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The Corporate Person: How U.S Courts Transformed a Legal Phantom into a Powerful Citizen

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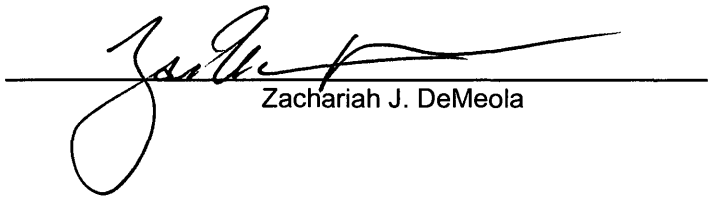

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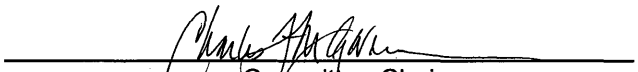

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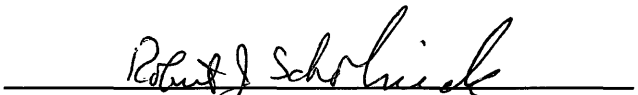

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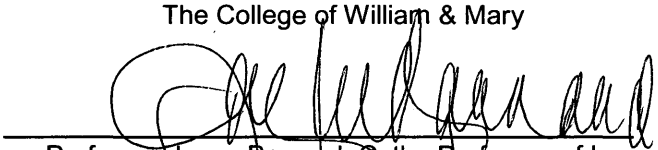

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ABSTRACT

This paper addresses the definition of "person" in U.S. corporate law, how its legal significance developed before and after the Fourteenth Amendment's passage, and whether the original context of the Fourteenth Amendment justified its ensuing transformation. Anglo-American law traditionally did not recognize corporations as actual living people and treated corporate personhood and its corresponding rights as a set of administrative tools necessary for conducting business. In the nineteenth century, the definition of corporate personhood altered as judges applied their own practical sense and personal bias to fill gaps that constitutional and common law could not. U.S. Courts allowed corporations to eventually depart from strict governmental control as judicial decisions granted corporations more economic flexibility. These variations were not always accompanied by corresponding restrictions of the power and rights of corporations that earlier legal decisions espoused, but they remained sound in common law tradition by keeping the definition of "person" narrow when applied to corporations. However, this set of conditions ultimately allowed a group of advocates and judges to make a distinct break from the common law and U.S. precedent by using the Fourteenth Amendment to fundamentally transform the meaning of the corporate "person" as a matter of law in the case *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886), and bestow rights to corporations they had never previously enjoyed.

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THE CORPORATE PERSON: HOW U.S. COURTS TRANSFORMED A LEGAL PHANTOM INTO A POWERFUL CITIZEN

I. Introduction

On January 21, 2010, the U.S. Supreme Court decided in *Citizens United v. Federal Election Commission* that government could not limit corporations from political spending for candidate elections.[1] Legislators, legal and political analysts, and President Obama denounced the opinion, fearing that unlimited corporate spending would disintegrate the political influence of average citizens.[2] Four years later, in *Burwell v. Hobby Lobby*, the Supreme Court determined that closely held for-profit corporations could claim to abide by religious beliefs, in some cases allowing exemptions from compliance with laws that were objectionable to those beliefs.[3] In particular, the Affordable Care Act's controversial requirement that closely-held corporations provide health benefits that include contraception coverage to their employees was an unlawful burden on a corporation's religious freedoms.[4] Each decision reinforced the notion that a corporation could possess and express distinct political and religious views, even though a corporation is totally incapable of any thought or action on its own—those abilities are, in reality, only possible for the individuals who own and serve corporations. Although both decisions arguably undermined longstanding democratic principles, they result largely from the U.S. legal doctrine that a corporation could be

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[1] *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010).

[2] Russell Feingold, "Who is Helped, or Hurt, by the Citizens United Decision," *Washington Times*, January 24, 2010; Jesse Lee, "President Obama on Citizens United: 'Imagine the Power This Will Give Special Interests Over Politicians,'" *White House Blog*, July 26, 2010, http://www.whitehouse.gov/blog/2010/07/26/president-obama-citizens-united-imagine-power-will-give-special-interests-over-polit (accessed April 27, 2011). In the first presidential election after the *Citizen's United* decision, campaigns, outside groups, and independent organizations spent an estimated $6 billion in political contributions, which was $700 million more than the previous "most expensive election" in U.S. history. John Hudson, "The Most Expensive Election in History by the Numbers," *The Wire: News from the Atlantic*, Nov 6, 2012, http://www.thewire.com/politics/2012/11/most-expensive-election-history-numbers/58745/ (accessed Oct. 4, 2014).

[3] *Burwell v. Hobby Lobby, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014). The Supreme Court imputed the religious belief of shareholders to certain types of corporations even though, as Amici Curae wrote in opposition, "[t]he essence of a corporation is its 'separateness' from its shareholders. It is a distinct legal entity, with its own rights and obligations, different from the rights and obligations of its shareholders." Brief for Corporate and Criminal Law Professors as Amicus Curiae Supporting Petitioners, *Burwell v. Hobby Lobby, Inc.*, 573 U.S. ____ (2014) (Nos. 13-354 and 13-356) 2, 3-6.

[4] Coverage of Preventive Health Services, U.S. Code 42, §300gg–13(a)(4) (2010). The Patient Protection and Affordable Care Act is commonly known as "Obamacare." Gregory Wallace, "'Obamacare': The word that defined the health care debate," *CNN*, June 25, 2012, http://www.cnn.com/2012/06/25/politics/obamacare-word-debate/index.html?_s=PM:POLITICS (accessed October 4, 2014).

considered a "person" under the Fourteenth Amendment's Equal Protection Clause.[5] Corporations were not always defined this way as people or persons. The meaning of the word "person," when applied to the corporation, had to undergo an enormous transformation before it entitled corporations to civil rights previously reserved only for human beings.

This paper addresses the definition of "person" in U.S. corporate law, how its legal significance developed before and after the Fourteenth Amendment's passage, and whether the original context of the Fourteenth Amendment justified its ensuing transformation. Anglo-American law traditionally did not recognize corporations as actual living people and treated corporate personhood and its corresponding rights as a set of administrative tools necessary for conducting business. In the nineteenth century, the definition of corporate personhood altered as judges applied their own practical sense and personal bias to fill gaps that constitutional and common law could not. But these variations were not accompanied by corresponding common law traditions that restricted the power and rights of corporations. U.S. Courts allowed corporations to eventually depart from strict governmental control as judicial decisions granted corporations more economic flexibility. Like water wearing away stone, economic changes and the judicial choices that followed dissolved the original corporate framework. This set of conditions ultimately allowed a group of advocates and judges to use the Fourteenth Amendment to fundamentally transform the meaning of the corporate "person" as a matter of law in the case *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394 (1886).

Much of the scholarship concerning this enormous swing in constitutional doctrine here focused either on specific individuals involved with the *Santa Clara* decision or on the theory of a gradual paradigm shift in jurisprudence. Morton Horwitz examined the *Santa Clara* decision's effect on corporate

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[5] The Fourteenth Amendment reads in relevant part "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Under *Citizens United,* political speech may not be banned based on the speaker's corporate identity, in the same way that government may not ban individual speech based on race or religion. *Citizen's United* and *Hobby Lobby* demonstrated that the First Amendment's protection over freedom of speech and religion may apply equally to corporations and individuals, because corporations constitutionally *are* individuals. In many ways, corporations are currently entitled to the same fundamental civil rights as any other "person" in the United States. See, e.g., *Hale v. Henkel*, 201 U.S. 43 (1906) (corporation allowed Fourth Amendment protection against unreasonable searches and seizures); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1888) (corporation entitled to due process of law under the Fifth and Fourteenth Amendments).

personhood in relation to previous Supreme Court decisions. His analysis focused on the development of legal theory, going so far as to suggest that the "natural entity" theory of the corporation, or the concept that a corporate entity was no different from the individual in its constitutional entitlements, did not motivate the *Santa Clara* decision at all. Instead, Horwitz argued that *Santa Clara* embodied an anti-regulatory trend that was the result of the prevailing "conviction that only a decentralized political and economic system could increase wealth while maintaining freedom and avoiding the tyranny of European statism was a central tenet of American exceptionalism."[6] This interpretation overlooks the personal responsibility and ambition of individuals who were crucial to the *Santa Clara* outcome, such as Justice Stephen Johnson Field. On the other hand, Jack Beatty concentrates his analysis on Justice Field and pays little attention to the significant changes in corporate law that preceded *Santa Clara*.[7] Analysis of the individuals involved in the *Santa Clara* decision, or of prevailing legal theories in U.S. history, certainly facilitate an understanding of *Santa Clara* and its progeny but when isolated from one another, they do not provide a comprehensive answer to the question of exactly why the definition of corporate personhood suddenly and vastly expanded. Instead, we must examine both to understand fully how *Santa Clara* could give birth to modern corporate personhood in the United States.

How modern U.S. corporate personhood parted from tradition is best understood through a close reading of Supreme Court decisions, supplemental opinions by judges, and attorney arguments within their respective historical contexts. Unlike most other U.S. law firmly based in a tradition of English common law, such as property or tort law, corporate law developed into an "indigenous" set of laws, created through a uniquely U.S. context and experience.[8] When the United States formed a Constitutional Republic in 1787, they adopted two fundamental sources of law: common law and its set of judicial precedents inherited from England, and the newly formed U.S. Constitution.[9] In the common law tradition, the concept of the corporate person had medieval roots in which the phrase "corporate person" denoted a

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[6] Morton Horwitz, *The Transformation of American Law,* 1870-1960 (New York: Oxford University Press, 1992), 67.
[7] Jack Beatty, *Age of Betrayal: The Triumph of Money in America 1865-1900* (New York: Vintage Books, 2007).
[8] Edwin Merrick Dodd, *American Business Corporations Until 1860 with Special Reference to Massachusetts* (Cambridge: Harvard University Press, 1954), 11.
[9] L. N. H., "Common Law: Adoption by States," *California Law Review* 8(5) (1920): 340-342; U.S. Const. art. I, §1; art. II; §1; art. III, §1.

phantom placeholder for basic legal rights pertaining to business operations. The creation of this "artificial" person came from the cessation of sovereign power, initially through charters given by a monarch, allowing a corporation the ability to organize as a single, self-governed entity with the authority to file suit and be sued, own and possess land, and to be taxed as a whole. As such, corporations were intricately linked to government and treated as governmental entities. The common law could not, however, adequately direct U.S. judges when resolving corporate legal issues within the framework of a democratic republic, because common law development of corporations operated under the assumption of a monarchical power base. The U.S. Constitution established a new form of government under which the common law would have to operate, but it made no reference to corporations. There was no constitutional authority to fill in the gaps. Thus, the two great sources of U.S. law provided insufficient assistance to judges who increasingly had to deal with categorizing private corporations into existing law. Judges therefore had more leeway in applying their own preferences or personal bias in deciding how Corporate Law functioned, beyond the use of analogy or indirect application of existing laws.[10]

Judges and attorneys shouldered much of the responsibility for the development of corporate law in the United States, making this branch of law more susceptible to further interpretation and improvisation by courts than legislators. As corporations grew and conducted business across state lines, their actions implicated federal issues. With a paucity of federal statutory or constitutional authority on the matter, federal judges were left to their own devices to answer the legal questions of the day. When state legislators attempted to limit or define the rights and abilities of corporations, the laws they devised gave way to the supremacy of federal law, enforced by federal judges. This was particularly true after states surrendered the significant local control they had over corporations by converting the process of incorporation from an act of the legislature, defining the limits of corporate power at a corporation's inception, to an automated administrative application process, allowing for general incorporation without legislative oversight. As judges attempted to reconcile the common law with constitutional law, they made decisions from a perspective based on demands of their times. The personal motivation of judges in a

[10] Dodd, *American Business Corporations Until 1860 with Special Reference to Massachusetts*, 11; Christopher Wolfe noted that judicial review in the U.S. became "merely another variant of legislative power" in the late nineteenth century, particularly in regards to property. Christopher Wolfe, *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge Made Law* (Lanham: Rowman & Littlefield Publishers, Inc., 1994), 3.

given era were much more fluid than common law precedent or constitutional provision, and it made corporate jurisprudence sensitive to the political influences and pressures of a court's given historical context. This set of factors resulted in allowing individual federal jurists to greatly influence the development of corporate law. In place of legal authority and the restrains imposed upon them by statutory language or the common law, judges substituted raw policy analysis.

Even as U.S. corporate law developed, U.S. courts made efforts to clearly distinguish human beings from corporate persons throughout most of the nineteenth century. However, as early as 1839 corporate attorneys introduced the idea of a much more expansive definition of "person," one that would include more of the rights recognized as inherent in human beings, and would subsequently offer more protection from regulatory interference in the Supreme Court case *Bank of Augusta v. Earl.* The notion had little legal support at the time, but it eventually took hold through the opportunism and concerted advocacy of corporate lawyers and judges sympathetic to expansive business rights. These men twisted the language of the Fourteenth Amendment that forbid states from denying "to any person within its jurisdiction the equal protection of the law," to give new meaning to the word "person" as a means of expanding corporate rights and powers.[11] This was not the purpose of the Fourteenth Amendment. The Fourteenth Amendment's Equal Protection Clause was expressly intended for the benefit of recently freed slaves, but federal courts had little stomach for applying it to protect the rights of African Americans.[12] Moreover, advocacy on behalf of freed slaves was intermittent, as evidenced by the very few cases that ever reach the Supreme Court.[13] Instead, railroad corporations, which were already ubiquitous in federal legal disputes,

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[11] U.S. Const. amend. XIV, § 1.

[12] A striking example of the Supreme Court's reticence to give force to the Fourteenth Amendment is *United States v. Cruikshank*, 92 U.S. 542 (1876). The case arose from events that took place during the 1872 Louisiana gubernatorial election. A federal judge ruled that the Republican-majority legislature be seated. In response, a white militia attacked African American freedmen who gathered at the Grant Parish Courthouse in Colfax, Louisiana, to resist an attempt of Democratic takeover of the offices. The white militia set fire to the courthouse and shot anyone who fled the building, slaughtering at least 105 freedmen. Louisiana ignored the situation, refusing to arrest or charge anyone involved. Federal authorities took three white men into custody and convicted them of violating the federal Enforcement Act of 1870, which made it a crime to interfere with any citizen's constitutional rights. The Supreme Court overturned the convictions, turning a blind eye to the murder of over 100 people, and held that the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment applied only to state action, not to actions by individual citizens. *Cruikshank*, 92 U.S. 542 at 554.

[13] In *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77, 90 (1938) Justice Hugo Black noted that "of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after

flooded the courts with petitions and arguments to adopt the Fourteenth Amendment as their own.[14] In time, corporations were capable of employing a massive amount of resources to influence judges and the outcome of legal issues, promoting jurisprudence that placed a higher premium on property rights (unregulated business) than people (the rights of freed slaves).[15]

In that context, Corporate law changed in 1886 after the *Santa Clara County v. Southern Pacific Railroad Company* case when, prior to oral argument, Chief Justice Waite noted that "[t]he court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution . . . applies to these corporations ... [w]e are all of the opinion that it does."[16] These lines appear only in the syllabus of the Supreme Court decision—a summary of the case for reference that has no legal authority—and nowhere in the *Santa Clara* decision itself. In fact, the Supreme Court never actually addressed the significant question of the Fourteenth Amendment's Equal Protection Clause, instead limiting its analysis to how California could legitimately assess property value for fences running beside railway tracks. Regardless, judges faced constant pressure from the cases railroads and other corporations brought to their courts, and those interested in expanding protection for business against government regulation eventually cited the *Santa Clara* syllabus as sufficient legal authority for bestowing constitutional rights to corporations.[17] The process was not immediate. After a change in the composition of the Supreme Court in 1888 following the death of Chief Justice Waite and a flood of cases in both state and federal courts more decisions relied on the *Santa Clara* syllabus until it became the basis for the

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its adoption, less than one-half of 1 per cent. invoked it in protection of the negro race , and more than 50 per cent. asked that its benefits be extended to corporations."

[14] From 1872 to 1884 alone, 312 corporate parties (as compared to 28 African American parties) sought relief under the Fourteenth Amendment's Equal Protection Clause. Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown & Co., 1912), 138.

[15] Thomas C. Cochran, *Railroad Leaders 1845-1890: The Business Mind in Action* (New York: Russell & Russell, 1965), 185-188.

[16] *Santa Clara County v. Southern Pacific Railroad Company*, Syllabus [1], 188 U.S. 394 (1886). Notably, a Supreme Court decision Syllabus holds no legal authority, but is there only to summarize the case for reference. American Bar Association, "How to Read a Supreme Court Decision," *Insights on Law & Society* 13, No. 1 (Fall 2012), http://www.americanbar.org/publications/insights_on_law_andsociety/13/fall_2012/how_to_read_a_ussupremecourtopinion.html (accessed October 24, 2014).

[17] Contemporary courts cited *Santa Clara County* as the basis the proposition that corporations are persons within the meaning of the Equal Protection Clause of the Fourteenth Amendment. Examples include *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889), *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888).

doctrine that allowed corporations to benefit from constitutional Equal Protection afforded to human beings, inherent in Fourteenth Amendment jurisprudence.[18]

The *Santa Clara* litigation marked the apex of this evolving dynamic and demonstrated the influential capabilities of powerful corporations, the likes of which common law and the Constitution had not previously contemplated. Corporate lobbyists who pushed for extending Fourteenth Amendment protection to corporations normalized their arguments by asserting that Justice Waite's casual remarks in *Santa Clara* were actually a reflection of long standing legal principle. After all, corporations had been defined as "persons" in common law for hundreds of years. But this argument twisted the fundamental meaning of "person" in the corporate context to redefine the rights available to corporations. Despite the arguments from these corporate proponents, no court prior to *Santa Clara* had ever understood corporations as possessing the same rights as "natural" people. Quite the opposite, all previous authority, including English common law and the unique U.S. corporate law, categorized corporations as being "artificial" persons with very specific, ascribed, and limited rights. Thus, the modern understanding of the corporate person is the result of a dramatic, and legally unjustified, departure from the common law and U.S. precedent.

Nonetheless, the result of this advocacy was an enormous expansion of the original meaning of corporate personhood. Once its proponents were able to insert the new meaning of "corporate person" into Supreme Court precedents by integrating *Santa Clara*'s Syllabus into contemporary case law, the notion was thereafter ossified to permanence in future U.S. law through the doctrine of *stare decisis*.[19] This development had profound effects on U.S. history, deeply influencing law and culture today.

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[18] Initially, the Supreme Court after Waite's death used the *Santa Clara* syllabus only to assert that "[i]t is *conceded* that corporations are persons within the meaning of the amendment." *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888) (emphasis added). By 1899 the Supreme Court, federal district courts, and state supreme courts had employed *Santa Clara* so often that the California Supreme Court declared, "It has long been *settled* that the word 'person,' within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation." *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 8 (Cal. 1899) (emphasis added).

[19] The doctrine of *Stare Decisis* is derived from Latin, meaning "to stand by things decided." It requires that courts follow rules or principles laid down in previous judicial decisions, unless those decisions are contrary to fundamental principles of justice. Legal Information Institute, "Stare Decicis," *Cornell University Law School*, http://www.law.cornell.edu/wex/stare_decisis (accessed Oct. 4, 2014); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 US 833, 854 (1992) ("[T]he very concept of the

The constitutional effect of defining a corporation as a person under the Fourteenth Amendment's Equal Protection Clause allowed for a select form of business entity to assume individual civil rights. State or federally imposed regulation was now potentially a violation of inalienable rights. As a legally identifiable person in this new context, the corporation could act more independently as an organization separate and protected from government interference. While this had enormous economic implications, it also empowered corporations to influence all manner of political and social issues. The anthropologist Richard Robbins argued that the power of corporate influence, derived from the corporation's status as a person, promoted cultural and economic ideologies, such as the notion that sustained economic growth was the way to human progress, free markets without government "interference" was the most efficient and socially optimal allocation of resources, and that governments should function primarily to provide infrastructure and to enforce the rule of law regarding property rights and contracts. [20] Indeed, as Morton Keller wrote, "corporations are accepted as the driving engines of our economy, as the places where most of us work."[21] Corporate messages also influence people through advertising and control of media, while corporations directly influence policy outcomes through election finance and corporate funded think tanks (even more so after *Citizens United*).[22] In addition, corporations today have an impact on the daily lives of millions of Americans in other, often intimate, ways. The *Hobby Lobby* case allows corporations to have a presence in religious thought and belief and to impede the health care of individuals. All of these cultural implications trace their roots to *Santa Clara*, in which the U.S. corporation achieved many of the privileges

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rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable."). After *Santa Clara* and Chief Justice Waite's death, there was a dearth of Supreme Court criticism of corporate "person" jurisprudence. It was not until *Connecticut General Life Ins. Co. v. Johnson*, 303 U.S. 77 in 1938 that Justice Hugo Black urged the court to overturn *Santa Clara*, regardless of *Stare Decisis*. In the meantime, *Santa Clara* gained legitimacy in every published decision that cited it with favor. In addition, the Supreme Court notoriously took a pro-business and employer attitude towards constitutional issues, as best exemplified in *Lochner v. New York*, 198 U.S. 45 (1905), in which the Court created a "liberty of contract" in favor of employers to overturn a New York law limiting the number of hours a baker could work to protect their health. If other federal judges agreed with Justice Black in the intervening period, none of them wrote those opinions in their cases or decisions. By 1938, the weight of authority would be difficult for any judge to overturn.

[20] Richard Robbins, *Global Problems and the Culture of Capitalism*, (Boston: Allyn and Bacon, 1999), p.100

[21] Morton Keller, "The Making of the Modern Corporation," *The Wilson Quarterly* 21(4) (Autumn, 1997): 58.

[22] Anup Shah, "The Rise of Corporations," *Global Issues,* http://www.globalissues.org/article/234/the-rise-of-corporations (accessed March 22, 2015).

associated with being a special branch or concession of government, but avoided having to concede many of its corresponding powers to government regulation.

II. Origin of the Anglo-American Corporation (1086 - 1795 C.E.)

English precedent is paramount to understanding the underlying framework of early U.S. corporate law. When the United States achieved independence from Great Britain in 1783, U.S. jurists continued employing traditional English legal practice to direct their decisions for the newly formed republic. English laws governing the creation, structure, and powers of corporations were no exception. Well into the Nineteenth Century, English common law was often the only legal authority available to U.S. judges and lawyers when dealing with corporations. Consequently, the U.S. theory of the corporate personhood had its origins in English legal history.

A. The Emergence of the Corporate "Person" as an Administrative Tool

The corporate entity began as an organizational tool of English feudal monarchy. Incorporation was originally a Roman invention, which allowed a group of individuals to act in concert toward a specific objective by forming a separate entity recognized by the state and not limited to any individual's lifetime.[23] Early in English history, political incorporation allowed the king to bring independent lords into the kingdom through the king's charters.[24] A king's charter provided for consolidation of individuals into a body politic, commensurate with municipal incorporation, and it provided specific corresponding rights for collective entities to manage their affairs, such as privileges, immunities, or the grant of specific public rights (often dubbed "franchises").[25] The king's charters and system of municipal incorporation allowed

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[23] The Roman concept expressed the theory that all power is derived from the State and, thus, persisted beyond the existence of individuals and groups. Substituting their personage for the State, regional lords developed incorporation into the practice of formally recognizing the customs of a particular place in exchange for services to the lord. Amasa M. Eaton, *The Origin of Municipal Incorporation in England and in the United States* (New York: Proceedings of the American Bar Association, 1902), 8; Ron Harris, *Industrializing English Law: Entrepreneurship & Business Organization, 1720-1844* (New York: Cambridge University Press, 2000), 7, 16.

[24] Charters were essentially concessions of privilege by the king for purposes of both organization and consolidation of power. A king's charter for municipal corporations, such as cities or counties, allowed an entity some self-governance within the confines of the law of the land and the rule of the king. The king made this concession of authority at his pleasure, and he could rescind it at any time. Eaton, *Origin of Municipal Incorporation*,13-15; Steward Kyd, *A Treatise on the Law of Corporations, Vol. I* (London: 1795), 44.

[25] Granting permission for these customs eventually formed the king's ability to grant franchises, or specific public rights. A Franchise would have been commonly understood as a "a royal privilege or branch of the

early corporations to eventually develop as political bodies possessing property and associated rights separate from individuals due to practical and administrative needs.[26] Cities and counties granted authority by the king to organize were distinct bodies. Legal recognition of these municipal corporations became necessary to enter into contracts or settle administrative or financial disputes.[27]

As a result, the corporation had its own exclusive legally protected rights. Once formed, the corporation became an entity with its own perpetual identity distinct from, and capable of surviving, individuals. A corporation could make bylaws, govern itself as a whole, own property and sue or be sued in court. A corporation could also provide limited liability to its members, allowing them to evade responsibility for the acts of the corporation, because the corporation could own property and be sued separately from its members. Additional liberties, franchises, or exemptions could be made available by the sovereign, usually contained in the charter or act that formed the corporation.[28] The king used chartered corporations to organize and provide some degree of self-government not only to towns but also to guilds,

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crown's prerogative subsisting in the hands of a subject," which was "an incorporeal hereditament, and arises either from royal grants or from prescription which presupposes a grant," such as "the right to hold a fair, market, ferry, free fishery," etc. Hugh Chisolm, "Franchise," *The Encyclopaedia Britannica*, 11th ed. (Cambridge: University Press, 1910), 932. In the U.S., a franchise was understood to be a "particular privilege or right granted by a prince or sovereign to an individual, or to a number of persons." Noah Webster, "Franchise," *American Dictionary of the English Language*, 3rd ed. (New York: S. Converse, 1830), 358.

[26] By 1215 C.E. the Magna Carta fixed the rights of chartered entities as a fundamental feature of English law, declaring that "the City of London shall have all its ancient liberties and free customs . . . furthermore, we decree and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs." Magna Carta, art. 13, http://www.constitution.org/eng/magnacar.htm (accessed April 3 2010). By approximately 1235 C.E. Henry Bracton singled out a special concept of property unique to corporations. Bracton wrote, "[t]hings in cities belong not to individuals but to the universitas...which belong to all the citizens in such a way that they belong to none individually." Henry Bracton, *De legibus et consuetudinibus Angliae (On the Laws and Customs of England), Vol. 2* (Cambridge: Harvard Law School Library, 2003), 40, http://hlsl5.law.harvard.edu/cgi-bin/bracton/hilite.cgi?Unframed+English+2+40+universitas.

[27] From 1066-1216 C.E., it was not uncommon for the King to fine counties rather than individuals. Thomas Madox, *The History and Antiquities of the Exchequer of the Kings of England, in Two Periods* (London: Printed for William Owen, 1769), 502, http://www.archive.org/details/historyantiquiti01mado (May 3, 2010 4 pm) p. 502 (1769 ed.) As early as 1202 C.E. a county could defend itself as a whole and hire a champion in legal disputes. Sir Frederick Pollock and Frederic William Maitland, *The history of English law before the time of Edward I, Vol. 1* (New Jersey: The Law Book Exchange, Ltd., 1996), 534, 536-37. Royal administrators considered the contributions of the individual villagers in an incorporated town to be too small for separate statements and referred to the group as a whole. James Tait, "The Borough Community in England," *The English Historical Review* 45 (180) (1930): 529.

[28] For a list and description of these exclusive rights, see William Blackstone, "Of Corporations," *Commentaries on the Laws of England in Four Books, Vol. I* (Philadelphia: J.B. Lippincott Co., 1893), 476; See also Kyd, *Law of Corporations*, 69.

universities and colleges, hospitals and ecclesiastical bodies within incorporated political spheres.[29] These nascent corporations were political in nature, but eventually corporations took on economic importance in the form of commercial pursuits.

B. The Origin of the English Private Business Corporation

The concession of royal authority, manifested in charters, together with the recognition of a political entity as a body apart from individuals, merged to create a foundation for the business corporation. What was initially only geographical organization shifted to become privileges of organization among merchants. As a tool of government, Kings used charters of incorporation to levy financial assessments and grant special franchises in the form of commercial privileges. At the outset, these privileges often took the form of monopoly rights. For instance, Henry I, who reigned from 1100-1135 C.E., granted a group of Cambridge merchants a monopoly over barge loading docks.[30]

Prior to the Sixteenth century, private corporations were small exceptions to what was typically a municipal corporate form, yet eventually the monarchy increased the popularity of private corporations by using them more often as tools of national policy. The chartered corporation extended to private business activity in part for convenience in assessing appropriate taxes from merchants. Certain franchises also empowered groups to take risky ventures abroad by offering a large payout to offset the investment, often in the form of monopoly, while the government created valuable revenue streams by creating new customs revenue and selling the rights to monopolies.[31] Companies received royal charters in order to expand English power through the development of foreign trade and the creation of colonies.[32]

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[29] Ron Harris, *Industrializing English Law*, 17.

[30] As cities and industry developed in the feudal economy, English kings recognized the importance of merchants and guilds to the success of the kingdom. For example, Richard II granted a charter in 1391 to English merchants in Prussia for organizational purposes, and in 1490 Henry VII made the Englishmen of Pisa a corporation. Harold J. Laski, "The Early History of the Corporation in England," *Harvard Law Review* 30(6) (1917): 580.

[31] Lasky, *Corporation in England*, 580; Ron Harris, *Industrializing English Law*, 40-41. Corporations generated government revenue in two ways: fees for the right of monopoly, and income through customs and trade. These additional funds off-set royal expenses that benefited the companies, such as foreign embassies or maintenance of the royal navy. Armand DuBois, *The English Business Corporation After the Bubble Act: 1720-1800* (New York: Octagon Books, 1971), 1. After James II was overthrown during the Glorious Revolution of 1688, the crown still formed monopolies, but the approval of Parliament was required before any monopoly could be assigned. Bishop Carleton Hunt, *The Development of the Business Corporation in England 1800-1867* (Cambridge: Harvard University Press, 1936), 5.

[32] Queen Elizabeth I promoted the inclusion of monopoly clauses into corporate charters for trade goods or geographic locations as a tool of government policy and power. Edward A. Bradford, "The History of

C. The Development of English Corporate Law and the Corporate Person in Relation to Private Business Corporations

English law was slow to develop any sort of distinction between charters that had political objectives and charters driven by economic purpose. Although corporations provided particular privileges, such as limited liability and perpetual existence, most people did not need special franchises and corporate charters to engage in typical business pursuits. Existing law was sufficient to guide business matters.[33] For instance, contract law enabled most people to engage in legally binding agreements that allowed for managing assets or business organization. Under English common law a contract established the necessary structure to create cooperative business partnerships.[34] In addition, the monarchy developed special Courts of Equity that allowed for the management of assets in legally created trusts, arrangements by which the property of one individual could be managed by another. Moreover, granting a charter required an individual act by the king, and corporations were few. Thus, the necessity for a unique law governing private business through corporations took time to develop. Over time, English law recognized corporate business practices apart from political privileges, and developed laws accordingly.

Corporate Law contained some nuance of origin and purpose, but overall corporations were subject to the same general authority: they were functions of the state. A corporation was first and foremost a legal entity, very distinct from a natural person. In 1612, Lord Coke emphasized the tenuous existence of corporations by describing their total lack of physical being. Unlike people, corporations "may not commit treason, nor be outlawed, nor excommunicate, for they have no souls, neither can they appear in person...[a] Corporation aggregate of many cannot do fealty, for an invisible body cannot be in person,

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Monopoly," *New York Times*, March 2, 1907, 122; Howard C. Anawalt, "Development of Intellectual Property," in *Economics, Law, and Intellectual Property*, ed. Ove Granstrand (Dordrecht, Netherlands: Kluwer Academic Publishers, 2003), 57. By the time of Charles I, monopolies were integral parts of corporate charters. Ron Harris, *Industrializing English Law*, 24, 43.

[33] By the eighteenth century some legal concepts, such as limited liability, made no legal distinction between municipalities and other corporations. Oscar Handlin and Mary F. Handlin, "Origins of the American Business Corporation," *The Journal of Economic History* 5(1) (May, 1945): 11. The method of creation was the primary difference between types of corporations, which was based on whether an organization sought incorporation for profit. Queen Elizabeth I created statutes that allowed for automatic incorporation among non-profit and charitable organizations, such as hospitals, houses of correction, and religious and municipal institutions. Statute of Charitable Uses (1601), 43 Elizabeth I c. 4.

[34] Common law, as opposed to statutory law, originated from customs already present in localities before the king possessed them, and thus collective judicial decisions that were based in tradition, custom and precedent formed the law shared by people in the same kingdom, under the same authority—the "common law." Winston Churchill, *A History of the English Speaking People* (New York: Bantam Books, 1963), 158-165. Common law operates through the doctrine of *Stare Decisis*.

nor can swear, it is not subject to imbecilities, or death of the natural, body."[35] Coke characterized corporations as "onely in abstracto, and resteth onely in intendment and consideration of the Law; for a Corporation aggregate of many is invisible, immortal, & resteth only in intendment and consideration of the Law."[36] Coke's writings were instrumental in demonstrating that the corporate person could only be a "legal fiction."[37] Sir William Blackstone further elucidated on the meaning of the corporate legal fiction in his *Commentaries on the Laws of England* published in the 1760s. Blackstone differentiated between "persons in their natural capacities" and corporations,[38] which were "artificial persons,"[39] writing that corporations were vessels created

> to have any particular rights kept on foot and continued, to constitute artificial persons, who may maintain a perpetual succession, and enjoy a kind of legal immortality... in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct.[40]

Neither Coke nor Blackstone indicated that either the for profit or non-profit corporate person was due any rights beyond what was explicit in its charter.

By the eighteenth century, the corporation had clear definition as an organization subservient to the government. English common law expressed corporate structure through a distinct set of characteristics. First, the formation of corporations derived from the king's ability to create jurisdictions, liberties, exemptions and franchises.[41] Parliament would later gain limited power of incorporation as well, but ultimately incorporation was an action of the state.[42] Second, the corporate entity was created by taking a group of individuals and transforming them into a whole entity. This process "synthesized men into the abstraction of a new being…[w]hat has happened is less the acquisition of new rights than the formulation

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[35] Sir Edward Coke, "The Case of Sutton's Hospital," *The Selected Writings and Speeches of Sir Edward Coke, Vol. I*, ed. Steve Sheppard (Indianapolis: Liberty Fund, 2003), 371-372, http://oll.libertyfund.org/title/911/106352 on 2011-04-27 104

[36] Ibid.

[37] A legal fiction is "[a]n assumption that something is true even though it may be untrue, made [] in judicial reasoning to alter how a legal rule operates" Bryan A. Garner, ed., "Legal Fiction," *Black's Law Dictionary*, 8th ed. (St. Paul, Minnesota: West Publishing Company, 1999), 913-914.

[38] Blackstone defined corporations as "a franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession, and to do corporate acts, and each individual of such corporation is also said to have a franchise, or freedom." Blackstone, *Commentaries*, 38.

[39] Blackstone, *Commentaries*, 468.

[40] Ibid.

[41] Early corporate law was consequently classified as the "Law of the King." Ron Harris, *Industrializing English Law*, 19.

[42] Ibid.

of a means whereby collective action may be taken by that which is not the body of citizens even while it is still the citizen body."[43] Accordingly, charters and incorporation served an organizational purpose that did not bestow natural rights, as opposed to administrative rights, to corporate "persons."[44]

D. The Common Law Pertaining to Corporations and the Corporate Person at the Time of the Creation of the United States of America

In 1795 Stewart Kyd wrote the first English treatise devoted to the law of corporations.[45] English jurists discussed corporations in many of their works, most notably Blackstone's whole chapter on corporations in his *Commentaries on the Law of England* in the 1760s, but no English writer ever dedicated an entire treatise to the subject. On the topic of corporate personhood, Kyd indicated that a corporation was an artificial form with the capacity to act as an individual in several respects.[46] Kyd emphasized that the individual capacity of corporations came in the form of property rights, contractual obligations, and the ability to sue and be sued, as well as the enjoyment of privileges and immunities, and political rights according to the powers conferred to the corporation.[47]

English law narrowly defined the privileges and immunities or political rights a corporation might enjoy. Kyd wrote that the corporate franchise was nothing more than the right of assembly among individual men explaining that, "[t] he right of acting, as a corporation, may be called a franchise."[48] For Kyd, the "franchise of being a corporation can only have precise meaning as existing collectively in all the individuals of whom the corporation is composed."[49] Only "the men and citizens" constituted "one body corporate or politic" and because natural persons constitute the body politic, "so all the operations and exercise of this right [of assembly], are performed only by the natural persons."[50] The right of union or assembly among individuals was the only corporate franchise that existed. When Kyd mentioned "privileges and immunities in common" his purpose was to indicate that the individual members of the corporation retained their natural rights. They did not forfeit anything, but instead merely exercised the right to assemble. At the same time, the body they composed did not suddenly develop the same rights that

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[43] Laski, "Corporation in England," 579.
[44] Ibid, 567.
[45] Steward Kyd, *Law of Corporations*, 13.
[46] Ibid.
[47] Ibid.
[48] Ibid.
[49] Ibid., 14.
[50] Ibid., 16-17.

inhered in individuals. Whatever corporations were, they were not "people" or "persons" under the law, as those words are commonly understood. Ultimately, the corporation may have had a separate existence from its individual members, but it did not retain all the rights of those individuals.

The corporation, or body politic, had no rights independent from its members or its chartered purpose because "[a] corporation being merely a political institution, it can have no other capacities than such as are necessary to carry into effect the purposes for which it was established...."[51] Consequently, a corporation was in no way a person because "it cannot therefore be considered as a moral agent subject to moral obligation, nor as a single person subject to personal suffering, or capable of personal action...."[52] True to its administrative origins, the corporation was an artificial person only so far as it needed to deal with contracts, property, and lawsuits. In fact, unlike the privileges and immunities enumerated generally in the common law, the corporation existed solely at the pleasure of the government. Thus, in the context of the law of corporations, the notions of "franchise" and "privileges and immunities" had specific application that excluded any retention of natural rights.[53]

These institutional and legal frameworks of incorporation were transported to America with the creation of English Colonies. In fact, many colonies were initially established under corporate charter.[54] At the time of the American Revolution, colonial jurists were educated in the writings of Blackstone and Coke and were aware of the legal fiction of the corporate person. However, after 1787, U.S. courts looked

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[51] Ibid., 70-71.
[52] Ibid., 71.
[53] Kyd was careful to note that there are privileges, or "liberties," that can have "no existence without reference to some person to whom it may belong," and that "in this sense a corporation cannot be called a franchise." Ibid., 15.
[54] For examples, see First Charter of Virginia 1606, Charter of New England in 1620, the Charter of Massachusetts Bay in 1629, the Charter of Maryland in 1632, the Charter of Maine in 1639, the Charter of Connecticut in 1662, the Charter of Rhode Island in 1663, the Charter of Carolina in 1663, and the Charter of Georgia in 1732. Richard L. Perry, ed., *Sources of Our Liberties* (Chicago: American Bar Foundation,1978), 35. The fact that the colonies were corporations played into the argument of whether Parliament had a right to tax them without representation. In 1775 the Reverend John Wesley wrote, "[a] corporation can no more assume to itself, privileges which it had not before, than a man can, by his own act and deed, assume titles or dignities. The legislature of a colony may be compared to the vestry of a large parish: which may lay a cess on its inhabitants, but still regulated by the law: and which (whatever be its internal expences) is still liable to taxes laid by superior authority." In other words, the American colonies, as English corporations, could not demand representation in parliament because it was a privilege they did not have. Nonetheless, they were "liable to taxes laid by superior authority." John Wesley, "A Calm Address to Our American Colonies," in *Political Sermons of the American Founding Era: 1730-1805*, Ellis Sandoz, ed., 2nd ed. (Indianapolis: Liberty Fund, 1998), 27.

to the Constitution in addition to common law. The interplay between these sources of law in U.S. history advanced a new concept of the corporate person.

III. Early American Corporations (1787-1868 C.E.)

The American experience with corporations initially formed against a backdrop of wariness and suspicion. At the time of the American Revolution, the distinguishing feature of the English corporate entity for many American colonists was privilege. Corporate charters entitled special privileges, which were arbitrarily applied to some favored individuals and organizations at the expense of others. The notion of conditional privilege, bestowed from on high at the discretion of a monarch, stood in stark contrast to the principle of inalienable rights.

A. Early American Antipathy Towards Corporations

When Americans achieved their independence, they confronted the familiar issue of corporations in the form of government sponsored trade monopoly. Past experience, such as the British East India Company's monopoly on the tea trade, colored the American debate over the potential role and meaning of corporations in the new republic during the Constitutional Convention of 1787. In the American experience, the "corporation" equated to trading companies, and trading companies were distasteful due to their roles as extensions of government power that allowed them to control foreign trade and even raise armies to levy war.[55] American anti-corporate sentiment manifested primarily in an opposition to the privilege of monopoly—the perceived source of a corporation's corrupting influence.[56] For example, delegates resisted Alexander Hamilton's proposal for a national bank project because they feared it would serve as precedent for granting monopolies similar to the East and West India Companies.[57] Delegates also

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[55] Gerard Carl Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge: Harvard University Press, 1918), 10.

[56] Ibid., 12. Henderson notes that the East India Company exemplified the sort of corporate powers particularly odious to American colonists, writing that "[t]he distinguishing feature of these companies was not legal personality, but monopoly." The Tea Act of 1773 manifested the British Parliament's attempt to reduce the surplus of tea held by British East India Company, which was at that time in financial turmoil. Colonists reacted to the Act with the Boston Tea Party, destroying an entire shipment of tea sent by the East India Company. Max Farrand, "The Taxation of Tea, 1767-1773," *The American Historical Review* 3(2) (Jan., 1898): 266-269; Arthur Meier Schlesinger, "The Uprising Against the East India Company," Political Science Quarterly 32(1) (Mar., 1917): 60-79; Jonathan Lurie, *Law and the Nation 1865-1912* (New York: Knopf, 1983), 27.

[57] Henderson, *Position of Foreign Corporations*, 412. The eventual chartering of a national bank would have vast implications on how later Americans understood the corporation, but at the moment Americans were forming government the notion of a federal government with the power to charter corporations was extremely unpopular.

worried that the Constitution's proposed Commerce Clause would give Congress the power to grant commercial monopoly. One delegate after another argued against the clause, equating "corporation" with "monopoly."[58]

Records from the Convention make clear that some delegates were so opposed to corporations that they sought to deny the federal government from having even the basic power of incorporation. James Madison twice tried to include a clause that expressly gave Congress the power to grant charters of incorporation, but was unsuccessful on both occasions.[59] State representatives shared the same distaste for a federal power to charter corporations. Massachusetts, New York, New Hampshire and Rhode Island ratified the Constitution as long as "Congress erect no company of merchants with exclusive advantages of commerce."[60] Consequently, the newly formed federal government had no power to create or maintain corporate charters. In fact, the Constitution was ultimately enacted entirely devoid of the word "corporation."

Americans were skeptical of corporations, but a minority of political leaders, in time, opened the way for federal corporate law. Alexander Hamilton as Secretary of the Treasury managed the national debt through a federal chartered bank in George Washington's first administration, notwithstanding a large front of opposition led by Thomas Jefferson.[61] Although the Constitution made no provisions for corporations,

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[58] Massachusetts delegate Elbridge Gerry objected that the "Power given respecting Commerce will enable the Legislature to create corporations and monopolies." Elbridge Gerry, "Objections of Mr. Gerry," *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), 635. George Mason of Virginia noted that "[u]nder their own construction of the general clause at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce." George Mason, "Objections of Mr. Mason," *The Records of the Federal Convention of 1787*, ed. Max Farrand (New Haven: Yale University Press, 1911), 640.

[59] During the Constitutional Convention, Madison twice attempted to secure the adoption of a clause expressly giving Congress power to grant charters of incorporation, but was defeated by votes of three states to eight. James Madison, *The Writings of James Madison, comprising his Public Papers and his Private Correspondence*, ed. Gaillard Hunt (New York: G.P. Putnam's Sons, 1900), 452-453.

[60] Four of the states accompanied their ratification of the Constitution with the recommendation, among others, "That Congress erect no company of merchants with exclusive advantages of commerce." Henderson, *Position of Foreign Corporations*, 20.

[61] Hamilton was specifically concerned that Jefferson and Madison were "disposed to narrow the Federal authority" in regards to a national bank. Alexander Hamilton, "*A Faction Decidedly Hostile to Me*," *Letter to Edward Carrington*, May 26, 1792, reprinted in Alexander Hamilton, *Hamilton Writings*, ed. Joanne B. Freeman (New York: Library Classics of the United States, 1961 [2001]), 745-747. Hamilton believed a federally chartered bank was constitutional because a corporation related to tax collection or trade was within the scope of fundamental federal issues, even though no federal power expressly permitted chartering a corporation. Richard Brookhiser, *Alexander Hamilton, American* (New York: Touchstone,

Hamilton managed to have the First Congress charter the Bank in 1791 by exchanging his support to move the national capital from New York to the banks of the Potomac with Thomas Jefferson and southern representatives.[62] Eventually, the United States Supreme Court, under the Federalist Chief Justice John Marshall, found legal authority for the Bank's charter by reference to the Constitution's "Necessary and Proper" clause, removing any risk to the Bank posed by the absence of express Constitutional power of incorporation.[63] This checkered history made the Bank a center of political controversy for the next forty years, and served as the doorway for federal involvement in Corporate Law.

B. The Supreme Court Asserts Jurisdiction Over American Corporate Law

By 1809, the First Bank of the United States was party to the first Supreme Court decision on corporate personhood in the United States. Specifically, the case addressed whether a corporation was a "citizen" under the Judiciary Act of 1789. The Act gave Federal Courts jurisdiction over a case or controversy between citizens of different states through the power of removal.[64] Put simply, the issue before the Court in *Bank of the United States v. Deveaux* was whether the Bank, as a federal entity, had any ability to file suit in Federal Court.[65]

At the outset, the Court had to form some opinion of a corporation's political status. Chief Justice Marshall thought it obvious that an "invisible, intangible, and artificial being, that mere legal entity" of a corporation could not literally be a "citizen."[66] Yet, he recognized corporations as a "company of individuals," all of whom could have citizen status.[67] Marshall noted that through the Judiciary Act, Congress allowed citizens of different states to bring controversies to Federal Court because state courts,

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2000), 92-93; Hamilton, *Opinion on the Constitutionality of a National Bank*, February 23, 1791, reprinted in Hamilton, *Hamilton Writings*, ed. Freeman, 613-636.

[62] There was substantial debate as to whether Congress could constitutionally charter the bank. Alexander Hamilton negotiated support from Southern representatives, led by Thomas Jefferson, in exchange for Hamilton's support to move the national capital from New York City to the banks of the Potomac. The Bank's charter expired in 1811 after the motion in the House of Representatives to renew the charter lost by 1 vote (the tie breaking vote submitted by Vice President George Clinton). President Madison managed to charter a Second Bank of the United States, however, out of a necessity for financing the War of 1812.

[63] The constitutionality of this charter was challenged but upheld by the Supreme Court in *McCulloch v. Maryland*, 17 U.S. 316 (1819), by invoking the Necessary and Proper Clause of the Constitution to find that Congress had the power to charter the bank.

[64] Judiciary Act of 1789, U.S. Code 28 (1789), §1257.

[65] *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61 (1809).

[66] Ibid., 86. Adhering to Blackstone and Coke's strict delineation between artificial and natural persons, Marshall wrote that a corporation "is certainly not a citizen."

[67] Ibid., 86-87.

according to Marshall, favored local parties over parties from other states.[68] Citizens of different states were "not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name."[69] In other words, though a corporation may not literally be a "citizen," the local bias that motivated Congress in passing the Judiciary Act was no less threatening to the individuals who comprised a corporation. Congress' policy of providing a judicial forum removed from local influence was compelling enough that even a corporation should fall under its protection.

With no American law to look to for guidance, Marshall stated, "[a]s our ideas of a corporation, its privileges, and its disabilities are derived entirely from the English books" he had to "resort to them for aid."[70] Marshall used these authorities to determine that a corporation could technically be a "citizen" for purposes of federal jurisdiction, despite its intangible form. Under English common law, although corporations were "a mere creature of the law, invisible, intangible, and incorporeal" they were "endowed...with the character of a citizen," allowing the corporation to come to court instead of requiring attendance of each individual member.[71] Thus, the corporation could retain the legal definition, rights and responsibilities of an "inhabitant."[72]

However, the Chief Justice was careful to indicate that the corporation's legal status did not rise to the level of an actual human being. Marshall believed that members of a corporation were not "out of view" and did not "merge[] in the corporation." Indeed, he did "not mean to liken [a corporation] to the case of a trustee" who was "a real person capable of being a citizen or an alien, who has the whole legal estate in himself."[73] Instead, a corporation had a right to bring controversies before Federal Court due to

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[68] Ibid., 87.
[69] Ibid.
[70] Ibid., 88.
[71] Ibid., 88-90. Marshall looked to common law examples such as Lord Coke's notion that corporations were "inhabitants" within the meaning of a law that authorized the power to tax every "inhabitant of such city" for bridge and road repair. Marshall also noted that the common law allowed judges to "look beyond the corporate name and notice the character of the individual for purposes of jurisdiction." Ibid., 88-89.
[72] Ibid., 89-90. Marshall rejected the idea that he should consider the individual rights of the members of a corporation to determine what rights the corporation had because "they use the name of the corporation for the purpose of asserting their corporate rights." Ibid.
[73] Ibid., 91.

their *limited* status as citizens.[74] According to Marshall, the corporate person in the United States should have narrow definition.

Marshall established three significant principles in the *Deveaux* opinion. First, corporations were squarely within the jurisdiction of federal courts. Though *Deveaux* involved a corporation specially chartered by Congress, Marshall's opinion was broad enough to offer federal jurisdiction to *any* corporation under the doctrine of "diversity."[75] This outcome was consistent with many of Marshall's early opinions, which reflected a Federalist objective of national unity under a strong federal presence.[76] Second, in order to achieve the first principle, Marshall introduced a flexible rule of interpretation in the context of Corporate Law: judges could adhere to the spirit of the Constitution, if not its literal meaning. Without such flexibility, absence of corporations in the Constitution might have stymied the Court. This standard allowed Marshall to focus on a constitutional policy objective through the use of English Common Law as an anchor for his decision. Marshall's third principle was to realize policy priorities by looking through the corporate person to focus on the individuals that comprised it. If corporations were outside the scope of the Constitution, then attacking a corporation might offer a loophole to get around constitutional rights that protected individual members. Marshall questioned how to protect individual rights explicitly protected by the Constitution when they presented themselves in a context that outwardly excluded corporations. The solution in *Deveaux* was simply an extension of legal fiction. The corporation could not literally be a citizen, but could be *treated* as one for limited legal purposes. The corporate person was an artificial person with a few legal rights enumerated in the corporate charter and a singular legal status for jurisdiction.

Marshall's solution did not stray far from English common law. His decision introduced the "artificial entity" theory into federal law, discussed in English jurisprudence by Lord Coke and Sir William Blackstone. Consequently, *Deveaux* applied the English Common Law tradition of limited administrative status for corporations, also consistent with Kyd's treatise on Corporate Law. Yet Marshall had not given much guidance on reconciling disparities between constitutional and common law. Differences such as the

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[74] Ibid.
[75] Diversity authorizes federal courts to hear cases where the opposing parties are citizens of different states. "Diversity jurisdiction" enables a federal court to hear cases where there is not a federal question.
[76] Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 8.

presence of a monarch created a gap between these two sources of U.S. law, which provided latitude for judicial interpretation in later years for lawyers and judges who struggled to merge them.[77] At the time of *Deveaux*, though, American corporations remained intimately tied to the sovereign state, consistent with common law. As a creation of the state, the corporation could not assert constitutional rights against its creator unless those rights were included in the traditional privileges of corporate charters.[78]

C. American Business Corporations: Rooted in Public Works

Notwithstanding American distrust of corporations, the corporate entity developed throughout early nineteenth-century.[79] Uncertainty about the federal government's role in cultivating infrastructure meant the lion's share of responsibility often fell to the states. By the late eighteenth century, a high demand for better transportation prompted many states to grant corporate charters for the construction of turnpikes, canals, and bridges.[80] States inherited the ability to charter corporations through the adoption of English common law.[81] Common law became the default law of states except Louisiana, and courts deferred to common law as long as it did not contradict state constitutions or statutes. Without federal

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[77] The difficulty of reconciling common law with constitutional law and the importance of policy judgments may be a reflection of Marshall's style of decision making. Theophilus Parsons, a law professor who knew Marshall personally, noted that Marshall's "knowledge of precedent was weak," and that he often made conclusions first, then found the law to back those judgments later. Parsons recounted that Marshall would assign the task of finding precedents to Justice Story, known for his scholarly ability, saying, "[t]here, Story; that is the law of this case; now go and find the authorities." Theophilus Parsons, "Distinguished Lawyers," *Albany Law Journal, Vol. II*, Isaac Grant Thompson, ed. (Albany: Weed, Parsons and Company, 1870): 126-7.

[78] Carl J. Mayer, "Personalizing the Impersonal: Corporations and the Bill of Rights," *Hastings Law Journal* 41 (1990): 580.

[79] Policy makers were unsure whether the Constitution permitted federal involvement in building improvements to state infrastructure, and federal proposals for road construction led to fierce debates on the fundamental issues of Federalism. The issue of improving state infrastructure was important enough that President Thomas Jefferson, who strongly favored the states' power over the federal government, initiated the first federal public works program. In 1806 Jefferson signed a bill appropriating funds for the construction of a road that ran from Cumberland, Maryland, to the Ohio River in Western Pennsylvania. The opponents of the project believed that the federal government was abusing its authority at the expense of state sovereignty. In 1822 President Monroe vetoed the bill because, "Congress does not possess the power under the Constitution to pass such a law." Lalor, John J., ed., *Cyclopædia of Political Science, Political Economy, and the Political History of the United States* (New York: Maynard, Merrill, and Co. 1899), 341,http://www.econlib.org/library/YPDBooks/Lalor/llCy338.html. This political struggle had long lasting effect. John Quincy Adams supported federally funded internal improvements, but Andrew Jackson ended Adams' efforts with the Maysville Road veto of 1830.

[80] Christian C. Day, "Partner to Plutocrat: The Separation of Ownership from Management in Emerging Capital Markets," *University of Miami Law Review* 58 (2004):530.

[81] L. N. H., "Common Law: Adoption by States," 340-342. The notable exception is Louisiana, which based its legal system on Civil Code (Napoleanic Code) rather than Common Law. Bernard C. Steiner, "The Adoption of the English Law in Maryland," *Yale Law Journal* 8 (1899): 353-361.

supervision, direction, or interference, states were capable of developing their own corporate law as they saw fit. As a consequence, corporations were not entirely removed from the political or economic environment of the early republic. States experimented with the corporation's ability to organize capital by allowing private business organizations to incorporate under heavy public overtones, tying corporations to government supervision and control through public works.[82]

This early model of corporations, a hybrid of public and private organization, enabled states to oversee public works without having to generate or commit public funds. Businesses otherwise had little need for the corporate structure because limited railroads or canals meant smaller and often unconnected markets. In a more insular atmosphere, businesses continued to rely on partnerships and contract law, as they had under common law.[83] Of course, not all businesses were so locally focused, but until 1820, state legislatures rarely granted corporate charters to organizations not involved with public works or philanthropy.[84] A very small minority of business corporations existed apart from public works, but their identity as a "person," per the prevailing "artificial entity" theory, was strictly limited.[85]

Standard among the states was the understanding that a corporation was an organization bestowed with specific privileges for a specific state-related purpose. The American corporation remained an extension of government with very limited power, kept in close control by the states that created them. In this spirit, New Hampshire attempted to take possession of Dartmouth College by transforming it from a private to a purely public corporation. The dispute brought *Trustees of Dartmouth College v. Woodward* to

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[82] States used English common law to govern and regulate corporations. They also inherited and put to use the Elizabethan statute allowing for the automatic incorporation religious, non-profit, charitable or municipal institutions. Abram Chayes, Introduction to *Corporations* by John P. Davis, (New York: Capricorn Books, 1961), vii. Corporations retained their civic purpose, as servants of the state, in early eighteenth century United States and were chartered predominantly for structuring local government bodies, such as towns, or for community use in organizing the construction of public works projects such as bridges or canals. James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States: 1780-1970* (Clark, New Jersey: Lawbook Exchange, 2004 [1970]), 17.

[83] Day, "Partner to Plutocrat," 539.

[84] James Willard Hurst, *Law and Markets in U.S. History* (Madison: University of Wisconsin Press, 1982), 48.

[85] Most of the tools that businessmen required for the accumulation of capital, organization and for entry into markets were provided for by partnerships or proprietorships regulated by traditional contract and trust laws. Ibid. Business activity affecting markets was decentralized and conducted through small individually owned or family firms with a single product or service each. In any case, business enterprises were owner operated and localized. Alfred Chandler, *The Essential Alfred Chandler: Essays Toward a Historical Theory of big business,* ed. Thomas K. McCraw (Boston: Harvard Business School Press, 1988), 228

the Supreme Court in 1819 on the issue of exactly how much power the state could exert over its chartered corporations.[86]

D. Private Corporations Gain Separation From Government Control Through Contract Law

In 1769, Dartmouth College received a grant of corporate charter from King George III, which passed to the control of the State of New Hampshire after American independence.[87] By 1817, the New Hampshire legislature passed a series of acts requiring the initial corporation to transfer all "property, rights, powers, liberties, and privileges" to a newly created public corporation.[88] The Board of Trustees refused the terms of the new charter and filed suit to retain the original charter. The New Hampshire Superior Court ruled against the trustees, employing common law to decide that state power to charter corporations included the power to revise those charters accordingly, even if it meant wholly transferring from private to public incorporation. The trustees appealed the case to the U.S. Supreme Court, asserting that New Hampshire violated the constitution in ruling against them.

New Hampshire argued that because the Dartmouth College entity was political in nature, it was subject to the pleasure of the sovereign, which was the state. Looking back to English law, New Hampshire substituted itself for any mention of the British Parliament or monarchy, claiming that after independence it inherited the power of the King or Parliament to revoke or modify a charter at any time.[89] In *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), an unrelated case, the Supreme Court previously equated legislative grants to contracts, and New Hampshire conceded that a private charter may be a contract between the state and the corporation.[90] New Hampshire insisted that the charter at issue differed from *Fletcher* because from it was tantamount to any ordinary act of public legislation. Indeed, the Dartmouth College Corporation was created for education, a civil purpose, so the private charter was "merely a mode

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[86] *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).
[87] All existing charters of incorporation at the time of American independence were inherited by the states in which they were formed, passing control from King George III and Parliament to the respective states. Ibid., 650.
[88] Ibid., Syllabus, 48.
[89] Ibid., Syllabus, 55. New Hampshire argued that its legislature was the successor in sovereignty to the charter.
[90] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810), held that a grant to a private land company was a contract under the Constitution's Contracts Clause.

of exercising one of the great powers of civil government."[91] New Hampshire thus concluded that it had the legal authority to amend the charter, as it would any other state act.

Dartmouth College, represented by Daniel Webster, characterized the case as a simple contracts issue. Webster tried to persuade the court that American constitutional values were incompatible with the common law in two crucial respects. First, the New Hampshire legislature as a sovereign entity had a power that was limited by the U.S. form of government—a limitation not shared by Parliament or the King under common law. The Dartmouth charter granted "vested liberties, privileges, and immunities" that "being once lawfully obtained and vested, are as inviolable as any vested rights of property whatever."[92] Unlike English Parliament, the New Hampshire Legislature could not take away vested rights—that ability was exclusive to the judiciary in the United States.[93] At best, Webster argued, the legislature had equal power to the king, who, after the rule of James II, granted charters as a part of the royal prerogative, but could not alter or revoke them without a process of forfeiture.[94] Second, the charter was private in nature and was a binding contract between the state and a private party. Therefore, Webster contended that any unilateral revision by the State violated Article I, Section 10 of the United States Constitution that "no State ... shall pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts."[95] As a contract, the charter also guaranteed property that could not constitutionally be seized without due process.[96]

The Supreme Court ruled in Dartmouth College's favor. Chief Justice Marshall offered the corporate entity substantive protection from government control. Marshall emphasized that the immortality of a corporation served an important administrative role, enabling the corporation to "manage its own affairs [] and to hold property without ... perpetual conveyances for the purpose of transmitting it from hand to hand."[97] Yet, the privilege of "immortality" did not inherently make the corporation a part of "the civil government of the country," unless it was explicitly created to be part of the government. Though the

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[91] *Dartmouth College*, Syllabus, 114.
[92] Ibid., Syllabus, 79.
[93] Ibid., 108-109. Webster made the policy argument that the judiciary was the proper establishment to prevent abuses and violations of trust because of its isolation from political pressure. Ibid., 109.
[94] Ibid., 3-4, 55-56.
[95] Ibid., citing US Const. Art. 1 Sect. 10.
[96] United States Constitution, Article I, section 10, clause 1.
[97] *Dartmouth College*, 17 U.S. (4 Wheat.) 518, 636, 642 (1819).

British Parliament had power that Marshall characterized as "omnipotent," such power did not exist in the United States.[98] States retained the right to alter or revoke purely public charters, but the authority was not assumed in the act of incorporation itself. A corporation was "no more a State instrument than a natural person exercising the same powers would be."[99]

Through this assessment, Marshall gave the corporate person a more robust definition. Nevertheless, equating a corporation to a natural person had its limits, namely that the corporation's rights were solely determined by the state at initial incorporation. A corporation was still only "the mere creature of law," and it retained "only those properties which the charter of its creation confers upon it," which were designed "to affect the object for which it was created."[100] Marshall limited the rights of the corporate person by restricting it to the specific language of the charter, which he defined as a contract. In exchange for the corporation offering benefits to the public, the government "compensated" it with a corporate charter, replete with certain "privileges and immunities."[101] Unless explicitly in the charter, any government claim of a right to alter the private nature of the corporation it created was unfounded. The right to alter could not be implied to exist for the government as grantor of the charter, just as a party to a contract could not unilaterally change its terms after execution.[102]

This result was a departure from common law, and Marshall conceded that it was "more than possible[] that the preservation of rights of this description was not particularly in the view of the framers of the constitution" as the contracts clause was drafted. Thus, Marshall turned to the intent of the framers, as he had in *Deveaux*.[103] That analysis led to the Court's ultimate holding that a private corporate charter is the equivalent of a contract, "the obligation of which cannot be impaired, without violating the constitution of the United States."[104] Even though the framers of the Constitution clearly opposed the notion of federal corporate charters, here the court merged such charters into constitutional law by making them analogous

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[98] Ibid., 643.
[99] Ibid., 636.
[100] Ibid.
[101] Ibid., 637. Marshall noted that a charter fulfilled the basic legal requirements of a contract: offer, acceptance, and consideration.
[102] Ibid., 638.
[103] Ibid., 644.
[104] Ibid., 650. Marshall made clear that all contracts, and rights respecting property, remained unchanged by the revolution. The obligations created by the charter to Dartmouth College were the same as they had been in the old government.

to land grants or other contracts granted by the government. Consequently, private corporations in the United States were now protected from certain common law traditions that limited them in relation to the governments that created them because their charters—now considered "contracts" between the corporation and the government—guaranteed certain rights by the Constitution not subject to revision or revocation. This interpretation offered direct constitutional protection for corporations by the Contracts Clause, which prohibits states from enacting any law that retroactively impairs contract rights.[105] It also stripped the chartering process of the reverence it enjoyed under English common law, transforming the process of creating a corporation from the regal concession of power to a mutual agreement between parties.[106] Chief Justice Marshall's opinion was again rooted in the "artificial entity" principle, and although Marshall was adamant that the corporate person was simply legal fiction, it could be fully independent from the government that created it.

In addition to Marshall's opinion for the Court, Justice Story offered a concurring opinion in the *Dartmouth* case that emphasized a practical consideration that would greatly influence federal jurisprudence in future analysis: the policy ramifications of a New Hampshire victory. That result, he suggested, would call into question the legitimacy of "thousands of land titles" that "had their origin in gratuitous grants of the States."[107] Story maintained that at the time states issued land grants no one could have imagined that those grants were "liable to be resumed at [the state's] own good pleasure." A New Hampshire victory could undermine the viability of contract law in general, which Story wished to avoid.[108] Thus, aside from the interplay and friction between the Constitution and common law, Story introduced a fourth factor in the analysis of U.S. corporate law: practical policy considerations.

The *Dartmouth* case demonstrated that the corporation in the United States would not be solely the subject of common law. States could not simply assume the powers of king and Parliament through the adoption of common law. Instead, the Constitution would regulate state acts in connection with corporations, and the special status of contracts in constitutional law established that a private corporation was not a political entity in the way that common law conceived of it. After the state permitted its creation,

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[105] U.S. Const., Art. I, §10.
[106] Morton Keller, "The Making of the Modern Corporation," 58-69.
[107] Ibid., 684.
[108] Ibid.

a private corporation under U.S. corporate law was purely a private endeavor and a fully independent body subject only to the terms of the contract and the bounds of the law.

Through *Dartmouth*, the Supreme Court divorced the private corporation from total political control. The corporate person, existing up to this point as an administrative placeholder for limited, formal participation in legal matters, could now be an independent private entity with protected interests that it could defend—even if those interests were contrary to the interests of the State. The Court mediated this new separation of corporations from the states that created them in favor of the states through an emphasis on the rights contained in charters and the ability of a government to be discerning in drafting a corporate charter. In effect, common law rules of contractual interpretation became the next focus for discerning the limitations of a corporation.

E. The Importance of the Corporate Charter in Defining United States Corporate Rights

Private corporations may have achieved some degree of independence from political control and regulation after *Dartmouth*, but states in turn responded by restraining corporations through tightly crafted charters. Lower courts employed very narrow and strict interpretations of the powers granted by legislators within corporate charters. Courts still referred to the state legislative body as the ultimate arbiter of corporate rights and responsibilities, given its role as the exclusive creator of corporate charters.[109] Central to this strict interpretation was the *ultra vires* theory, which held that a corporation could only act in strict accordance with the purpose set in its charter.[110] Any deviation from that specific purpose was beyond the rights of the corporation and could result in the charter being revoked. Yet a charter's status as a contract raised questions on appropriate rules of interpretation, given the potential for a state's governance to conflict with a corporation's stated goals if the charter was vague in any way.

The Supreme Court addressed the interpretation question in 1830. This time the case involved a tax the Rhode Island Legislature passed in 1822 on every bank save for the Bank of the United States.. Providence Bank refused to pay this tax and eventually brought the case, *Providence Bank .v Billings and*

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[109] Morton Keller, *Affairs of State: Public Life in Late Nineteenth Century America* (Cambridge: Harvard University Press, 1977), 432.

[110] "Ultra Vires" means "unauthorized," or "beyond the scope of power allotted or granted by a corporate charter or by law." Bryan A. Garner, ed., "Ultra Vires," Black's Law Dictionary, 8th ed. (St. Paul, Minnesota: West Publishing Company, 1999), 1559.

Pittman, before the Supreme Court.[111] The Bank argued that a tax that only applied to banks amounted to breach of contract, in that it was an additional fee that was not a part of the initial charter.[112] This tax, the Bank maintained, was nothing more than a tax upon the contract itself, imposed ex post facto and contrary to the Contracts Clause of the Constitution.[113] Taking a cue from Justice Story's concurrence in *Dartmouth*, the Bank argued that if Rhode Island were correct, states could theoretically circumvent their contractual obligations by taxing away all the profit of the bank and destroying the franchise entirely. Therefore, the Bank urged the Court to imply from the charter an exemption from this tax.

Rhode Island countered that any exemption in perpetuity from the state's power to tax was too material to be simply inferred from a charter. It must be explicit in the charter, Rhode Island claimed, particularly because a prospective tax exemption was never a necessary or standard right in traditional corporate charters.[114] Rhode Island insisted that the "capacities and qualities as are necessary to the creation and legal being of a corporation, and such only, are incidents of the corporation," and "an exemption from taxes" was never "necessary to the existence of a corporation, especially a moneyed corporation."[115] Rhode Island also posited a policy consideration that provided insight as to the difficulty of determining just how much a state could regulate a private corporation after the *Dartmouth* case. The State argued that although the chartering of a corporation rests on the law of contracts, the act of incorporation alone does not imply any sort of relinquishment of the state's legislative power. In its creation of a corporate charter, the government only conceded the ability to unjustly or arbitrarily compromise the grant contained in the charter.[116] To rule in the alternative, Rhode Island argued, was to propose the "not wholesome doctrine for private corporations to imbibe, that they are independent of the power that creates them; and that they shall be protected in setting it at defiance."[117] The proposition that a state could not regulate issues of deep public interest might prevent a state from regulating, for instance, a chartered military company or a chartered company engaged in supplying a city with water. If private

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[111] *The Providence Bank v. Billings and Pittman*, 29 U.S. 514 (1830).
[112] Ibid., Syllabus, 26.
[113] Ibid., 31.
[114] Ibid., 50.
[115] Ibid., 52.
[116] Ibid., 62.
[117] Ibid., 63.

corporations were entirely independent of state power, states might be powerless in relation to the corporation to provide those fundamental aspects of government for the people.

Chief Justice Marshall sided with the Rhode Island this time. Notably, Marshall did not make much effort to reconcile common law and constitutional law in order to reach his decision. Instead, as Justice Story in the *Dartmouth* case, Marshall focused on the practical consequences of the decision. Marshall considered it axiomatic that the taxing power was essential to the existence of government and he was clear that a relinquishment of such a critical ability could never be implied or assumed "as the whole community is interested in retaining it undiminished; that community has a right to insist that its abandonment ought not to be presumed."[118] A corporation, Marshall explained, was protected from unjust taxation through the application of the "interest, wisdom, and justice of the representative body, and its relations with its constituents."[119] Marshall concluded that a "mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the state as any individual would be."[120]

This equation of a corporation "as any individual" came with qualifications. Supporting the notion of strict charter interpretation, Marshall explained that "[t]he great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men," but that "[a]ny privileges which may exempt it from the burthens [sic] common to individuals, do not flow necessarily from the charter, but must be expressed in it, or they do not exist."[121] Thus, the Supreme Court still subscribed to the "artificial entity" theory of defining the corporation and was willing to allow states to expand the traditional rights, privileges or immunities of corporations, but was not willing to recognize that corporations could, like people, possess inherent or natural rights.

In *Providence Bank*, the Supreme Court left intact the practice of careful construction of corporate charters, though it relied less on common law to do so. But the common law was not any less influential in

[118] *The Providence Bank v. Billings and Pittman*, 29 U.S. 514, 561 (1830).
[119] Ibid., 563.
[120] Ibid., 564.
[121] Ibid., 562.

U.S. jurisprudence when it came to corporations. On the contrary, common law was still a dominant part of U.S. judicial analysis.[122]

F. American Corporate Law Reform: Bringing Corporations to the Masses

The political debates of the 1830s brought reform to the traditionally limited and state controlled corporate charter. Expansion of the corporate model depended on a special legislative act—a requirement inherited from Common Law—in order to charter a corporation. An act of incorporation allowed for state representatives to examine proposed charters and to determine whether the State had any need or desire for the proposed corporations. Thus, the corporation in America remained a tightly controlled concession by State Governments. When technology allowed for transportation by rail, states initially used the same corporate model previously used for the construction of roads and turnpikes. By the 1830s, however, the model allowed private endeavors in early railroad ventures, such as the Baltimore and Ohio Railroad, which laid its first rail in 1828.[123] As states chartered more private corporations for the purpose of public works, pressure grew to use generic requirements to efficiently streamline charters that required special legislation, as a method of organizing capital for other ventures.[124]

From colonial times to the turn of the century, Massachusetts, Rhode Island, Connecticut, and Pennsylvania chartered approximately 310 business corporations, the majority of which were banking, insurance, canal, toll bridge, turnpike, and water supply companies.[125] In comparison, from 1800 to 1830

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[122] For example, in the 1834 New Jersey Supreme Court case of *Taylor v. Griswold*, 14 N.J.L. 222 (N.J. Sup. Ct. 1834), involving a dispute over the shareholder voting rights of the Passaic and Hackensack Bridge Company, Justice C.J. Hornblower, who wrote the opinion for the court, relied predominantly on common law. Hornblower, viewing the corporation as first and foremost the creation of the "Crown," or for purposes of U.S. law, the Legislature, wrote that only an explicit grant by the government, in the form of a constitution or statute, could justify a change to corporate powers that was inconsistent with the common law. Ibid., 228, 235-36. He noted that "corporations are created by, and amenable to law; and when partners, or voluntary associations ask for and accept a charter, they must take it with all its restrictions as well as its benefits." Ibid., 236. Thus, individuals may voluntarily relinquish their natural and individual rights to the authority of the charter, but only in their capacity as shareholders. Following the Supreme Court's example, Hornblower was not willing "to extend [a] right to all private or moneyed corporations" through judicial construction beyond the charter. The proper role of the court, according to Hornblower, was to take a restricted view of charters and of corporations, limiting them as entities that were mini-extensions of government itself.

[123] Henry Meyer Balthazar, *Railway Legislation in the United States* (New York: Macmillan Company, 1903), 33.

[124] Colleen Dunlavy, "Corporate Governance in the Late 19th-Century Europe and the U.S.: The Case of Shareholder Voting Rights," *Comparative Corporate Governance – The State of the Art and Emerging Research*. Ed. Klaus J. Hopt, et al. (Oxford: Clarendon Press, 1998), 17.

[125] Chayes, Introduction to *Corporations*, vii; Dodd, *American Business Corporations Until 1860 with Special Reference to Massachusetts*, 11.

these four states chartered nearly 1900 business corporations.[126] To better manage the increased demand, States began to experiment with new methods of efficiently chartering corporations.

Slowly, however, strict state control loosened in a political atmosphere that disapproved of advantage given to the elite. Although incorporation by special charter kept the corporation subservient to the state, people viewed this process (only granting charters to those with enough influence to be deemed "necessary" by the legislature) as corrupt and a source of special privilege inconsistent with democracy. In the early 1830s, Jacksonian leveling rhetoric targeted the political clout and persuasion many believed that elites dispensed to obtain corporate charters. Critics claimed that acts of special legislation creating corporations were based on political influence rather than economic necessity.[127] If only those with the most political influence could attain charters, they could achieve *de facto* monopolies over those without the same resources or access to the legislature. Of course, those who already had charters of incorporation wanted to retain the exclusive nature of their charters, but this impulse played directly into a caricature of privileged elitist monopolists preventing progress for the people.[128] President Jackson especially disapproved of the monopoly model in banking, a model ingrained in the charter for the Bank of the United States, and his political battles against the National Bank led the thrust of his reforms of business practices with disastrous consequences.[129] Incorporation through a legislative act, or incorporation by special charter, had few proponents during the Jackson Administration.

Thus, while Americans used the corporation for public works and private gain, they strongly opposed the idea of privileges inherent in the existence and creation of corporations. The corporate entity was therefore retained, but it now was separated from its traditional basis in special legislation through a

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[126] Ibid.; William C. Kessler, "Incorporation in New England: A Statistical Study, 1800-1875," *Journal of Economic History* 8 (43) (1948): 46-47. Maryland, New Jersey, New York, Ohio and Pennsylvania incorporated an equivalent amount of business organizations in the same time frame. Chayes, Introduction to *Corporations*, viii.

[127] Arthur M. Schlesinger, Jr., *The Age of Jackson* (Boston: Little, Brown and Company, 1945), 336-337.

[128] The Jacksonian bias was "that corporation creation should be common practice, not class privilege." Lurie, *Law and the Nation,* 29.

[129] For Instance, Jackson vetoed the renewal of the Bank of the United States stating, "Every monopoly and all exclusive privileges are granted at the expense of the public, which ought to receive a fair equivalent." Andrew Jackson, "President Jackson's Veto Message Regarding the Bank of the United States; July 10, 1832," *A Compilation of the Messages and Papers of the Presidents Prepared under the direction of the Joint Committee on printing, of the House and Senate Pursuant to an Act of the Fifty-Second Congress of the United States* (New York : Bureau of National Literature, Inc., 1897) (July 10, 1832), http://avalon.law.yale.edu/19th_century/ajveto01.asp.

series of reforms. The reforms, including "General Incorporation," replaced the requirement of special legislation with a simple registration process, proliferated among the states.[130] Jacksonian Democrats supported general incorporation because they believed it extended access to corporate organization to any business that could meet specific requirements, rather than limit that access only to businesses that could effectively lobby state legislatures.[131]

The State of New York led the way in 1811 with a law of general incorporation for the purpose of promoting manufacturing, but it took until 1837 for other states to follow along.[132] The Governor of Connecticut, a Jacksonian Democrat, called for the next General Law of Incorporation among the states in 1836, and a year later the Connecticut Legislature passed the Hinsdale Act, abolishing incorporation by special charter and creating the first system of general incorporation available to "any lawful business...."[133] Eventually, beginning with the Louisiana Constitution of 1845, states went so far as to *prohibit* incorporation by special charter, severing the absolute control government had always maintained over the creation of corporations.[134] American policy-makers were innovating new forms of corporate law distinct from common law.[135]

G. The Supreme Court Reflects Political Opposition to Corporate Monopoly By Moving Farther From the Common Law

In conjunction with state transformations of Corporate Law in the 1830s, the Supreme Court, under Chief Justice Roger Taney, altered its analysis of the relationship between states and private corporations. In 1837, the Taney Court heard *Charles River Bridge v. Warren Bridge,* another case that reflected the country's general suspicion over monopolistic corporations and political privilege. Motivated

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[130] Schlesinger, Jr., *Age of Jackson*, 336.
[131] Ibid., 337. The Jackson administration also supported general incorporation laws to break up monopolies by easing entry into the marketplace for erstwhile corporate competitors in a given field. Ibid.
[132] Ronald E. Seavoy, "Laws to Encourage Manufacturing: New York Policy and the 1811 General Incorporation Statute," *The Business History Review* 46(1) (Spring, 1972): 85-95.
[133] J.M. Morse, A Neglected Period of Connecticut's History, 1818-1850 (New Haven: Yale University Press, 1933), 297, 302.
[134] Chayes, Introduction to *Corporations*, ix.
[135] The notion of general incorporation was not entirely foreign to common law, as it was introduced by the Elizabethan Statute in English law that created an exception to the restrictive creation of incorporation with automatic incorporation for hospitals and houses of correction, and self-incorporation of some religious, charitable or municipal institutions. However, the Common Law never applied this sort of exception to private endeavors.

by anti-monopoly concerns, the Taney Court revisited the question of whether a state could alter a charter after it was issued.

The case concerned the grant of two charters to different corporations for the purpose of constructing bridges across the Charles River.[136] In 1785, the Massachusetts Legislature incorporated the Charles River Bridge Company, which retained the right to collect tolls for use of the bridge it constructed, maintaining high tolls despite enormous profit margins. Such monopolistic behavior enraged the public, and Massachusetts responded in 1828 by chartering the Warren River Bridge Company to construct a second bridge across the Charles River. The Legislature granted the proprietors of the Warren Bridge the right to collect tolls on that bridge until they were reimbursed, after which time the bridge would become property of the State and free for the public to traverse.[137] The Charles River Bridge Company sued claiming that Massachusetts exceeded its constitutional authority in authorizing another bridge on the same river, particularly a free bridge, because it effectively eviscerated the value of its charter.

Chief Justice Taney, writing for the Court, framed the issue under the rubric of the Contracts Clause and followed a strict reading of the Charles River Company's charter. Relying in part on the *Providence Bank* case, Justice Taney declined to imply rights from the charter that were not already explicit. On its face, the charter contained no plain exclusion of another bridge.[138] In declining to imply rights from a charter, Taney expanded the holding in *Providence Bank* beyond the tax power to an absolute level. No implications could be read into a charter regarding any of the state's fundamental powers.[139] Taney remarked that "[w]hile the rights of private property are sacredly guarded, we must not forget that the community also have rights...."[140] Otherwise, Taney explained, government would be worthless if "by implications and presumptions," it was stripped of its powers and "the functions it was designed to perform transferred to the hands of privileged corporations."[141]

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[136] *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837).
[137] Ibid., 538.
[138] Ibid., 544.
[139] Nothing would be implied that would diminish the state's power to promote "the happiness and prosperity of the community by which it is established." Ibid., 547-548.
[140] Ibid., 548.
[141] Ibid. In light of Taney's background this change in analysis was not altogether unsurprising. Prior to replacing John Marshall as Chief Justice in 1836, Taney served as President Jackson's Attorney General.

Aside from governmental analysis, Taney also mentioned the practical reality that as technology improved, newer transportation would naturally put archaic transportation out of business. As a matter of law, Taney decided that the state's further attempts at modernization did not violate the rights of corporations.[142] Such an implied contract, if it existed, would mire the states in "the improvements of the last century," keeping the "lights of modern science" under the control of old turnpike corporations.[143] Corporations had no right to "property in a line of travel," an argument he likened to "old feudal grants."[144]

Justice McLean agreed with Taney and wrote separately on the matter of the monopoly at stake in this case and the issue of infrastructure progress. He first remarked that common law supported Taney's suggestion that, essentially, any vague portion of a charter must be interpreted in favor of the State. In doing so, he suggested that state legislatures received the same deference common law applied to parliament or king. Otherwise, McLean downplayed the role of monopoly in the case.[145] The expansion of infrastructure, conversely, was paramount to his decision:

> The spirit of internal improvement pervades the whole country. There is perhaps no State in the Union where important public works such as turnpike roads, canals, railroads, bridges, &c., are not either contemplated or in a state of rapid progression. These cannot be carried on without the frequent exercise of the power to appropriate private property for public use. Vested rights are daily divested by this exercise of the eminent domain.[146]

Once again the court factored into its decision the policy imperatives of the time. At issue was their understanding of economic progress at issue, and states had to retain the power to keep progress moving.

With *Charles River Bridge* Taney and McLean revived the idea that states merely substituted themselves for king or parliament, leaving the dynamic between sovereign and corporation intact. According to Justice Story, writing in dissent, this was the necessary analysis to allow Justice Taney to

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As Attorney General, Taney wrote to Congress in 1833 regarding the controversy surrounding the Bank of the United States. Expressing agreement with Jackson, Taney proclaimed that "[i]t is a fixed principle of our political institutions to guard against the unnecessary accumulation of power over persons and property in any hands; and no hands are less worthy to be trusted with it than those of a moneyed corporation." Roger Taney, "Taney's Report From the Secretary of the Treasury on the Removal of Public Deposits from the Bank of the United States (1833)," *Congressional Serial Set* (Washington, D.C.: U.S. Government Printing Office, 1884), Senate Doc. 2, 20.

[142] *Charles River Bridge*, 36 U.S. at 552.

[143] Ibid., 553.

[144] Ibid.

[145] McLean nevertheless reflected the attitudes of the times by dubbing Monopolies "odious." Ibid., 583.

[146] Ibid.

strictly construe the charter as he had because it was the only way to make the outcome of this case congruent with common law rules of contractual interpretation.[147] Taney's approach was marred by a severe problem, though. According to Story, his analysis had already been discredited and rejected by the Court in the *Dartmouth* case, and had no place in U.S. law.

Story explained that, according to common law, "[w]henever the grant is upon a valuable consideration...the grant is expounded exactly as it would be in the case of a private grant–favorably to the grantee." This is because, according to constitutional law, the grant was a contract, and Story wanted the Court to treat it as such.[148] He believed that grants could carry necessary implications that the legislature do nothing to destroy or impair the franchise.[149] The doctrine Taney supported was "utterly repugnant to all the principles of the Common Law," according to Story, because it required the court to "overturn some of the best securities of the rights of property."[150] It also ran contrary to the outcome in the *Dartmouth* case, in which Justice Story had concurred with Marshall and the majority.[151] This analogy between "royal grants and legislative grants under our republican forms of government" in favor of "republican prerogative" was not, according to Story, based on any authority whatsoever because it relied upon "the Divine Right of Kings."[152] Without monarchy, the Constitution filled in where common law was inapplicable, and nothing in the Constitution allowed grants to be construed differently from contracts.[153] Thus, if Story were correct, precedent with regard to corporate law would be left in disrepair. Nonetheless, because it was a dissent, Story's opinion was not legally controlling.[154]

In the *Charles River Bridge* opinion, Taney signaled a shift in the Court's attitude towards states' rights by creating a constitutional exception to the *Dartmouth* equation of grants to contracts. Contracts

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[147] For Story, common law was the "birthright of every citizen of Massachusetts." Ibid., 647.
[148] Ibid., 583.
[149] Ibid., 646.
[150] Ibid., 647.
[151] Ibid., 637.
[152] Ibid., 647.
[153] Ibid. In fact, according to Story, "Our Legislatures neither have nor affect to have any royal prerogatives." Ibid.
[154] A dissenting opinion is not binding precedent and does not become a part of case law. Yet, dissenting opinions are important as a source of persuasive authority in subsequent cases when arguing that the court's holding should be limited or overturned. Judges will also use dissenting opinions to pressure the majority to refine and clarify its opinion. Hon. Ruth Bader Ginsberg, "The Role of Dissenting Opinions," *Minnesota Law Review* 95(1) (2010): 1-8.

could reasonably imply agreements under certain circumstances, but now grants could not. Like the acts of a king, state grants of corporate charters could not entirely be reduced to private contracts. Taney's exception, consistent with the political sentiment of the times, provided states with a tool for regulating corporations and, in particular, dismantling monopolies. Taney moved the Court away from Marshall's Federalist inclinations and towards a more Jacksonian support of states, but to some degree he had to do so at the expense of legal precedent.[155]

H. The Supreme Court Bestows States With Protection Over Corporations

Although the Jacksonian reforms generally prevailed, Americans still had reservations about the expanded use of the corporation. In particular, many commentators were concerned that corporate persons inherently lacked any moral conscience or responsibility that could be found among natural people.[156] As corporations became more independent from state control, they also represented a new economy coming unhinged from what Arthur Schlesinger termed "the restraints and scruples of personal life."[157] This criticism found voice even among those who firmly believed that businesses had some degree of legally protected rights.[158] The Taney Court directed its next decision to these apprehensions.

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[155] Taney forged his own way, even if it meant harming the integrity of the Court, in order to reach a result he deemed appropriate. This was best exemplified by his notorious Dred Scott decision in 1858, in which Taney determined that neither Dred Scott nor any other person of African ancestry could claim citizenship in the United States, whether enslaved or free. *Dred Scott v. Sandford*, 60 U.S. 393 (1857). But in *Charles River Bridge,* Taney's departure from the *Dartmouth* opinion was still within the ambit of common law, allowing the law some flexibility to accommodate the changes in society and technology at the time.

[156] One commentator in 1833 worried that corporations were not affected by social considerations that might influence individual behavior writing that, "As directors of a company men will sanction actions of which they would scorn to be guilty in their private capacity...A crime which would press heavily on the conscience of one man, becomes quite endurable when divided among many." W.M. Gouge, *A Short History of Paper Money and Banking in the United States* (Philadelphia: T.W. Ustick, 1833), 43. A Massachusetts legislator in 1845 shared this opinion and wrote that "[t]hese artificial creatures...unlike individual employers, are not chastened and restrained in their dealings with the laborers, by human sympathy and direct personal responsibility to conscience and to the bar of public opinion." Edward Everett, "Peter C. Brooks to Edward Everett, July 15, 1845," *Edward Everett papers*, Massachusetts Historical Society, Document No. 153 (1850).

[157] Schlesinger, Jr., *Age of Jackson*, 335.

[158] Early in the debate over general incorporation laws in 1834, George Bancroft warned that "[w]e must protect these merchants, but not be governed by them." Herbert Baxter Adams, ed., "Bancroft to Jared Sparks, August 22, 1834," *The Life and Writings of Jared Sparks: Comprising Selections from His Journals and Correspondence, Vol. 2* (New York: Houghton, Mifflin, 1893), 189. James Fenimore Cooper noted that "Commerce is entitled to a complete and efficient protection in all its legal rights, but the moment it presumes to control...it should be frowned on, and rebuked." James Fennimore Cooper, *The American Democrat* (Cooperstown: H&E Phinney, 1833), 169. Perhaps the most striking comment by one of general incorporation's critics, Samuel J. Tilden, was, "[w]e do not assail property, we merely deny it

In *Bank of Augusta v. Earl,* the Supreme Court for the first time faced the issue of what powers a state held over a corporation chartered in another state.[159] Three banks chartered outside of Alabama purchased bills of exchange in Alabama; however, the makers of those bills refused to pay because "foreign" banks were not authorized to do business in Alabama.[160] Attorneys for the banks chartered outside of Alabama, including the famed Daniel Webster, forged a new theory for expanding the corporate person's rights, addressing common law, constitutional law, and policy objectives, all of which had now become standard fare for corporate law disputes before the Supreme Court.

First, the banks spoke to practical concerns. They raised the specter of halted progress and argued that if Alabama's law were permissible, it would domestically provide a bank monopoly in Alabama among those with the exclusive right to participate in banking. The impact on the nation as a whole would effectively shut down commerce between the states.[161] Second, the banks appealed to common law through an argument that centered on the importance of comity as a sovereign attribute.[162] Comity stipulates that courts should not demean foreign jurisdictions, laws, or judicial decisions under the presumption that other jurisdictions will reciprocate the same courtesy. The banks argued that a corporate person formed in one state had the right of recognition in other states. This line of argument introduced a critical innovation to the scope of the corporate person's rights. The issue of comity served as a transition to a constitutional argument because cooperation between the states was critical to the function of the federal republic. In fact, states were obligated by the Constitution to give "full faith and credit" to the "public acts, records, and judicial proceedings of every other state."[163]

The banks also used a variety of analogies to align the corporate person more closely with natural persons. They began with the proposition that a corporation's existence depended on its being "clothed with all the powers of a person." However, if Alabama Law was valid, a corporation lost its personal

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political power." Samuel J. Tilden, *Writings and Speeches of Samuel J. Tilden, Vol. I,* John Bigelow, ed. (New York, 1885), 85.

[159] *Bank of Augusta v. Earl,* 38 U.S. 519 (1839).

[160] A bill of exchange is a written, unconditional order by one party (the drawer) to another (the drawee) to pay a certain sum, either immediately (a sight bill) or on a fixed date (a term bill), for payment of goods and/or services received. The drawee accepts the bill by signing it, thus converting it into a post-dated check and a binding contract.

[161] Ibid., Syllabus, 15, 23.

[162] Ibid., 61; *Bank of Augusta,* 38 U.S. at 555.

[163] Article IV, Section 1 of the United States Constitution.

existence once it crossed state lines. That law made little sense, inasmuch as the shareholders of the corporation, under the corporate aegis, also reserved their constitutional rights in any state where they conducted business. The banks pointed out that partnerships did not strip their members of the right to contract; however, according to Alabama, their participation as a foreign corporation stripped them of those same rights.[164] Just as one person could lawfully represent a partnership, a corporation may represent the individual incorporators, because "[t]hey all make up one person in the law."[165]

The banks strove to associate the corporation with natural people in an attempt to expand corporate rights across state lines. Referring to rights under common law and to the *Deveaux* case, the banks argued that the corporate person was "not so entirely artificial as to conceal or destroy the substantial character of the individuals associated under its name; nor to take away their rights, or release them from their obligations as citizens."[166] In order to recognize this entity as a legal person, one must recognize all that, by law, constitutes them as persons. Consequently, the banks argued, a corporation has two claims under the Alabama Law: first, a claim "to respect for the law of its creation," and second, "to respect for the rights and privileges of the individuals who compose it."[167] Thus, the constitutional rights of the individual citizens were significantly part of the rights of the corporate person.

Briefly addressing the comity and constitutional law argument of the banks, Alabama replied that it had a sovereign right to require banking to be a state affair because banking involved making money or a substitute for it, both of which are sovereign privileges. If the Court were to impose one state's banking laws on another, Alabama argued that the result would "not be comity, but would rather be an act of aggressive servitude."[168]

Alabama's main riposte, however, focused on limiting the extent of rights afforded to the corporation as a legal person. Alabama stressed the consistent stance of the Supreme Court that corporations were artificial entities and that no corporation was wholly a citizen.[169] State acts created

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[164] *Bank of Augusta v. Earl*, Syllabus [30], 38 U.S. 519 (1839).
[165] Ibid., 62.
[166] Ibid.
[167] Ibid.
[168] Ibid., 141-142.
[169] Ibid., 148.

corporations with franchises as instruments of state policy. They could only exist by express permission of the state, "mostly assigned to a place, always confined to defined purposes," and therefore were not people or partners. Thus, Alabama, as the sovereign entity, had the right to choose whether to recognize corporations by determining if their purpose conflicted with Alabama's public policy.

Alabama also reminded the Court that corporations utterly lacked the characteristics of natural people. As a practical matter, "[p]ersonal identity, corporeal being, and powers of motion, are the attributes of persons, but not of corporations."[170] The contrast over the issue of rights was even more striking. Whereas an American person was sovereign in his or her own right with original and unlimited rights who, like states, could do whatever was not prohibited,[171] a corporation was a "creature" restrained by "strict obligation," with franchises that were derivative and specific.[172] A corporation was a "confederation," able only to do what its charter expressly allowed.[173] The corporation was limited to being "personal" for legal responsibility only.[174] The common law, "with its characteristic adaptation to exigencies" tended to "keep down corporation privilege, not to exaggerate it."[175] Alabama explained the reason for this dynamic:

> The seal, the regular vote, the record, the duly constituted agent, and other philosophical guards of this formidable in imperio, cannot be dispensed with, without enabling a vast engine of factitious wealth to crush communities. And all the law is contrary to it. Charters are intended to benefit the unincorporated more than the incorporated. Legislatures and states organize them on no other principle; and Courts carry it into practice by restricting the grant to its letter, and, if indispensable, moulding Common Law to countervail privilege.[176]

Alabama concluded that the Court's duty was to allow states to remain sovereign while corporations remained subject. If the Court ruled for the banks, corporations would become the sovereign entity to which states were submissive.[177]

The banks had seemingly boxed the Court into a very difficult position. Should the Court favor Alabama, as it had Massachusetts in the *Charles River Bridge* case, it faced the possibility of invalidating

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[170] Ibid., 157.
[171] Ibid., 156-157.
[172] Ibid.
[173] Ibid., 157.
[174] Ibid.
[175] Ibid., 163.
[176] Ibid., 152.
[177] Ibid., 163.

every contract between an out-of-state corporation and another party, potentially undermining the national economy overnight. The banks improved their chances of associating the rights of the corporate person with those of its individual members by attaching it to this dilemma. Additionally, should corporations achieve citizenship through comity, they may then possess the "privileges and immunities of citizens in the several states," which, among other things, would give them the right "to exemption from higher taxes and other unequal impositions."[178]

Maneuvering out of the difficult position, the Taney Court forged a middle ground between the arguments by separating the economic issue from the attempt to expand corporate rights. Regarding the extent of rights claimed by the corporate person, Chief Justice Taney, again writing for the Court, referred to *Deveaux* as his point of departure and dismissed the notion that an individual's rights would be equal to the corporate person's. Taney noted that the *Deveaux* Court deliberately limited its opinion to the question of jurisdiction and to the right to sue. Thus, the principle of defining the rights of a corporation based on the rights of its individual members never "extended any farther than it was carried" and never applied to contracts made by a corporation.

Taney explained that the constricted nature of corporate rights existed for a fundamental reason by pointing out the negative consequences to the corporations if the banks' arguments were followed to their logical end. If the Court were to give the corporation the rights of its individual shareholders, it would also have to apply the liabilities in a like manner. Limited liability would be removed, and the Court would simply be left with partnerships.[179] The result would be antithetical to corporate being: the corporate person would cease to exist altogether. Alternatively, when a corporation entered into a contract, that action bound the artificial entity, not the shareholders. Ultimately, "[t]he only rights [a corporation] can claim are the rights which are given to it in that character, and not the rights which belong to its members as citizens of a state."[180] Thus, the expansion of the corporate person's rights was halted.

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[178] *Corfield V. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823) (No. 3,230).
[179] *Bank of Augusta*, 38 U.S. at 586.
[180] Ibid.

Taney also acknowledged the "multitude of corporations" that had already engaged in "contracts to a very great amount."[181] Although the corporation was an artificial entity, it was entitled to status as a "person" with the limited right to contract. Corporations may contract, just as natural persons may contract, through agents in locations where they did not reside.[182] Taney wrote that the law of comity created a legal presumption of the existence of an artificial person created by the law of another state, "clothed with the power of making certain contracts."[183] The existence of the corporation would be protected across state lines. Even so, a corporation's actions may still be subject to state regulation. If a state's law was more restrictive, the state must then "declare its will, and the legal presumption is at once at an end."[184] In other words, the law of comity would function in much the same way as the common law, providing a legal presumption that could only be expressly trumped by statutes or state constitutions, so long as all of these sources of law abided by the U.S. Constitution. Thus, even though a corporation retained the right of recognition across state lines, the corporate person remained an artificial entity with limited administrative rights.[185]

I. Corporate Personhood Limited by the Courts Despite Continued Corporate Growth

By the time of the Civil War, the Supreme Court had provided private corporations with more independence and power than under English common law. Corporations now had constitutional rights based in theories of comity and contracts. Yet despite the states' efforts to promote the corporate form of business, and with differing policy priorities among judges, the Supreme Court steadfastly restricted corporate powers in relation to states by limiting the corporation's status as a person. The Court ensured that states retained more power than the corporations they created through two measures: court created

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[181] Ibid.
[182] Ibid., 589.
[183] Ibid., 590.
[184] Ibid.
[185] This standard was ubiquitous prior to the enactment of the 14th Amendment. For instance, in 1854 a California Supreme Court Justice wrote, "The word 'person' in its legal signification, is a generic term, and was intended to include artificial persons." *Douglass v. Pacific Mail Steamship Co.*, 4 Cal. 304, 306 (1854). Additionally, in 1832 Joseph Angell and Samuel Ames wrote the first American treatise on Corporate Law. The seventh edition of that treatise, published in 1861, established that, "When a corporation is said to be a person, it is understood to be so only in certain respects, and for certain purposes, for it is strictly a *political* institution. The construction is, that when 'persons' are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute." That standard remained in the treatise through the 9th Edition in 1871. Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations Aggregate*, 7th ed.& 9th ed. (Boston: Little, Brown and Co., 1861, 1871), 3.

exceptions to contracts law, and a limited definition of corporate personhood. Common law traditions remained highly influential to American jurists in this regard. This trend would continue in the late nineteenth century, but advocates of a more robust corporate personhood would come to focus their efforts in court. Eventually, conditions would permit the Supreme Court to disregard common law and its own precedent to shift from rejecting the corporation as a natural "person" to extending constitutional protection to corporations by more fully personifying them.

IV. The Modern American Corporation

Though the Supreme Court restricted the rights of the corporate person, state political measures, in general, still promoted corporate growth. Legislatures continued their trend of detaching state power over corporations through the mid-nineteenth century. By the 1850's, the expanding railroad network and growing factory systems required organization and capital accumulation that corporations ably provided. Railroads in particular required massive capital investments and administrative arrangements beyond the resources of partnerships or individuals.[186] The old model of small, organized groups created to manage public works was far too restricted for the enormity of the railroad endeavor. Between 1830 and 1870 corporate charters still required special grants by legislators in some states, but in this period those grants occurred routinely through standardized form. After 1870, all states eliminated special acts for granting corporate charters altogether.[187]

Prior to the Civil War courts limited state attempts to expand corporate powers, but post war economic pressures and changes to the Constitution altered the dynamic between states and corporations. The Civil War stimulated economic growth and business endeavors seeking to exploit new opportunities, which, in turn, generated demand for factories and railroads across the country as investment and profit-making ventures.[188] New technology, economies of scale, and the need for reach in broader markets across

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[186] Chandler, *Essential Alfred Chandler*, 228. Previously, relatively little management was required for the local canals and turnpikes that spurred the formation of corporations. Prior to the railroad model businesses that required more sophisticated management, such as textile mills, ironworks and agricultural plantations, only required a manager to supervise a few foremen. Ibid., 345. Conversely, hundreds and managers oversaw railroads, which required a permanent workforce of tens of thousands of employees and expanded over thousands of miles of territory. Ibid, 228. Railroads were among the first business to pioneer large departments of management for activities such as finance and transportation. Ibid., 228.

[187] Hurst, *Law and Markets*, 47-48.

[188] Chandler, *Essential Alfred Chandler*, 229; Richard White offers a critical response to Chandler's positivism, focusing not on the aspirations of management, but on the financiers, executives and workers.

state lines all contributed to the expansion of corporations on a national level.[189] Corporations, specifically railroad companies, grew in size, scope and wealth to be prominent players in the political and economic spheres of the U.S.

By the late nineteenth century, railroad companies faced political backlash. Popular dissatisfaction with railroad business practices led to the election of state legislators that were unsympathetic to corporate interests. Corporations adjusted to this new reality by promoting their interests in court. Railroad corporations could devote formidable resources to courtroom advocacy due to their expansive financial development. In addition, the growth of the federal government's authority after the Civil War created a new legal environment under which corporations could thrive. Railroad companies sought the advantage of federal standardization in court as a tool to overcome individual state regulations.[190]

A. Political Opposition to Railroad Corporations

In order to achieve greater independence from government regulation, railroad companies employed a variety of strategies to influence public opinion and policy outcomes. Prior to the early 1870s these efforts included directly reaching out to the public through press releases, letters to important citizens or customers, employment of professional writers, and provision of perks, such as free transportation, to newspaper editors.[191] Lobbying state legislatures was also part of their strategy.[192] Although these activities persisted well into the late 19th Century, popular sentiment turned against corporations, and railroad companies in particular during the economic depression of the 1870s.[193]

White's work suggests that the enormity of the railroad corporations were not altogether the result of ordered, large scale organizations, but were instead "corporate containers for financial manipulation and political networking," a reflection of individualistic and selfish pursuits, driven by men "clever enough at soliciting money and not repaying debts." Richard White, *Railroaded* (New York: W.W. Norton & Co., 2011), xxviii, xxxii. Railroads often failed to show profit "and repeatedly needed rescuing by the state and the courts." Ibid., xxx.

[189] Hurst, *Law and Markets*, 48-49.

[190] Keller, *Affairs of State*, 173.

[191] Thomas C. Cochran, *Railroad Leaders 1845-1890: The Business Mind in Action*, 185-188. Thomas C. Cochrane examined collections of railroad executives' correspondence covering the period 1845 to 1890. Cochrane analyzed a variety of themes these letters included and catalogued most of the letters he looked at in his appendix, reprinting them in full.

[192] Robert Harris, President of Northern Pacific (1884-1888) to Schuyler Colfax, former Vice President under Grant and lecturer/journalist, March 8, 1884, reprinted in Cochran, *Railroad Leaders*, Appendix 353.

[193] Corresponding anti-railroad sentiment took political form in a variety of organizations, such as the Patrons of Husbandry and the Grangers. Cochran, *Railroad Leaders*, 184.

In 1878, Charles Francis Adams, Jr., a member of the Massachusetts Railroad Commission and later President of the Union Pacific Railroad, wrote an account of his experience investigating corrupt railroad business practices, which chronicled the anti-railroad attitude and the popular "prejudice" against corporations in general at the time.[194] He recalled that the "popular agitation" of 1870 "threatened to sweep down not only all legal barriers but every consideration of self interest" of corporations.[195] The political threat for corporations "was aggravated," in the case of railroad companies, "by well authenticated rumors of the gross financial scandals which disgraced their management."[196] According to Adams, scandal started high up and spread down through the entire system "until it might not unfairly be said that everything had its price."[197] This is quite a concession, and probably understated, given Adams, a railroad president, was writing from a perspective of trying to save railroads from regulation.

Railroad companies were initially slow to recognize and adapt to their deteriorating public image and often stirred more opposition through their obstinacy. After years of legislative cooperation with railroad corporations, company executives hid behind the *Dartmouth* decision and behaved as if they could unilaterally conduct their affairs without regard for political implications.[198] Railroad companies, as evidenced by the internal communications of railroad executives, often simply ignored new state

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[194] Charles Francis Adams, Jr., *Railroads: Their Origins and Problems* (New York: G.P. Putnam & Sons, 1878), 126.
[195] Ibid.
[196] Ibid.
[197] In Adams' words, scandals "began high up in the wretched machinery of the construction company, with all its thimble-rig contrivances to effect the unseen transfer of assets from the treasury of the corporation to the pockets of its directors" and "spread downward through the whole system of supplies and contracts and rolling-stock companies ...." Ibid.
[198] Adams wrote extensively about this particular strategy. He saw the railroad companies as claiming "for themselves [sic] a species of immunity from the control of the law-making power." Adams indicated that "[w]hen laws were passed with a view to [railroad] regulation, [railroad executives]... entrusted with the execution of those laws [] contemptuously ignored" them and "[s]helter[ed] themselves behind the Dartmouth College decision." Ibid., 128. This is consistent with other contemporary sources and literature about the era. For example, in 1872 the President of the Illinois Farmer's Convention declared "'Dartmouth College' may have been well enough for that day, and for an institution of learning; but it cannot much longer be made a standard-rule and hobby horse for railroads." L.D. Whiting, *Address of Mr. Whiting*, January 15, 1873, reprinted in A.M. Garland, ed., *Transactions of the Department of Agriculture for the State of Illinois* (Springfield: State Journal Steam Print, 1873), 878. States would grant land to railroads through competitive bids as incentive for railroad construction, but the *Dartmouth* case would make them powerless to later alter these deals by passing new laws. Mark T. Kanazawa and Roger C. Noll, "The Origin of State Railroad Regulation: The Illinois Constitution of 1870," in *The Regulated Economy: A Historical Approach to Political Economy*, ed. Claudia Goldin and Gary D. Libecap (Chicago: University of Chicago Press, 1994), 16. Richard White noted that the "railroads smudged the line between corporate competition and federal regulation," making "politics a realm of private competition." White, *Railroaded*, xxviii-xxix.

regulations that created stricter regulation of their businesses.[199] This sort of attitude among railroad executives only incensed an already angry public, and policy-makers reacted accordingly.[200] One series of resolutions, adopted at a general convention of the Grangers of Springfield, Illinois in 1873, contained an assertion that "[t]he railways of the world, except in those countries where they have been held under the strict regulation and supervision of the government, have proved themselves of as arbitrary extortion and opposed to free institutions and free commerce between the states as the feudal barons of the Middle Ages."[201] This sort of rhetoric reflected a hostility among voters and the emergence of a grass-roots political movement that signaled legislators to take a more discerning role in supporting railroad company interests.

B. Railroad Corporations Lobby Courts Instead of Legislatures

By 1875 many railroad companies discovered that legislators who previously acted as loyal company supporters had abandoned them. Communications among railroad executives at the time demonstrate that these men developed a deep distrust of legislators and government officials both on the federal and state levels.[202] On March 1, 1875, a letter from Amasa Stone, the Managing Director of the Lake Shore and Michigan Southern Railroad, to then-Congressman James Garfield stated: "I have long known how almost impossible it is for any just claims to receive recognition from Congress ... I do not write this letter with any expectation that the claim may still be acted upon, but simply to express my utter disgust with the character of a Congress, that can flippantly throw aside the proper business of the people to engage in demoralizing warfare."[203] In the state legislatures, William K. Ackerman, President of the

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[199] Internal communications of railroad executives at the time confirmed this strategy. For example, in a letter from James Monroe Walker, President of the Chicago, Burlington & Quincy Railroad ("CB&Q"), to one of its Chairmen, Walker recommended that the railroad "should disregard the provisions of the Act (Iowa Law) and proceed as though no such law had been passed...." James Monroe Walker, President Chicago, Burlington & Quincy to John Denison, Chairman, March June 11, 1874, reprinted in Cochran, *Railroad Leaders*, Appendix 489. According to Adams, as reflected in the correspondence above, "[i]n the West, during the years 1872-73, if a railroad official was asked what course the companies proposed to pursue in regard to the new legislation, the usual answer was that they did not propose to pay any attention whatever to it." Adams, Jr., *Railroads*, 136.

[200] Adams found this behavior to be "at once arrogant and singularly injudicious" and believed that railroad executives "practically undertook to set even public opinion at defiance." Adams, Jr., *Railroads*, 128.

[201] Ibid. The Grangers were a coalition of U.S. farmers that fought monopolistic grain transport practices.

[202] Cochran, *Railroad Leaders*, 190.

[203] Amasa Stone, Managing Director, Lake Shore and Michigan Southern (1873-1875), to the Honorable James A. Garfield, U.S. Representative, Ohio, March 1, 1875, reprinted in Cochran, *Railroad Leaders*, Appendix 469.

Illinois Central Railroad, found the "situation at Springfield ... by no means encouraging for the Railways."[204] Ackerman complained to Lewis V.F. Randolph, the Treasurer and Director of the Illinois Central, "Members talk fairly to your face, but act very differently in Committee or in their seats."[205] Railroad companies were losing their potency in affecting legislation in their favor. Moreover, by 1874 anti-railroad Grangers were electing local judges as well as legislators into office.[206] Thus, the unpopular decision of railroad companies to ignore new laws produced not only stronger regulation, but also the advancement of political leaders whose objectives were to ensure regulatory compliance.

Railroad companies eventually learned that they had to change their tactics in order to promote their interests effectively. In the past, those in favor of expanded corporate rights pursued action among state legislatures rather than courts, but by the end of the 1870s, railroad companies had generally switched their focus from unreliable, and often hostile, legislators to the relative stability of judges and courtrooms. In some cases, railroad companies abandoned political remedies altogether believing their only option was taking their case to the courts.[207] Railroad companies learned to exploit the anti-democratic nature of attaining decisions by unelected judges in federal courts to their advantage.

Without public support or the access to political influence they enjoyed in the past, Railroad executives faced the options of either changing their business strategies or finding another way to protect their interests. Rather than surrender to popularly mandated regulation or change their practices to

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[204] William K. Ackerman, President Illinois Central to Lewis V.F. Randolph, Treasurer and Director Illinois Central, March 5, 1881, reprinted in Cochran, *Railroad Leaders*, Appendix 244.

[205] Ibid. Ackerman found the Illinois Senate to be "composed largely of quite young men of no practical knowledge of business, or experience in the world" who "pass their nights in rollicking, will drink all you offer them, and make you any amount of wild promises, but their actions ... give lie to the promise." They were "utterly unreliable." Ibid.

[206] Ibid., 126-127. The Granger movement succeeded in regulating the railroads and grain warehouses. The births of the Cooperative Extension Service, Rural Free Delivery, and the Farm Credit System were due largely to Grange lobbying. The peak of their political power was marked by their success in *Munn v. Illinois*, 94 U.S. 113 (1877), which held that the grain warehouses were a "private utility in the public interest," and therefore could be regulated by public law. However this achievement was overturned later by the Supreme Court in *Wabash, St. Louis & Pacific Railway Company v. Illinois*, 118 U.S. 557 (1886). David B. Danbom, *Born in the Country: A History of Rural America* (Baltimore: Johns Hopkins University Press, 2006), 154–6.

[207] James Monroe Walker, President of the Chicago, Burlington & Quincy railroad wrote to his Vice President in 1874, "Iowa has gone about as far as it can go in hostile legislation and there is to-day no way left for us but to fight it out in the courts." Monroe at this point believed that "[t]here is not much to be expected from any attempt to conciliate voters and politicians in this regard." James Monroe Walker, President Chicago, Burlington & Quincy to Charles Elliott Perkins, Vice President Burlington and Missouri River, May 16 1874, reprinted in Cochran, *Railroad Leaders*, Appendix 489.

accommodate reform movements, the railroads affected policy by resolving disputes apart from the democratic process and securing favorable federal legal outcomes, decided by appointed jurists not subject to popular recall. Railroad executives concentrated on getting cases before higher courts and judges unaffected by local political pressure and distanced from local juries. The internal communications from the Chicago, Burlington & Quincy ("CB&Q") Railroad epitomize this thinking. The Chairman of the railroad suggested an openly anti-populist strategy with regard to the courts in 1873 when he wrote, "[a]s the [state] Judiciary is elected and the people threaten us with a court which shall render decisions to suit, I suppose we shall have to look to the U.S. Court to protect our rights."[208] Even federal courts were not perceived to be the best option if they involved juries. The President of the CB&Q line disapproved of another railroad removing their case to a Federal Circuit Court because they "do not by this mode avoid a jury." Instead, the CB&Q followed a more sensible plan that "brings the cases into the United States Court in Equity... A Jury is avoided and the case will be tried under the ordinary rules of evidence which of course are much more favorable."[209] A letter from the CB&Q President to Judge David Rover revealed that the railroad would be inclined to settle only if cases could not be removed to federal courts under these conditions.[210] Federal courts provided an end-run around the regulatory political trends of the day.

CB&Q's legal tactics exemplified a strategy of avoiding local courts, but it was not unique to that railroad. Generally, "Railroad men ... expected more favorable consideration from courts than from legislatures or commissions, more from judges than from juries, and more from the highest courts than from the inferior ones."[211] Indeed, anti-railroad legislative reform was ineffective unless courts agreed those reforms could be constitutionally enforced, and railroads had better odds of convincing judges than

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[208] John Newton Denison, Chairman of Chicago, Burlington & Quincy (1864-75) to N.W. Beckwith, April 7, 1873, reprinted in Cochran, *Railroad Leaders*, appendix 308.
[209] James Monroe Walker, President Chicago, Burlington & Quincy to Sidney Bartlett, Director, May 14, 1874, reprinted in Cochran, *Railroad Leaders*, Appendix 488.
[210] James Monroe Walker, President Chicago, Burlington & Quincy to the Honorable David Rover, September 21, 1874, reprinted in Cochran, *Railroad Leaders*, Appendix 491.
[211] Robert Harris, President of Northern Pacific (1884-1888) to L.D.M. Sweat, ex-directory of NP, February 5, 1887, reprinted in Cochran, *Railroad Leaders*, Appendix 362. The writer continued, "It seems to me that the tendency to single out corporate property and to deny to it the protection that is given to other forms of property by the courts is one of grave importance and that it will lead to results far more disastrous to the community at large than to the unfortunate owners of corporate property. Why should this Co., for instance, chartered by Congress, be denied the protection of the U.S. Courts, and be turned over to a jury in some frontier town upon a subject as to which the community may be prejudiced by their own narrow interests." Ibid.

they did legislators. Judges were inevitably drawn from the upper ranks of the socio-economic class, were often personally connected to railroad financiers and executives, and would therefore be likely to have the sort of bias that would favor business in general and railroads in particular.[212] Consequently, railroads evaded democratically implemented regulation as long as courts were willing to overturn new anti-railroad laws. Switching the advocacy focus from lobbying the legislature to influencing judges was integral to the modern formation of the corporate person, particularly after the constitutional landscape changed with the addition of the 14th Amendment.

C. Early Attempts at Crafting New Arguments for Corporate Rights Through the Fourteenth Amendment

The passage of the Fourteenth Amendment provided Corporations with a novel argument that called for exactly the kind of federal court intervention railroad companies sought.[213] Prior to the Civil War, corporations had little basis to oppose increasing state regulation. John Marshall initially strengthened state authority in 1830 under *Providence Bank* to specifically protect the state's right to tax, and Roger Taney had expanded that authority to include absolute constitutional protection over all state powers with regard to corporations. States were able to enforce the new regulations and taxes against railroad companies based on these decisions.[214] After 1868, the adoption of the Fourteenth Amendment

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[212] Robert G. McCloskey, *The American Supreme Court* (Chicago: The University of Chicago Press, 1960 [1994]), 69; Personal relationships between federal judges and railroad executives were not uncommon, and "[s]uch friendships merged public business and private business." White, *Railroaded*, 8. For instance, Salmon Chase, Chief Justice of the Supreme Court from 1864-1873, was close friends with railroad financier Jay Cooke and remained friends while he was on the bench. Ibid. Justice Stephen Johnson Field was intimate with railroad executives, and dined publicly with Leland Stanford even while presiding over *Santa Clara* —a case involving Stanford's railroad. Beatty, *Age of Betrayal*, 170. In addition, legal theories in support of business were developing in ways that offered railroads support in court, such as substantive due process, espoused by judges as a means of restricting state regulation of business.

[213] Congress adopted the Fourteenth Amendment to the United States Constitution on July 9, 1868 to provide citizenship rights and equal protection of the laws to former slaves after the Civil War.

[214] Central to Railroad managers' and executives' concerns were new tax policies against their companies—policies they believed were either unfair or unwise. Cochran, *Railroad Leaders*, 190. By the 1880s this mode of regulating railroad companies became the focus of railroad legal battles. James C. Clarke, the President of the Illinois Central railroad, expressed his frustration with popular sentiment to his Vice President in 1883 that "The people are in favor of building a new road and do what they can to promote it," but "[a]fter it is once built and fixed then the policy of the people is usually in opposition." James C. Clarke, President Illinois Central (1883-1887) to Stuyvesant Fish, Vice President Illinois Central, September 13, 1883, reprinted in Cochran, *Railroad Leaders*, Appendix 296. In a letter to a Land Commissioner Charles Elliott Perkins, President of Chicago, Burlington & Quincy, wrote, "I agree with you that one of our most serious dangers is in the taxing power. The tone of the press and legislatures toward railroads is enough to discourage almost anybody, but we cannot afford to let ourselves become demoralized, and we must keep at it and do the best we can to educate honest people, who are greatly in the

radically changed the Constitution in ways that were only just becoming apparent to judges and lawyers. Those changes allowed for the possibility of reversing the weak legal position of the railroad companies, and by extension all corporations. This was not what the Fourteenth Amendment was intended to do. It was specifically intended to preserve the rights of freed slaves in a new, post-Civil War society, but the new legal authority it created also empowered federal courts to interfere with state law in a manner never before available to them.[215] This ability allowed federal judges sympathetic to railroad or business interests to impose their policy preferences and exert their biases in unprecedented ways, which opened the door for corporations to secure a more robust definition of the term "person."

The Fourteenth Amendment to the United States Constitution was adopted on July 9, 1868 along with the Thirteenth and Fifteenth Amendments. Like the Thirteenth and Fifteenth Amendments, many of the Fourteenth Amendment's provisions were designed to end the effects of slavery after the Civil War. Prior to the passage of the Fourteenth Amendment the Bill of Rights did not apply to the states, but existed only to limit the federal government's actions.[216] A few critical aspects of the Fourteenth Amendment (all contained in Section One to the Amendment) allowed federal supervision of state activity. First, the Privileges and Immunities Clause prohibited states from making or enforcing any law that abridged the privileges or immunities of all U.S. "citizens," including recently liberated slaves. Second, the Due Process Clause guaranteed "due process of law" to any "person" a state tried to deprive of life, liberty or property, and would later apply most of the Bill of Rights to the states.[217] Third, the Equal Protection Clause—also

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majority. As to the dishonest ones, of course, there is no way of reaching them, except through their pockets." Charles Elliott Perkins, President Chicago, Burlington & Quincy, to William W. Baldwin, Land Commissioner, March 18, 1885, reprinted in Cochran, *Railroad Leaders*, Appendix 440. The strategy of paying public figures to promote railroad interests continued, but ultimately the most effective strategy for countering hostile legislators was to tie up their tax laws in court.

[215] One of the major provisions of the 14th amendment was to grant citizenship to "All persons born or naturalized in the United States," thereby granting citizenship to former slaves. U.S. Const. amend. XIV, § 1.

[216] *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) confirmed this in a holding that established that the United States Bill of Rights could not be applied to state governments.

[217] U.S. Const. amend. XIV, § 1. Prior to 1925, the Bill of Rights only to applied to the federal government. Under the incorporation doctrine, most provisions of the Bill of Rights now also apply to the state and local governments. The Court also derived procedural due process rights from this clause, such as requiring legal proceedings prior to the government seizing a person's property interest. This clause was also the basis of substantive due process rights, such as parental rights and, in the context of the nineteenth century, economic rights embodied by the "freedom of contract." "Freedom of Contract" is most notoriously cited from *Lochner v. New York*, 198 U.S. 45 (1905) in which the Supreme Court determined that state regulation on maximum work hours would violate the workers "freedom of contract" even though

contained in Section One—required states to provide equal protection under the law to any "person" within their jurisdictions. Although Congress drafted the Fourteenth Amendment with the intent of protecting freed slaves, corporations exploited the Amendment's language to argue for more rights, refashioning the meaning of corporate personhood through application of the word "person" in the Fourteenth Amendment.[218]

Initially, the Supreme Court conformed the Fourteenth Amendment to the precedents Marshall and Taney established regarding corporate rights and kept the new Amendment's provisions consistent with the tradition of limited understanding of corporate personhood. In 1869 the Supreme Court unanimously decided that corporations were not "*citizens*" under the Privileges and Immunities Clause.[219] Consequently, whether corporations were "persons" under the Due Process and Equal Protection Clauses of the Amendment became central to corporate rights litigation.

The equal protection route appeared to be a dead end for corporations. The first case to raise the issue in the Federal Court was in Louisiana, *Livestock Dealers and Butchers Association v. Crescent City Livestock Landing and Slaughter House Company*, which resulted in that court looking no further than the text of the Amendment itself, holding that "[o]nly *natural persons* can be born or naturalized; only *natural persons* can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the first two clauses just quoted."[220] The court seemed to regard the issue as a simple matter of construing the Fourteenth Amendment consistently with U.S. and common law precedent, all of which restricted the rights

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the work conditions were unhealthy and the hours extended well beyond eight hour days. The case would come to stand for the callousness of business interest over labor, among other things.

[218] See *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 37 (1872). Moreover, the enactment of the Fourteenth Amendment was motivated in large part to nullify the *Dred Scott* decision, in which Justice Taney determined that African Americans were "persons" but could never be "citizens." Accordingly, Congress intentionally used the word "persons" in the context of the Fourteenth Amendment to ensure that freed slaves would be entitled to equal protection and to overturn the *Dred Scott* ruling. Malcolm J. Harkins III, "The Uneasy Relationship of Hobby Lobby, Conestoga Wood, The Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil The Legal System." *Saint Louis University Law Journal* 7 (2014):240.

[219] *Paul v. Virginia*, 75 US 168 (1869).

[220] *Livestock Dealers and Butchers Ass'n v. Crescent City Livestock Landing and Slaughter House Co.*, 4 Fed. Cas. 891, No. 2,234, 68 (C.C. La. 1870), Rev'd 16 Wall. 36 (U.S. 1873) (emphasis added). The court continued, "the person to whom equal protection of the law is secured are person born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons." Ibid. This would eventually become part of the "Slaughterhouse cases," which the Supreme Court would take up and overturn at a later date, but at this time the Circuit Court had the only word on the matter.

for artificial corporate persons. The Supreme Court would not take up the issue until it heard the seminal Slaughterhouse Cases of 1873, which included the *Livestock Dealers and Butchers Association* case.

The *Slaughterhouse* cases dealt directly with the relationship between corporations and states. Slaughterhouses and butchers gutted over 300,000 animals per year a mile and a half upstream from New Orleans and dumped animal entrails, dung, blood, and urine into New Orleans' drinking water, which was implicated in cholera outbreaks among the population.[221] In response, the Louisiana legislature passed a law that allowed the city of New Orleans to create a corporation that centralized all slaughterhouse operations in the city. The butcher associations of New Orleans saw this as an attempt by the government to take over the slaughterhouse industry and challenged the act as a violation of the Privileges and Immunities Clause. The Court held that the Fourteenth Amendment's Privileges or Immunities Clause affected only rights of United States citizenship and had no bearing on how a state treated its own citizens.[222] Therefore the butchers' Fourteenth Amendment rights had not been violated.[223]

The *Slaughterhouse* decision favored state regulation over business interests, but the Supreme Court never directly addressed whether corporations were to be considered "persons" under the Fourteenth Amendment. The Supreme Court's revision of the slaughterhouse cases meant that the *Livestock Dealers and Butchers Association* decision by the lower court, and its stance on artificial versus naturally born "persons," was no longer good authority. On the other hand, Justice Miller, writing for the majority, confirmed that the Due Process and Equal Protection Clauses existed to protect recently freed slaves, implying that these clauses should be narrowly understood in future cases.

Justice Stephen Johnson Field dissented from the opinion and argued for more expansive definitions of both clauses.[224] In Field's view, "A citizen of a state is now only a citizen of the United States residing in that state," he wrote, and therefore his right to the "privileges and immunities" granted by

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[222] *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Today, the Privileges and Immunities Clause prevents discrimination against people from out of state, but only with regard to basic rights. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1978).

[223] Michael A. Ross, "Justice Miller's Reconstruction: The Slaughter-House Cases, Health Codes, and Civil Rights in New Orleans, 1861-1873," *Journal of Southern History* 64, no. 4 (November 1998): 649-676; This interpretation effectively rendered the Privileges & Immunities Clause toothless, contrary to congressional intent. Akhil R. Amar, "Foreword: The Document and the Doctrine," *Harvard Law Review*, 114(26)(2000): 123 n.327; *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977).

[224] *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 83-130 (1873).

his national citizenship "are not dependent upon his citizenship of any state."[225] Accordingly, the Fourteenth Amendment was broad enough to include a common law presumption in favor of an individual right to pursue a legitimate occupation. Field was not proposing that the federal government have a strong role in enforcing the civil rights of freed slaves. In fact, the issue of race and equal protection was of little interest to Field.[226] Notwithstanding the fact that equalizing race relations was the whole purpose of the Fourteenth Amendment, as Justice Miller rightly observed, Field wanted to use the Amendment's language and new authority to enforce his view that business should not be prone to the regulations of states. He was opposing the states' strong regulatory powers in favor of individual property rights.[227] Whereas Miller sought to reign in fears of centralized federal power by narrowing the Amendment's protections to center upon race, Field believed that the Fourteenth Amendment had radically changed the federal system to offer a greater scope of protection over individual property rights, which could provide crucial protection for corporations against the regulations they opposed. Although Field's reading of the Fourteenth Amendment did not prevail in the *Slaughterhouse* cases, he would have ample opportunity to expand upon his dissent as railroads continued to bring cases to federal courts.[228]

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[225] Ibid., 95.

[226] Late in life Justice Field systematically collected and destroyed his correspondence. Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory" and American Constitutionalism* (State Historical Society of Wisconsin, 1968), 24. A collection of letters written to Field's friend, John Norton Pomeroy, survived, which were recovered from the Pomeroy heirs. Ibid. In one letter, Field wrote "You know I belong to the class, who repudiate the doctrine that this country was made for the people of all races. On the contrary, I think it is for our race-the Caucasian race. We are obliged to take care of the Africans; because we find them here, and they were brought here against their will by our fathers. Otherwise, it would be a very serious question, whether their introduction should be permitted or encouraged. Stephen J. Field, "Letter to John Norton Pomeroy," April 14th 1882, in "Four Letters of Mr. Justice Field," ed. Howard Jay Graham, *Yale Law Review* 47(1937-1938): 1104. Field's record as a judge reflected this attitude, especially in regard to the Fourteenth Amendment. He dissented in *Strauder v. West Virginia*, 100 U.S. 303 (1880), in which the Court held that excluding blacks from juries due only to their race violated the Equal Protection Clause. He also joined the majority in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the notorious decision upholding the "separate but equal" doctrine as a constitutionally permitted form of racial segregation.

[227] Field is a prime example of the sort of judge railroad executives could hope to persuade for expanded corporate rights. His dissent in the *Slaughter House Cases* is commonly understood as one of the foundations for the "Substantive Due Process" theory, which allowed the Court to look past procedural fairness (designed to ensure equal treatment of individuals) to the substance of state law, regardless of the judicial procedure in place. This allowed federal courts to review and reject state law based on notions of unwritten, but " inherent" rights. The "right to contract" employed in the *Lochner* case is the most notorious example. Kermit L. Hall, *The Oxford Companion to the Supreme Court of the United States* (New York: Oxford University Press, 2005), 275.

[228] Field recognized that the federal courts and the Supreme Court were getting more cases that touched on corporate law in this period. In a presentation at the Centennial Celebration of the Federal Judicial, he remarked:

D. Justice Field Expands the Fourteenth Amendment to Protect Corporate Rights

Justice Field had the opportunity to elevate his *Slaughterhouse* opinion to that of controlling law in the Ninth Circuit. In 1879, Justice Field presided over a series of habeas corpus decisions in the Ninth Circuit regarding the rights of Chinese aliens in California.[229] The California Constitution prohibited corporations from hiring Chinese workers. Justice Field held that this provision violated the treaty rights of Chinese workers, and the rights of corporations, as persons, for purposes of Equal Protection and Due Process under the Fourteenth Amendment.[230] Because Congress made *habeas corpus* decisions non–reviewable by the Supreme Court in 1868, Field effectively transformed the minority view in the Slaughterhouse cases into the prevailing law of the Ninth Circuit.[231]

In *Santa Clara County v. Southern Pacific Railroad* (1886) and *San Bernardino County v. Southern Pacific Railroad Company* (1886), two cases from California, the application of the Fourteenth Amendment to corporations again came under judicial review, eventually by the Supreme Court. California had denied railroads the ability to deduct the amount of their mortgages from their taxes – a privilege that California's Constitution guaranteed to individuals only.[232] This was an important measure because railroad property, unlike other property, was mortgaged for more than cost. After the railroads refused to pay under the new tax structure, a variety of California municipalities sued the companies to collect taxes owed. Pursuing a now familiar strategy, the railroad companies removed the cases to Federal Court, bringing them before Justice Field's Ninth Circuit Court of Appeals and eventually the United States

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> "The facility with which corporations can now be formed has also increased [the Supreme Court's] business far beyond what it was in the early part of the century. Nearly all enterprises requiring for their successful prosecution large investments of capital are conducted by corporations. They, in fact, embrace every branch of industry and wealth that they hold in the United States equal in value four-fifths of the entire property of the country. They carry on business with the citizens of every state as well as with foreign nations, and the litigation arising out of their transactions is enormous, giving rise to every possible question to which the jurisdiction of the federal courts extends."

Stephen J. Field, "Address of Justice Field at the Centennial Celebration of the Organization of the Federal Judiciary, at New York," February 4, 1890, reprinted in John P. Davis, *Corporations* (New York: Capricorn Books, 1897 [1961]), 2.

[229] The Judiciary Act of 1802 created the Federal Circuit Court system whereby a justice of the Supreme Court joined with a U.S. district court judge to convene U.S. circuit courts. The Circuit Courts provided the last word on a legal decision unless the U.S. Supreme Court overturned the decision after granting certiorari to review it. Judiciary Act of 1802, 2 Stat. 132 (1802).

[230] *In re Tiburcio Parrott*, 1 Fed. 481 (C.C. Cal. 1880).

[231] Act of March 27, 1868, 15 Stat. 44 § 2 as cited in Howard J. Graham, *Everyman's Constitution*, 392.

[232] California Const. 1879, Art. 12, §§ 21-23

Supreme Court.[233] Justice Field wrote the Ninth Circuit opinion in the *Santa Clara* case prior to its appeal to the Supreme Court.

By the time of the California tax cases, Justice Field had a reputation for maintaining intimate and unprofessional relationships with railroad corporations.[234] It was his standing with railroads that contributed to his failed Presidential bids prior to the California tax cases.[235] Field earned his reputation in part because he enjoyed open friendships with executives in the Stanford-Huntington group.[236] Chief Justice Waite worried about the propriety of Field writing railroad decisions for the Court because, as he wrote to Field in a note from his chambers, "[t]here was no doubt of your intimate personal relations with the managers of the Central Pacific."[237] Yet, Field was untroubled by fraternizing with railroad men even while presiding over their cases, and this remained true when the Court heard arguments for the *Santa Clara* case.[238] In fact, Field was instrumental in finding an attorney to represent the railroads in the California tax cases. He penned the General Manager of the Central Pacific and Southern Pacific Railroads "urging the officers...to retain [the] professional services" of his friend John Norton Pomeroy.[239] Pomeroy wrote the argument on behalf of the railroads before the Ninth Circuit and the Supreme Court. Thus, when

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[233] *Santa Clara County*, 118 U.S. 394 (1886); *San Bernardino County v. Southern Pacific Railroad Company*, 118 U.S. 417 (1886).

[234] In fact, Field's open relationship with railroad executives was the reason he did not write the majority opinion in these crucial railroad cases. Chief Justice Waite explained to Field that "it would tend to discredit the opinion if it came from someone known as the personal friend of the parties representing these rail road interests," as cited in Graham, *Everyman's Constitution*, 410-411 n.155. Graham notes, "Field had repeatedly embarrassed Waite and the Court by close association with the Southern Pacific proprietors and by zeal and bias in their behalf. He had thought nothing of pressuring Waite for assignment of opinions in various railroad cases, of placing his friends as counsel for the road in upcoming cases . . . even of passing on to such counsel in the undecided San Mateo case 'certain memoranda which had been handed me by two of the Judges.'" Ibid., 570.

[235] At the California convention delegates signed pledges to support "Tilden first, Thurman second, Field never." One delegate from San Francisco warned fellow Democrats from "accepting from the railroad corporations their chosen candidate, Stephen J. Field." The anti Field vote passed 453-19. Beatty, *Age of Betrayal*, 157.

[236] Howard J. Graham, "An Innocent Abroad: The Constitutional Corporate Person," *UCLA Law Review* 2 (1955): 155-160,183.

[237] Beatty, *Age of Betrayal*, 170.

[238] After the end of the day's arguments before the Supreme Court, Field dined in public with Leland Stanford and his legal team in honor of Stanford's attorneys on the case. Ibid. The *Wasp* published a cartoon editorial at the time that satirized this event accusing Field of "making a mockery of justice." Chief Justice Waite took notice and clipped the cartoon writing on it "Judge Field's Dinner at Chamberlin's." C. Peter Magrath, *Morrsion R. Waite: The Triumph of Character* (New York: MacMillan Company,1963), 222.

[239] Graham, "An Innocent Abroad," 183.

Field presided over *Santa Clara* in the Ninth Circuit at the initial appeal phase of the case, he was sitting in judgment over a group of close, personal, and professional friends.

At the Federal Court of Appeals level in the Ninth Circuit, Justice Field wrote a lengthy and in-depth analysis for *Santa Clara* favoring the railroads.[240] In the Ninth Circuit opinion, he focused on the idea that the protections of the Fourteenth Amendment should extend to corporations in order to protect the individual rights of their members, given that a corporation was essentially a collective body of individuals. Field began his analysis with an explication of the meaning of equal protection. Under the Fourteenth Amendment, Field wrote, equal protection "implies not only that the means which the laws afford for such security shall be equally accessible . . . but that no one shall be subject to any greater burdens or charges than such as are imposed upon all others under like circumstances."[241] For the purposes of the *Santa Clara* case, that meant that the Fourteenth Amendment prohibited unequal taxation among persons. Emphasizing a broad interpretation of the protection, Field wrote that it applied to "every one everywhere, whatever be his position in society or his association with others, either for profit, improvement, or pleasure," including corporations.[242]

Field turned to the composition of the corporation itself, characterizing it as a civil institution and likening membership to that of a political body or to a religious society.[243] Starting with the basic proposition that "private corporations consist of an association of individuals united for some lawful purpose," Field concluded that the members do not, because of such association, lose their rights of equal protection.[244] He wrote,

> "[a]s members of the association -- of the artificial body, the intangible thing, called by a name given by themselves -- their interests, it is true, are undivided, and constitute only a right during the continuance of the corporation to participate in its dividends, and, on its dissolution, to a proportionate share of its assets; but it is property, nevertheless, and the courts will protect it, as they will any other property, from injury or spoliation."[245]

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[240] *County of Santa Clara, et. al. v. Southern Pacific Railroad Company, et. al.*, 18 F. 385 (C.C.D. Cal. 1883).
[241] Ibid., 398.
[242] Ibid.
[243] Ibid.
[244] Ibid., 402.
[245] Ibid., 402-403.

Under this reasoning, not only did corporate membership protect individual members' rights, corporate membership established constitutionally protected property interests. In fact, according to Field's argument, the legal entity itself, the metaphysical being of a corporation, was the equivalent of an individual member because it could not feel either injury or benefit without its members.[246] Ultimately, Justice Field couched the issue in terms of individual rights even as he assembled the shareholders of a corporation into a collective. Under his analysis, in order to preserve the rights of each individual member, a corporation is one unit, one "person," for purposes of applying Fourteenth Amendment protections.

Field's analysis differed little from Webster's rejected argument before the Taney Court in *Bank of Augusta v. Earl* that corporations and their shareholders were somehow interchangeable. Yet, the intervening passage of the Fourteenth Amendment provided the opportunity to revive and re-litigate the same argument. This time, Field was there and willing to assist. The only substantial difference between Webster's earlier argument and Field's analysis was the bare assertion that the Fourteenth Amendment was the catalyst that changed corporations from artificial entities to receptacles for individual constitutional rights. Combined with this assertion was Field's subtle insinuation that the Fourteenth Amendment re-defined words to modify otherwise settled common law rules and principals. For instance, "property," which to this point regarded tangible property, was now equivalent to "earning power," corporate "membership," and "exchange value." The word "deprived" no longer meant a physical taking, but a "diminution" or "impairment."[247] Even though Field was using the same words Marshall and Taney employed, under Field's analysis the state act of taxing a corporation now implicated violations of traditionally grounded civil rights.

Field's new formula lacked any foundation in common law, the language of the Constitution, or U.S. precedent. If taken seriously, it would effectively overturn Marshall and Taney's holdings that the state's power, particularly its taxing power, was absolute in relation to corporations. Without citation to any particular legal authority, Field shored up his interpretation with the general proposition that "everywhere, and at all times, and in all Courts, it has been held [that equal protection and due process], either by tacit assent or by express adjudication . . . extend, so far as their property is concerned, to

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[246] Ibid.
[247] Graham, "An Innocent Abroad," 155-160.

corporations."[248] This was plainly incorrect. To name just a few courts that directly contradicted Field's claim, the federal circuit court in Louisiana decided the issue in complete opposition to Field not long before in 1871, and Marshall, Taney and even the venerable Blackstone never considered corporations to have inherent natural rights. But Field intended his result despite its scarcity of legal authority, all the more demonstrated by his obvious reliance on Railroad counsel for his erroneous underlying authorities.

Indeed, Field's analysis mirrored the railroad companies' arguments. Railroad counsel John Norton Pomeroy, Field's friend,[249] authored the argument in *Santa Clara* that the Fourteenth Amendment protected the property rights not of some abstract entity, but rather of all the individuals that comprise that entity.[250] Justice Field also explicitly cited the railroads' other attorney, Roscoe Conkling, on no less than three separate occasions in his opinion. Conkling was a member of the Senate when the Fourteenth Amendment was discussed and adopted and he argued the case orally in front of the Ninth Circuit Court of Appeals. Field approved of Conkling's description of the Amendment as "protection against injustice and oppression" that was made "secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place."[251] With the help of Conkling's argument and Senatorial status, Field could declare the Fourteenth Amendment to encompass a broad and overarching federal supervision of state behavior with regard to corporations.

Unfortunately for Field's analysis, and for posterity, Conkling neglected to inform the Ninth Circuit Court of Appeals that Congress had overtly voted down the application of the Fourteenth Amendment to Corporations.[252] In Congress' first session after the ratification of the Fourteenth Amendment, John Bingham, who drafted Section One of the Amendment, sponsored a bill to apply the privileges and immunities of the United States to corporations. Although the text of the bill is not recorded

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[248] *The Railroad Tax Cases*, 13 F. 722, 746-47 (C.C.D. Cal. 1882).
[249] Pomeroy and Field's friendship is documented through letters written by both prior to the Santa Clara Case. Howard Jay Graham, ed., "Four Letters of Mr. Justice Field," Yale Law Journal 47 (1938): 1100. Pomeroy wrote the "Introductory Sketch" of Field's career for a biography intended to promote Field's Presidential Aspirations in 1880 and 1881. Ibid.
[250] The argument posed by Pomeroy was that "for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators." Horwitz, *Transformation of American Law*, 70.
[251] *Santa Clara*, 188 U.S. at 398.
[252] Graham, *Everyman's Constitution*, 17.

in the *Congressional Globe*, Congressmen referred to it as extending to corporations "the privileges and immunities guaranteed by the Constitution of the United States," implying that corporations would have the protection of both the Constitution's Comity Clause and the Fourteenth Amendment.[253] Bingham introduced a revised bill in 1871, after the Supreme Court ruled that corporations were not American citizens for purposes of the Fourteenth Amendment. That bill contained the language:

> that being ruled to be citizens of the United States within the meaning of the Constitution to the extent that they shall be entitled as such to sue and be sued in the courts of the United States, by virtue of their citizenship under the Constitution . . . under the protection of that provision of the Constitution of the United States which gives them in whatever state they may be found no greater disability in reference to trade and commerce than the citizens of the state in which they live.[254]

Even though the focus of the bill was on citizen status, its repeated rejection by Congress revealed that Congress did not wish to offer the same natural rights of people to the artificial entities of corporations.[255] Accordingly, although the railroads could claim that one of the prominent drafters of the Fourteenth Amendment may have intended for it to cover corporate rights, Congress abjectly and explicitly refused to enact that intention into law. Counsel for the railroad companies made no mention of this legislative history during the *Santa Clara* litigation even though they were clearly aware of it; neither did Field in his opinion.[256]

In *San Bernardino County v. Southern Pacific Railroad Company* (1886), a case the Supreme Court decided in tandem with *Santa Clara*, Justice Field would expand upon the railroads' argument in his

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[253] House Bill 349, 41st Cong., 1st Sess. (1869), as cited in Graham, *Everyman's Constitution*, 122, n. 54.
[254] See Cong. Globe, 41st Cong., 3rd Sess. (1871) 538, 715, 1288-1290 as cited in Graham, *Everyman's Constitution*, 122, n. 54.
[255] During the same year Congress enacted the Dictionary Act, 1 U.S.C. § 1 (1871), which instructs courts to apply to federal statutes definitions of certain common words. The Dictionary Act states that "the words 'person' and 'whoever' include corporations." The Supreme Court looked to this definition in the *Hobby Lobby* case to interpret the phrase "a person's" exercise of religion, and consequently imputed religious belief to a corporation. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768, 189 L. Ed. 2d 675 (2014). However, given the same Congress that passed the Dictionary Act also expressly rejected including corporations into the fold of the Fourteenth Amendment, as described above, it is unlikely that the definition of the word "person" as used in the Dictionary Act was intended to bestow religious belief to corporations. Indeed, the definitive treatise on corporations by Angell and Ames, also published in 1871, made it clear that, "When a corporation is said to be a person, it is understood to be so only in certain respects, and for certain purposes, for it is strictly a political institution. The construction is, that when 'persons' are mentioned in a statute, corporations are included if they fall within the general reason and design of the statute." Joseph K. Angell and Samuel Ames, Treatise on the Law of Private Corporations Aggregate, 9th ed. (Boston: Little, Brown and Co., 1871), 3.
[256] Beyond outright concealing this integral piece of information, the Railroad's brief mischaracterized many of the facts and arguments. For instance, the brief indicated that the mortgage on the Southern Pacific road "exceeds $3000 per mile," which Field adapted verbatim in his opinion. The mortgage actually exceeded $40, 000 per mile, which was double the full assessed value of the land. Graham, "An Innocent Abroad," 190.

concurrence to the Supreme Court ruling.[257] But it was prior to hearing arguments in *Santa Clara* that Justice Waite uttered the two sentences that would from that point forward form the basis for corporate personhood under the Fourteenth Amendment and drastically change Corporate Law: "[t]he court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations ... [w]e are all of the opinion that it does."[258] Notwithstanding that the two cases were ultimately determined on grounds not involving the Fourteenth Amendment at all, the syllabus of the *Santa Clara* case preserved Justice Waite's casual declaration that corporations were "persons" under the Fourteenth Amendment.[259]

Although the United States Supreme Court decided these cases on other grounds that never provided a basis for treating a corporation as a person under the Fourteenth Amendment, Justice Field took it upon himself to separately provide analysis and justification for such a conclusion in concurring opinions with the Court, which reinforced his early Ninth Circuit opinions. In *San Bernardino County*, Field's concurrence provided the sole Supreme Court rationale on record for categorizing a corporation as a "person" under the Fourteenth Amendment. Field first took care to memorialize his *Santa Clara* arguments into Supreme Court jurisprudence. He wrote that although he agreed with the outcome of *Santa Clara* and its companion tax cases (such as *San Bernardino*) he regretted that the decision had "not been deemed consistent with [the Court's] duty to decide the important constitutional questions involved, and particularly the one which was so fully considered in the Circuit Court, and elaborately argued here" involving "the equal protection of the laws guaranteed by the Fourteenth Amendment of the

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[257] Waite would not allow Field to write the majority opinion, even though it was Waite's turn in the rotation, because of the impropriety of Waite's close association with railroad magnates, including those whose railroads were parties to the case. Graham, *Everyman's Constitution*, 570.

[258] *Santa Clara*, Syllabus [1], 118 U.S. 394 (1886).

[259] The task of drafting the syllabus fell to J.C. Bancroft Davis, clerk to Chief Justice Waite. Davis was president of Newburgh and New York Railway Company before clerking for Waite. James Barnes, *Annual Report of the State Engineer and Surveyor of the State of New York, and of the Tabulations and Deductions from the Reports of the Railroad Corporations for the Year Ending September 30, 1867* (Albany: The Argus Company, 1868), 336. However, there is no written evidence that he discussed the syllabus with Field before writing it. For more discussion on Davis, see Harkins, "The Uneasy Relationship of Hobby Lobby, Conestoga Wood, The Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil The Legal System," 250-259.

Constitution."[260] This statement ensured that Field's Ninth Circuit analysis would now be part of the record as well. In addition, Field quoted Justice Waite's declaration prior to oral argument in *Santa Clara* that all the Justices agreed corporations were "persons" within the meaning of the Equal Protection clause. Including this statement in Field's concurrence assured that it could be referred to in later decisions as persuasive precedent, even though the opinion was not controlling, which offered more substance to later judges and lawyers than the lack of authority afforded by statements in the *Santa Clara* syllabus. Field did his best to take full advantage of the opportunity during the Supreme Court's review of the California tax cases to establish a radical shift in American political structure in favor of corporations.[261] Even so, at this point Field's published opinions did not yet extend to federal law as a whole, beyond the Ninth Circuit. It would take some time before later judges would solidify the conclusions made in Field's opinions and the *Santa Clara* syllabus.

E. The Formation of the Constitutional Corporate Person Contrary to Constitutional and Common Law

That a corporation is to be treated as an individual for purposes of the Fourteenth Amendment existed on the Supreme Court level not as a detailed policy analysis or prescription, but as a single sentence of the Chief Justice recorded by a court reporter. In terms of understanding the analysis, the Justices provided almost no policy consideration or justification, let alone direction, to future lawyers or judges. In fact, even though Waite's statement shifted fundamental American Corporate Law and influenced later courts, it was never enacted by statute or through any actual Supreme Court holding. Attached to Waite's sentence through concurring opinion was the justification espoused by Field and the railroads. Justice Field's concurrence served to preserve his much more detailed examination of the issue in his lower court decision in the *Santa Clara* Case. This collection of Field's writing became the only authority on the law behind Waite's casual statement, and later courts used it as such.[262]

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[260] *Santa Clara*, 118 U.S. at 422.

[261] In addition, the practical consequence of this decision was that railroad land comprised of rails, ties, and graded real estate, which costs an average of $30,000 per mile and mortgaged for as much as $40,000, was no different for taxation purposes than a $5000 farm mortgaged at 15%. Graham, "An Innocent Abroad," 190. This would have drastic consequences for California. The state eventually closed schools and cut public service positions while the courts decided this issue. Beatty, *Age of Betrayal*, 166.

[262] *Nashville, Chattanooga, & St. Louis Ry. Co. v. Taylor*, 86 F. 168, 179-80 (C.C.M.D. Tn. 1898) (stating that the Santa Clara circuit opinion "must be regarded as of the highest authority which any case decided at the circuit can possess"); *Russell v. Croy*, 164 Mo. 69, 108 (1901) (expressing doubt regarding whether Supreme Court resolved question of constitutional corporate person and concluding that the Circuit

Without Justice Field's writings, the California tax cases did not demonstrate a predilection the Supreme Court had towards the arguments over the corporate person, nor did they tailor any sort of pattern in favor of corporate rights under the Fourteenth Amendment. In fact, Chief Justice Waite had been hard on railroads in his Court prior to hearing *Santa Clara County* and *San Bernardino County*.[263] Most significantly, in the 1877 case of *Munn v. Illinois*, Waite ruled in favor of Granger legislation that fixed maximum rates chargeable by railroads.[264] In his majority opinion, Waite adhered to the precedent established by Marshall and Taney. He held that a business or private property was subject to governmental regulation when it was "affected with a public interest."[265] One railroad executive was so demoralized by the holding that he wondered if, under the Waite Court, railroads would need to shift their tactics once again and "look to polls and not to the courts to have their wrongs redressed."[266]

The Chief Justice's willingness to sustain regulatory laws demonstrated that even if he assumed that corporations were "persons" at the outset of the *Santa Clara County* oral arguments, he did not believe the existence of that personality prevented government from exercising regulatory power. It is much more likely that Waite considered his statement as nothing more than referring to the limited administrative personality of corporations established and well settled by hundreds of years of common and constitutional law. Waite's statement was a routine instruction to counsel, as evidenced also by his having the court reporter include it in the headnotes of the opinion. There is no evidence to support the notion that Waite would leave such a sweeping shift in constitutional doctrine to his reporter's discretion.[267] The Chief Justice had little time to realize the ramifications of *Santa Clara*. He died suddenly and unexpectedly of pneumonia on March 23, 1888, almost two years after the *Santa Clara* decision.

"opinion of Mr. Justice Field . . . seems to furnish a conclusive answer . . . and we are satisfied with . . .the correctness of its conclusion").

[263] Chief Justice Waite presided over a number of rulings in the 1870s and 1880s that hurt railroad interests, such as *Railroad Company v. Richmond*, 96 U.S. 521 (1877) (allowing the state to place limitations on a railroad in one part of the state but not in another); *Sinking-Fund Cases*, 99 U.S. 700 (1879) (requiring railroads to pay interest on bonds the U.S. government had floated to finance construction of the intercontinental line) ; and *Ruggles v. Illinois*, 108 U.S. 526 (1883) (affirming a state act regulating the maximum rate of charges for the transportation of passengers).

[264] *Munn*, 94 U.S. 113.

[265] Ibid., 237.

[266] Magrath, *Triumph of Character*, 219.

[267] Ibid.

The California tax cases were victories for Justice Field, because the Supreme Court had neither endorsed his circuit opinions nor overruled them. This meant that his concurring opinions were functionally the last word from the United States Supreme Court, the ultimate arbiter on the matter. Field's opinions are the only judicial sources that authoritatively establish the "corporate constitutional person."[268] The concurrence resolved circuit splits in favor of corporations. From that point on, courts cited *Santa Clara* for the proposition that a corporation was a "person" under the Fourteenth Amendment and used Field's analysis to guide them.[269] Field's analysis was all that was available for future courts and attorneys to look to when determining how to understand Justice Waite's declaration, which enabled it to creep de facto into U.S. jurisprudence as the new law of the land.

The cases were also a victory for the railroad companies as a complete vindication of their efforts to focus copious resources on taking their case to federal courts, while brashly ignoring state regulation. Because the issue involved the Fourteenth Amendment, both state and federal courts had to pay heed. The vagueness of the determination that the Fourteenth Amendment protected the corporate person and the brevity of Waite's corresponding language left an opening for what would later become the "natural theory" of Corporate Law. Corporations could now legitimately assert natural rights, and point to U.S. legal authority for that assertion, for the first time in their history. Even with the *Santa Clara* syllabus and Field's concurrence, results were not guaranteed. The endeavor would require judges to agree, and to enshrine the notion in legal precedent. As it turned out, starting in 1888 (the year of Chief Justice Waite's death) judges on the benches of various courts, including Justice Field, found the *Santa Clara* Syllabus sufficient to serve as authority in subsequent decisions regarding the corporate person.[270] Field wrote seven

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[268] Graham, "An Innocent Abroad," 160.

[269] The Supreme Court cited *Santa Clara County* for the proposition that corporations are persons within the meaning of the equal protection clause of the Fourteenth Amendment in two cases shortly after making its decision the Santa Clara case. *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26, 28 (1889); *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209-210 (1888).

[270] The rise of state regulatory action brought many cases to the courts from 1874 to 1900, and the temperament of the Supreme Court was "to find state economic regulations invalid" which the "Court proceeded to do [] in a series of decisions running in a seldom broken line from the year of Chief Justice Waite's appointment to the turn of the century." McCloskey, *The American Supreme Court*, 82. Accordingly, railroads found receptive audiences among the Supreme Court (and other courts) for the new corporate person under the Fourteenth Amendment in *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888); *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U.S. 26 (1889), *Louisville Safety-Vault & Trust Co. v. Louisville & N. R. Co.*, 13 Ky.L.Rptr. 517, 92 Ky. 233, 17 S.W. 567 (Ky. 1891), *Charlotte, C. & A.R. Co. v. Gibbes*, 142 U.S. 386 (1892), *Dugger v. Mechanics' & Traders' Ins. Co. of New Orleans*, 95 Tenn.

opinions for the Court after *Santa Clara* in which he concluded the Court had already determined that corporations were persons under the Fourteenth Amendment, even though the resolution of the corporate person was never at issue in these cases. This strategy allowed Field to build a body of law and precedent that could later be referred to by other courts without drawing the attention or ire of those who may have disagreed with his assertions.[271] As railroads continued to inundate the courts with cases, they pressed their claims to a robust personhood under the Fourteenth Amendment, and, over time, an idea once limited to a syllabus and concurrence seeped into precedent and eventually became controlling authority.[272] U.S. courts affected this radical change, one of the most significant in American jurisprudence, as if by accident, with a minimum of internal jurisprudential logic or examination. In that manner, and not according to common law or the constitutional precedent of the Marshall and Taney Courts, corporations became natural people under the law.

V. Conclusion: The Legacy of *Santa Clara*

The history of corporate personhood in the United States originated with English common law, but the U.S. experience significantly altered the concept of corporate "persons." The prevailing view of corporate law prior to the *Santa Clara* case made corporations subservient to government regulation in a very direct way. Government permission was the only recourse a corporation could take to possess any rights at all. Once corporate persons separated from state power, the "person" took a step closer to being "natural" by no longer existing entirely at the pleasure of the state. The Bill of Rights, and its application to citizens under the Fourteenth Amendment, supplied a doctrinal context U.S. courts did not share with their English counterparts. It allowed corporations another source of independence, once corporate attorneys tapped into this new source of law. Previously, corporations could only challenge state action that specifically conflicted with the Constitution or state crafted charters, but as "persons" under the Fourteenth Amendment, corporations shifted the burden to the government to justify any regulation affecting them.

245, 32 S.W. 5, 11 Pickle 245 (Tenn. 1895), *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896), and *Central Trust Co. of New York v. Western N.C.R. Co.*, 89 F. 24 (W.D.N.C. 1898).

[271] Harkins III, "The Uneasy Relationship of Hobby Lobby, Conestoga Wood, The Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil The Legal System," 262.

[272] It took eleven years before courts would deem the corporate person after *Santa Clara* to be firmly established, from the first reliance on the *Santa Clara* syllabus in *Missouri Pac. Ry. Co. v. Mackey*, 127 U.S. 205 (1888) to the declaration that "It has long been *settled* that the word 'person,' within the meaning of the fourteenth amendment to the constitution of the United States, applies to a corporation" in *Johnson v. Goodyear Min. Co.*, 127 Cal. 4, 8 (Cal. 1899) (emphasis added).

Santa Clara was also a radical shift of constitutional doctrine due to the influence of corporations over certain judicial behavior.[273] Supreme Court Justices applied their personal policy inclinations when the common law and the Constitution presented gaps in jurisprudence. As a result, the historical context and political pressures of a given era influenced the creation of corporate law in the United States. While Justice Field was participating in a tradition of legal analysis created through the uncertainty of U.S. corporate law, his manipulation of the law was far more reaching than his predecessors.[274] Field pursued strategies that are more aptly understood as purely political—not judicial— in nature, which wholly departed from the confines of the common law, robbing U.S. Jurisprudence of what Malcolm J. Harkins III has referred to as the "incremental, evolutionary development that tests, validates, and clarifies most common law concepts" when it came to the corporate person.[275]

Every precedent in U.S. law prior to *Santa Clara* contradicted the concept that corporations could or should be treated as natural persons. Not one case or statute, let alone constitutional provision, established the personality of a private corporation as a constitutional doctrine.[276] In fact, the notion that corporations would be protected under the Fourteenth Amendment as actual people was rejected at least twice by Congress, and appears nowhere in the *Santa Clara* decision itself. Regardless, courts bound by precedent and the *stare decisis* doctrine continue to use *Santa Clara* for the proposition that corporations are "persons" under the Fourteenth Amendment, even though the case contains no analysis, justification or even legal authority to establish this consequential finding.[277]

At least two subsequent Supreme Court Justices recognized this striking inconsistency many years after *Santa Clara*. In 1938 Justice Hugo Black wrote a dissenting opinion in *Connecticut General Life*

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[273] California's resources could not match those of the Railroad companies. At the time of the Santa Clara case, the Railroad's chief counsel had a salary of $24,000 a year while the entire Attorney General's office had an average total expenditure of $10,000. Graham, "An Innocent Abroad," 209. From 1878 to 1883, the Central Pacific Railroad earned on average the amount California spent on its entire judiciary, including judges' salaries, upkeep of courts, and the Legal Department of the Attorney General. Ibid.

[274] Field's handling of the law in this respect was the most radical of his fellow Justices, as evidenced by its almost total lack of precedential anchoring.

[275] Harkins III, "The Uneasy Relationship of Hobby Lobby, Conestoga Wood, The Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil The Legal System," 211.

[276] Graham, "An Innocent Abroad," 162.

[277] *Citizens United v. FEC*, 558 U.S. ___, 130 S. Ct. 876 (2010), *Burwell v. Hobby Lobby, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014), *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77 (1938) and *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 581 (1949) are only a few examples.

Insurance Co. v. Johnson, 303 U.S. 77, 85 (1938), in which he advocated overruling *Santa Clara* specifically because he believed the word "person" did not include corporations.[278] Black was certain that history proved "that the people were told [the Fourteenth Amendment's] purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments."[279] Black lamented the tragic fact that an Amendment intended to correct the terrible wrongs and injustice of slavery had been applied for the protection of African Americans in less than one half of one percent of cases involving the Fourteenth Amendment up to that point, whereas in more than fifty percent of Fourteenth Amendment cases it extended benefits to corporations.[280] Justice William O. Douglas shared this conviction in his own dissent in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 581 (1949).[281]

Indeed, had the Supreme Court reversed Justice Field's Ninth Circuit holdings regarding corporate personality, the Court may have sustained the Louisiana federal circuit's views in the *Livestock Dealers*, 4 Fed. Cas. 891, No. 2,234, 68 (C.C. La. 1870), that "[o]nly *natural persons* can be born or naturalized; only *natural persons* can be deprived of life or liberty." Perhaps individual shareholders could have sued in their own names in order to preserve their personal rights, if such rights were so threatened, instead of the court simply imputing personhood by equating the corporation to its individual members. These sorts of outcome would have been much more consistent with common law precedent, which had already been developing in such cases as *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837), and *Bank of Augusta v. Earl*, 38 U.S. 519 (1839).

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[278] *Connecticut General Life Insurance Co. v. Johnson*, 303 U.S. 77, 85 (1938).
[279] Ibid.
[280] Ibid., 90.
[281] Justice Douglas wrote, " It may be most desirable to give corporations this protection from the operation of the legislative process. But that question is not for us. It is for the people. If they want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation." *Wheeling Steel Corporation v. Glander*, 337 U.S. 562, 581 (1949). Douglas revisited his dissent in *Bell v. Maryland*, 378 U.S. 226, 261-262 (1963), in which he again insisted corporations could not be people under the Fourteenth Amendment and decried the conviction of African American "sit-in" civil rights protestors for trespass at restaurants and lunch counters in part because "[t]he corporate beneficiaries of these convictions, those whose constitutional rights were vindicated by these convictions, are not parties to these suits," asking the question "[w]hy should a stockholder in Kress, Woolworth, Howard Johnson, or any other corporate owner in the restaurant field have standing to say that any associational rights personal to him are involved?" These dissents may have been persuasive in civil rights issues, but they were not effective in achieving any progress towards overturning *Santa Clara*.

Notwithstanding the inconsistency of *Santa Clara* or the injustice pointed out by Justices Black and Douglas, later courts embedded *Santa Clara* into firm precedent through its repeated use as authority for the proposition that corporations were protected as persons under the Fourteenth Amendment. The results of this theory in some ways left a legal conundrum, demonstrating its incoherence with corresponding law. For instance, a corporation cannot be a member to a conspiracy because it is not a sentient being.[282] But when it comes to constitutional protection of civil rights, a corporation is constitutionally a person vying for its rights of equal protection and First Amendment issues involving thought, belief and speech. This legal fiction wound up giving corporations the best of both worlds – having many of the rights of individuals without the corresponding responsibilities. The same precedent eventually led to corporations legitimately claiming the First Amendment rights when it came to funding political elections or having inalienable religious beliefs in *Citizens United v. Federal Election Commission* (2010) and *Burwell v. Hobby Lobby* (2014), respectively.

Santa Clara left modern day U.S. society with two unfortunate legacies. First, corporations gained access to inalienable personal rights in addition to often vast financial and legal resources. A corporate entity could use these tools to inordinately influence government regulation for private gain at the expense of democratic principles. Second, *Santa Clara*'s outcome undermined the strength and purpose of the common law system (the restraint of judicial discretion and the provision of orderly legal outcome). Although the gap between common law and constitutional law allowed required judges to work through solutions within the context of their times, federal judges pushed their authority to unprecedented bounds to impose their personal views of social or economic policy over the policy imperatives of Congress or state legislatures.[283]

Both legacies have had profound impact on American culture. *Santa Clara*'s outcome resulted in empowering corporations to be independent of state interference, which allowed corporations to be a strong

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[282] *U.S. v. Stevens*, 909 F.2d 431 (11th Cir. 1990) (holding that a sole shareholder of a corporation who acquired loans defrauding the federal government cannot be charged with conspiracy because conspiracy requires two or more autonomous minds.).

[283] Charles Beard and Mary Beard, *Rise of American Civilization* (New York: MacMillan Company, 1927), 111-113.

influence on both social and economic policy in the U.S., as exemplified by the *Citizens United* and *Hobby Lobby* cases. Ironically, this particular outcome was precisely what colonists during the era of independence, earlier judges, and earlier courts feared when they steadfastly maintained the boundary between the corporate person and human beings. Even today, many Americans are frustrated with this problem. Unfortunately, the American legal dynamic has been unable to sufficiently address the issue.

The activities of nineteenth century judges in support of a particular type of economic policy and in opposition to popularly supported economic regulations demonstrated that the judiciary could operate as its own unelected legislature. Judges are tasked with the duty of denying the will of the people when popular legislation defies the Constitution.[284] It would follow that the Supreme Court would be the ultimate arbiter of in favor of protecting minority rights from majority oppression. This is the check of the judiciary in the U.S. system of government. But the Court's role in creating the modern corporate person (at the expense of the freed slave) is exemplary of a failure in this regard. Judges are supposed to be anchored to the Constitution, and are not, in theory, allowed to stray too far from it. By conjuring their own theories without having to adhere to the texts of constitutional amendments or statutes or even the common law to that point, judges in the nineteenth century became unhinged from the system of checks and balances, and effectively imposed their will and priorities over the that of the people without constitutional authority.[285] We live with this feature of U.S. law today, and it raises difficult questions of whether the Supreme Court is prone to acts that impermissibly subvert American democracy.[286] The Constitutional Scholar and lawyer Erwin Chemerinsky writes that the "Supreme Court's decisions have been the product of the justices and their values and views. Only after we recognize this reality will we be able to discuss and appraise the Court in a useful way."[287] A close examination of the modern corporate person is a crucial part of that discussion.

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[284] Erwin Chemerinsky, *The Case Against the Supreme Court* (New York: Penguin Group, 2014), 8-13.
[285] Ibid., 5-6.
[286] Ibid., 5. Chemerinksy is convinced that "the Court has frequently failed, throughout American history, at its most important tasks, at its most important moments."
[287] Ibid., 14.

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