen” through legislation; rather, the constitutional grant of diversity jurisdiction operates as a limit on Congress’s power to confer original subject-matter jurisdiction on “such inferior courts as the Congress may from time to time ordain and establish.”²⁷⁶ In other words, Section 1332(c), as it stands, is unconstitutional from an originalist perspective.

This fact should, we note, also give living constitutionalists pause. This is

274. See *supra* notes 240–246 and accompanying text.

275. 28 U.S.C. § 1332(c)(1) (2019).

276. U.S. CONST. art. III, § 1.

not a close case. To the extent that living constitutionalists give substantial (if not decisive) weight to the clear and unequivocal meaning of the constitutional text, there is a *prima facie* case against Section 1332(c).

Perhaps corporate diversity jurisdiction can be salvaged by amending Section 1332(c). However, there is only one route such an amendment could take: the one charted in antebellum cases like *Deveaux*, where the Supreme Court allowed corporations to access the federal diversity docket based on the citizenship of their shareholders. To save corporate diversity jurisdiction, an amended version of Section 1332(c) would need to rely on the concept of “minimum diversity” by conferring jurisdiction over corporations when at least one shareholder of a corporation is a citizen of a state other than the state of which the opposing party is a citizen.²⁷⁷ This, in turn, would require corporate litigants to determine whether shareholders are United States citizens and their states of domicile in order to invoke federal diversity jurisdiction. Of course, Section 1332(c) does not require such a determination; it confers diversity jurisdiction irrespective of the citizenship of shareholders.

It is, though, far from clear this fix is consistent with the original meaning of the diversity clause. Whether it passes originalist muster turns on the original meaning of the phrase “controversies between” citizens. If the parties “between” whom “controversies” subsisted were those over whom the court exercises *in personam* jurisdiction, then shareholders would usually not qualify as Article III parties in suits by or against their corporations. In that case, this attempted fix would be just as unconstitutional from an originalist perspective as the current version of Section 1332(c). An inquiry into the persons “between” whom Article III “controversies” subsist is, though, a subject for future research.

Another potential problem with salvaging diversity jurisdiction over corporations on the basis of shareholder citizenship is that the strategy assumes the complete diversity rule of *Strawbridge v. Curtiss*²⁷⁸ is only a statutory rule, not a constitutional requirement. Again, this topic is beyond the scope of this Article, but we note that Justice Marshall’s very concise opinion in *Strawbridge* says nothing about the relationship between the meaning of the diversity statute and the almost identically worded constitutional provision.²⁷⁹ The supposition that the *Strawbridge* rule is not constitutional does not, as far as we are aware, seem to be grounded in a rigorous investigation of the original public meaning of Article III. Rather, it seems to us to be an assumption made by contemporary courts and commentators who assumed a nonoriginalist framework.

It might be argued that the unconstitutionality of corporate diversity

277. Although most cases involving corporate diversity would fit within an amended version of Section 1332(c), there remains a category of cases that are allowed by the current statute but would not be allowed by an amendment. For example, if all of the relevant shareholders of a corporation were nondiverse from all of the opposing parties, the amended statute would not confer diversity jurisdiction. This possibility illustrates our basic point: as written, the current diversity statute confers jurisdiction in cases where the original public meaning of the word citizen would not—even if the fiction that diversity controversies involving corporations are actually controversies between shareholders is allowed.

278. *Strawbridge v. Curtiss*, 7 U.S. 267, 267 (1806).

279. *Id.*

jurisdiction is not a matter of great consequence. If these cases cannot be heard in federal court, there will always be a state court forum available. State courts are courts of general subject-matter jurisdiction, and some state court will have jurisdiction over any corporation that is incorporated in one of the United States. But this argument ignores the importance of forum shopping, especially in cases in which a corporation is the defendant.²⁸⁰ It may well be the case that federal courts systematically favor corporate defendants represented by Big Law over individual plaintiffs represented by local plaintiff’s lawyers—although the investigation of that empirical claim is beyond the scope of this Article. We believe it is very likely that corporate diversity jurisdiction has important consequences, and hence that the question whether such jurisdiction is constitutional is not trivial or insignificant.

The Article’s findings are also important for bigger picture debates about originalism. First, the findings help shore up originalism against a common attack: that it is just a cover for “conservative” preferences. In recent years, progressives have often fought to preserve state control over corporate litigation, while business conservatives have generally favored expanding federal power over corporate litigation, at states’ expense, through enactments like the Class Action Fairness Act. By complicating the scope of corporate diversity jurisdiction, the results illustrate that originalism is a project that is orthogonal to any one set of partisan preferences.

On the other hand, the project also shows how originalism, or at least non-“faint-hearted” versions, would, if put in the practice, lead to results that unsettle major features of what might be called the practical or workaday constitution, of which diversity jurisdiction is a major part. This may lend fuel to critics’ complaints that originalism is too impractical to implement. Stout-hearted originalists will need to grapple with what the findings here mean for their approach to originalism as a normative matter.

Faint-hearted originalists who happily adhere to long-settled precedent, by contrast, won’t face this problem—and will even find the results here help rationalize some otherwise mysterious features of current precedent. Modern doctrine, for example, directs that statutory grants of diversity jurisdiction should be construed narrowly—what has sometimes been termed the Court’s “anti-jurisdictional canon.” Many have questioned merits of the canon.²⁸¹ But, by raising doubts about the constitutionality of corporate diversity jurisdiction, this Article tees up the possibility that the canon might be rationalized as a “second-best” strategy, or compensating adjustment, for entrenched underenforcement of Article III limits on diversity jurisdiction.

These are just some of the further inquiries that flow from the simple but important fact that corporations’ claim to state citizenship finds no support in

280. See Susan Steinman, *Help Fight Corporate Forum Shopping*, TRIAL, Apr. 2016, at 16; Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1469–70 (2008); George W. Ball, *Revision of Federal Diversity Jurisdiction*, 28 ILL. L. REV. 356, 361 n.30 (1933).

281. See, e.g., Aaron-Andrew P. Bruhl, *The Jurisdiction Canon*, 70 VAND. L. REV. 499 (2017).

the Constitution's original meaning.