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CREATING THE CORPORATE CONSTITUTIONAL PERSON

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ABSTRACT

This dissertation examines the development of the constitutional law of corporate personhood in the nineteenth-century United States. A socio-legal history, it illuminates local conflicts over the control of corporations that resulted in foundational constitutional cases. In so doing, it exposes previously unknown connections, including the intersection of corporate constitutional rights and race.

This dissertation reveals that corporations were instrumental players in both broadening and limiting the scope of the constitutional rights available to all persons, helping establish constitutional doctrine that continues to undergird civil rights claims today. As such, it contributes substantially to literature on the transformation of legal personhood, citizenship, and constitutional rights in the nineteenth century. Notably, the history of corporate personhood has never yet been integrated into the history of constitutional rights-claiming, a conversation this dissertation seeks to initiate.

The project also provides a needed corrective to legal studies of corporate personhood by examining nodes of conflict in which competing visions of the corporate "person" were debated. It exposes a previously unstudied aspect of corporate personhood, the popular view of the corporation as embedded in an affective, familial hierarchy, the "child" or "servant" of the public. The dissertation traces how this alternative view percolated up the legal system, from social movements for corporate regulation, to the arguments of corporate lawyers, all the way to Supreme Court opinions. By claiming constitutional rights, corporate lawyers attempted to extricate corporations from this familial relationship and recast corporate shareholders as akin to other subordinated groups, namely persecuted racial minorities. In so doing, corporate lawyers and

federal judges transformed corporations from subordinate members of the household to private, rights-bearing, profit-seeking market actors. Yet the popular vision of corporations as servants or children of the public, with distinct duties and limited rights, continued to inform legal arguments throughout the nineteenth century. By exposing the connections between corporate personhood and race and adopting the lens of the household to examine corporate-public relationships, this dissertation sheds new light on a canon of cases that we thought we knew, and puts the history of constitutional rights-claiming in conversation with the history of corporate personhood for the first time.

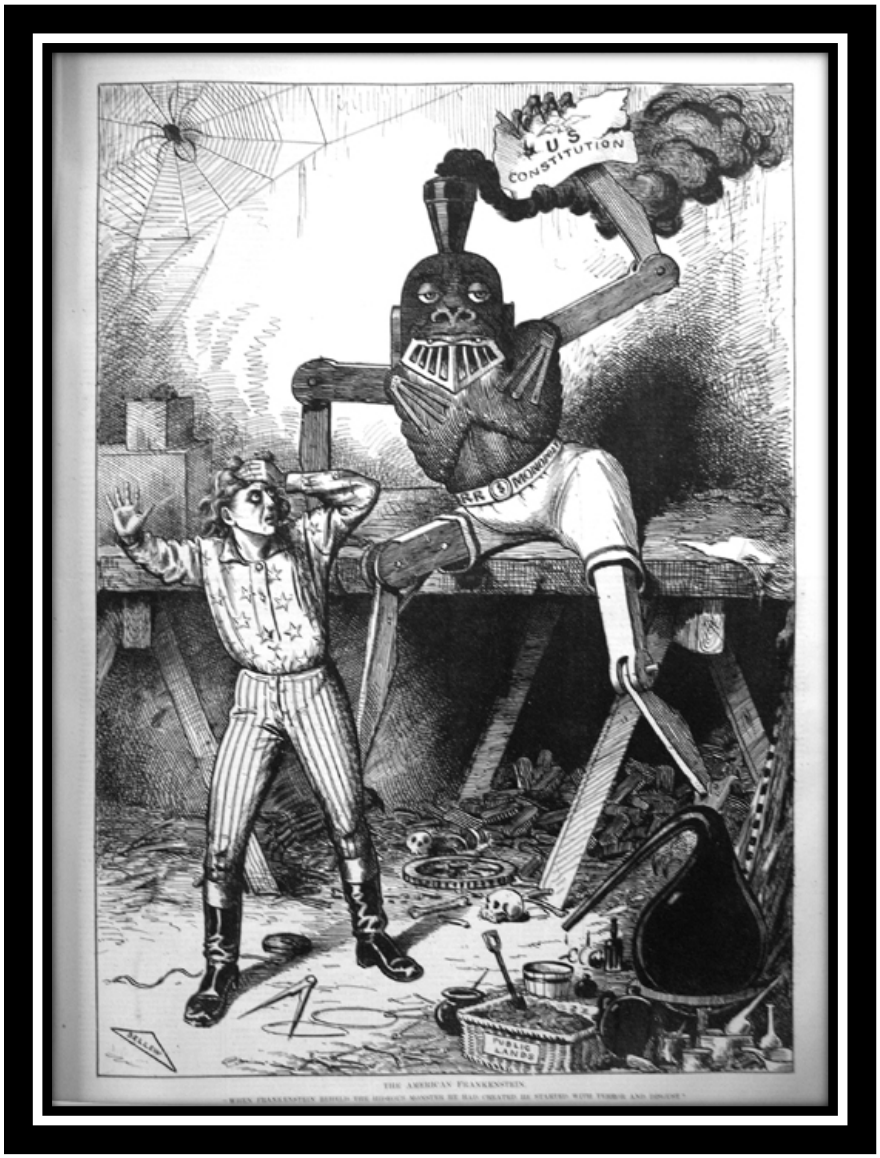

Image 1: *The American Frankenstein by Frank Bellew (1873)*
"When Frankenstein Beheld the Hideous Monster He Had Created
He Started with Terror and Disgust."

INTRODUCTION

Over the course of the nineteenth century, corporations transformed from creatures of the public to constitutional rights-bearing "persons." No more aptly was this illustrated than in political satirist Frank Bellew's cartoon "The American Frankenstein." In Bellew's drawing, the "Railroad Monopoly" is personified as a monster arising from the workbench of a haggard Uncle Sam. The corporate monstrosity is an immense, misshapen figure, pieced together with railroad ties, metal, and human remains, and fed, presumably, with the oil and "public lands" lying below the workbench. The monster's face bears a striking resemblance to blackface caricatures of African Americans of the period, colored dark black with drooping eyelids, a broad nose, and an enormous mouth surrounded by bright white lips opened to reveal a railroad grill, like oversize teeth.[1] The racialized railroad monster clutches a shredded copy of the U.S. Constitution in his animal claws. Uncle Sam recoils from his creation in fear, as if saying, as did Dr. Frankenstein, "Wretched devil!... that I may extinguish the spark which I so negligently bestowed!"[2] The message here is twofold: first, in creating corporations, the country had unwittingly engendered a monster. Second, this corporate monster, like black Americans and other racial minorities, was brandishing the Constitution to demand its legal rights.

This dissertation is a comprehensive examination of corporate constitutional rights-claiming in the nineteenth century. A multiscalar sociolegal history of the corporation, it situates the transformation of the legal personhood of corporations within the context of social, economic,

[1] Many thanks to the participants at an early workshop of this manuscript at the American Bar Foundation in 2019 for this insight.
[2] Mary Wollstonecraft Shelley, *Frankenstein: or, The Modern Prometheus* (London: George Routledge and Sons, 1891) (1818), 136.

and political forces on the ground.[3] In so doing, it not only illuminates aspects of corporate personhood that have never been explored, but also exposes the intersection of corporate constitutional rights with broader transformations of legal personhood in the nineteenth century, including those involving race. This dissertation reveals that corporations were instrumental players in both broadening and limiting the scope of the constitutional rights available to all persons, helping establish constitutional doctrine that continues to undergird civil rights claims today.

This project brings together multiple areas of scholarship that have not previously been combined: legal histories of corporate personhood, social histories of movements for corporate regulation, and histories of rights-claiming by racial minorities. In so doing, it reveals that corporate claims to constitutional rights, and the success and failure of those claims, not only intersected with other areas of rights-claiming at the time, but ultimately influenced constitutional law doctrine in a way that applied beyond corporations to human individuals as well. This study thus provides new insights into both the foundations of corporate claims to constitutional rights-bearing personhood, and, more broadly, the expansion of individual rights over the nineteenth century.

Among the most powerful and well-funded litigants of the nineteenth century, corporations were trailblazers of constitutional doctrine. Arguing for interpretations that benefitted corporate clients, innovative corporate lawyers and federal judges guided the trajectory of constitutional jurisprudence. Sometimes corporate litigation resulted in a broad interpretation of rights

[3] Bottom-up histories focusing on the interaction between social movements for corporate responsibility and legal cases are rare in legal history scholarship. Those scholars who do employ such an approach tend to focus on specific controversies rather than explore change over time. *See, e.g.*, George H. Miller, *Railroads and the Granger Laws* (Madison, University of Wisconsin Press, 1971); Solon Buck, *The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations, 1870-1880* (Cambridge: Harvard University Press, 1913).

protection that benefitted individuals as well, as in the case of corporate cases involving the equal protection clause of the Fourteenth Amendment. Other times, corporate litigation resulted in narrower readings of constitutional provisions, as with the privileges and immunities clause of Article IV. Whatever the result, as Felix Frankfurter proclaimed, "The history of American constitutional law in no small measure is the history of the impact of the modern corporation upon the American."[4]

One major fallacy underlying contemporary scholarship on corporate personhood is the assumption that legal "person" meant the same in 1800 that it does today. This scholarship takes for granted that to be a legal "person" means that one is rights-bearing – and that these rights include constitutional rights. Yet in the first half of the nineteenth century, rights, particularly constitutional rights, were not inherent to legal personhood. Rather, whole categories of legally-recognized "persons" existed in American law whose rights were circumscribed by their status.[5] During the Civil War and Reconstruction, the understanding of rights and legal personhood underwent a profound shift. Proponents of emancipation and equal rights for black Americans argued that to be a "free" person meant that one possessed certain "fundamental" or "inalienable" rights to life, liberty, due process, and equal protection under the law, a belief that Reconstruction Era Republicans inscribed into the new Fourteenth Amendment.[6] In the social, political, and economic convulsions of the Civil War and its aftermath, Americans were forced to grapple with

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[4] Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* (Chapel Hill : The University of North Carolina Press, 1937), 63.

[5] *See* William J. Novak, "The Legal Transformation of Citizenship in Nineteenth-Century America," in *The Democratic Experiment: New Directions in American Political History,* edited by Meg Jacobs, William J. Novak, Julian Zelizer (Princeton, N.J.: Princeton University Press, 2004), 85-119; Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York : Cambridge University Press, 2010); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge and New York: Cambridge University Press, 1998).

[6] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper and Row, 1988) (2002); Stanley, *From Bondage to Contract*; Welke, *Law and the Borders of Belonging*; Laura Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015).

what those terms meant and who could invoke them. As a consequence, the definition of "legal personhood" expanded drastically; to be a legal person now meant that one possessed fundamental and constitutional rights that could not be infringed on by the state.[7]

The history of corporate personhood has until now been excluded from histories of this transformation of legal personhood. Yet as this dissertation shows, the emergence of the corporation as a constitutional rights-bearing entity was intimately connected to the rights revolution of the nineteenth century. At the beginning of the nineteenth century, corporations were among the legal "persons" who possessed only limited rights – for corporations, these included the rights to own property, contract, and sue and be sued as one person in law. Although composed of individuals, corporate rights and duties were considered to be distinct from those of their members. From the early decades of the century, however, corporate lawyers and federal judges sought to expand the legal personhood of corporations to include constitutional rights. Regardless of whether this expansion was based on protecting the rights of the corporation's members or rights intrinsic to the corporate creature itself, in practice the corporation increasingly exercised the constitutional rights of legal personhood.[8]

A central contribution of this dissertation is to uncover the interconnections between corporate personhood and race.[9] It brings together two strands of scholarship that have up until

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[7] Welke, *Law and the Borders of Belonging*; Edwards, *A Legal History of the Civil War and Reconstruction*.

[8] In line with the popular perception of corporations as both aggregate and entity, as well as judicial decisions that talk about the corporation as both an aggregate of persons and a single person in law, discussed in more detail in the following chapters, this dissertation argues that the term "corporate person" is appropriate as the outcome was the same, the creation of a rights-bearing corporate entity in law.

[9] A growing area of scholarship explores the connections between corporations and race. *See, e.g.*, Cheryl L. Wade, "Attempting to Discuss Race in Business and Corporate Law Courses and Seminars," *St. John's Law Review* 77, no. 4 (Fall 2003): 901-91; Alfred Dennis Mathewson, "Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses," *St. John's Journal of Legal Commentary* 23, no. 3 (Fall 2008): 667-698; Cheryl L. Wade, "Introduction to Symposium on People of Color, Women, and the Public Corporation: The Sophistication of Discrimination," *St. John's Law Review* 79, No. 4 (Fall 2005): 887-898; Thomas W. Joo, "Corporate Hierarchy and Racial Justice," *St. John's Law Review* 79, No. 4 (Fall 2005): 955-976; Thomas W. Joo, "Race, Corporate Law, and Shareholder Value," *Journal of Legal Education* 54, no. 3 (2004): 351-364; Juliet E.K. Walker, "White Corporate

now been siloed: scholarship on corporate constitutional personhood, and scholarship on race and rights-claiming. As this dissertation reveals for the first time, analogies to racial minorities played a key role in shaping corporate claims of constitutional rights. Corporate lawyers drew from the rhetoric of debates over emancipation, free labor, and citizenship to draw explicit comparisons between corporations and their shareholders and disempowered groups. Corporate lawyers and judges particularly invoked the relationship of master and slave to justify recognizing the constitutional rights of corporations. Not infrequently, they contended that if courts upheld state regulation, it would mean that "no corporation… has any rights which the state is necessarily bound to respect." This claim directly invoked Chief Justice Roger Taney's infamous claim in *Dred Scott v. Sanford* that "the class of persons who had been imported as slaves" and their descendants traditionally "had no rights which the white man was bound to respect."[10] In echoing Taney's language, corporate lawyers remarkably compared powerful corporations and their shareholders to black persons, obscuring the striking power difference between monopolistic companies and racial minorities. Putting these distinct strands of scholarship in conversation suggests new ways of thinking about important questions in corporate and constitutional law – such as the Supreme Court's seemingly unprompted extension of Fourteenth Amendment rights to corporations – that have puzzled scholars for many years. In so doing, this dissertation timely speaks to current efforts in the legal academy to expose the importance of race in shaping every aspect of American law.

America: The New Arbiter of Race" In *Constructing Corporate America: History, Politics, Culture*, edited by Kenneth Lipartito and David B. Sicilia (Oxford: Oxford University Press, 2007); Richard R.W. Brooks, "Incorporating Race," *Columbia Law Review* 106, no. 8 (December 2006): 2023-2094; Robert Strassfield, "Corporate Standing To Allege Race Discrimination In Civil Rights Actions," *Virginia Law Review* 69, no. 6 (September 1983): 1153-1182; Susanna Kim Ripken, *Corporate Personhood* (New York, NY : Cambridge University Press, 2019); Harwell Wells, "Shareholder Meetings and Freedom Rides: The Story of *Peck v Greyhound*," (unpublished article) (on file with the author); Aaron Dhir, *Black Star Line, Inc.: Race in the Historical Life of the Corporation* (book manuscript in progress) (on file with the author).

[10] "The Railroads," *Milwaukee Daily Sentinel*, July 7, 1874 (emphasis added); see also "The Wisconsin Railway Decision," *North American and United States Gazette*, July 14, 1874 (using the same phrase); Dred Scott v. Sanford, 60 U.S. 393, 407 (1857).

Methodologically, this dissertation provides a new critical lens into the legal history of the corporation. It employs a multiscalar, sociolegal analysis that exposes the relationship between social movements for corporate regulation and the creation of corporate constitutional personhood.[11] Reading little-known primary sources like advertisements and town hall debates in conjunction with legal documents like court opinions and lawyers' briefs, it traces how lawyers translated grassroots demands for corporate accountability into legal arguments.[12] Tacking back and forth from the local to the national; from the public meeting hall to the Supreme Court; from East to West and North to South; and from the earliest decades of the American Republic to the Gilded Age, this analysis illuminates the multiple facets of conflicts that resulted in seminal corporate personhood cases.

This dissertation also challenges the accepted framework of scholarship on corporate personality. Although "personality" is often used interchangeably with "personhood" in the literature, I used "personality" here to mean the capacity for being the subject of rights and duties recognized by law, and "personhood" to refer to one aspect of corporate personality, the quality of being an individual person.[13] Since the early twentieth century, the debate over corporate

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[11] For various representative discussions of multiscalar analysis as a critical social science methodology, see, e.g., *Native American Interactions: Multiscalar Analyses and Interpretations in the Eastern Woodlands*, edited by Michael S. Nassaney, Kenneth E. Sassaman (Knoxville: University of Tennessee Press, 1995), xxvi; Nina Glick Schiller and Garbi Schmidt, "Envisioning Place: Urban Sociabilities within Time, Space and Multiscalar Power," *Identities* 23 no. 1 (2016): 1-16; Nathan F. Sayre, "Ecological and Geographical Scale: Parallels and Potential for Integration," *Progress in Human Geography* 29 no. 3 (2005): 276-290. On the inclusion of multiscalar analysis in the legal studies context, see Mariana Valverde, "Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory," *Social and Legal Studies* 18, no. 2 (2009): 139-157.

[12] This methodology of tracing grassroots ideas through legal arguments up to court decisions takes as inspiration recent histories of the Civil Rights movement, such as Tomiko Brown Nagin's *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (Oxford ; New York : Oxford University Press, 2011); Kenneth W. Mack, *Representing the Race : The Creation of the Civil Rights Lawyer* (Cambridge, Mass. : Harvard University Press, 2012); Risa Goluboff, *The Lost Promise of Civil Rights* (Cambridge, Mass.: Harvard University Press, 2007). Getting into the nitty-gritty of local circumstances is also helpful for understanding the way corporate-public interactions played out in practice. For an example of scholarship that uses arcane detail to draw compelling broader conclusions, see Novak, *People's Welfare*.

[13] "Personality," Definition II(7)(c), Oxford English Dictionary 3rd Edition, www.oed.com (accessed July 13, 2021); "Personhood," Oxford English Dictionary 3rd Edition, www.oed.com (accessed July 13, 2021),

personality has centered on three related questions. The first is whether corporations are "public" or "private." The second is whether the corporation should be considered an aggregate of persons (the "aggregate" or "associational" theory) or a person itself (the "entity" or "personal" theory). The third question is whether the corporation is an "artificial" entity created by the state (also called the "grant" or "concession" theory); a "natural" organization that arises organically in the market and that the state can merely recognize or not (the "real entity" or "natural entity" theory); or simply a "nexus of contracts" among stakeholders (the "contract" theory).[14] The contours of

[14] For a sample of representative writings on corporate personhood and corporate personality, see Morton Horwitz, "*Santa Clara* Revisited: The Development of Corporate Theory," *West Virginia Law Review* 88, no. 2 (Fall 1985): 173-224; Gregory A. Mark, " The Personification of the Business Corporation in American Law," *University of Chicago Law Review* 54, no. 4 (1987): 1441-83; Herbert Hovenkamp, "The Classical Corporation in American Legal Thought," *Georgetown Law Journal* 76, no. 5 (1988): 1593-1690; David K. Millon, "Theories of the Corporation," *Duke Law Journal* 1990, no. 2 (1990): 201-262; Paddy Ireland, "Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality," *The Journal of Legal History* 17, no. 1(1996): 41-73; Elizabeth Pollman, "Reconceiving Corporate Personhood," 2011 *Utah Law Rev.* 1629 (2011); Margaret M. Blair, "Corporate Personhood and the Corporate Persona," *University of Illinois Law Review* 2013, no.3 (2013): 785-820; Margaret M. Blair and Elizabeth Pollman, "The Derivative Nature of Corporate Constitutional Rights," *William and Mary Law Review* 56, no. 4 (2015): 1673-1743; David Ciepley, "Beyond Public And Private: Toward A Political Theory Of The Corporation," *American Political Science Review* 107, no. 1 (2013): 139-158; David Ciepley, "Neither Persons nor Associations," *Journal of Law and Courts* 1, no. 2 (Fall 2013): 221-246; David Ciepley, "Member Corporations, Property Corporations, and Constitutional Rights," *Law and Ethics of Human Rights* 11, no. 1 (2017): 31-59; David Ciepley, "The Anglo-American Misconception of Stockholders as 'Owners' and 'Members': Its Origins and Consequences," *Journal of Institutional Economics* 16, no. 5 (2020): 623–642; Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing Corp, 2018); Turkuler Isiksel, "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights," *Human Rights Quarterly* 38, no. 2 (2016): 294-349; Zoe Robinson, "Constitutional Personhood," *George Washington Law Review* 84, no. 3 (May 2016): 605-667; Melvin A. Eisenberg, "The Conception that the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm," *Journal of Corporation Law* 24, no. 4 (Summer 1999): 819-836; Henry N. Butler, "The Contractual Theory of the Corporation," *George Mason University Law Review* 11, no. 4 (Summer 1989): 99-124; David F. Linowes, "The Corporation As Citizen," in *The United States Constitution: Roots, Rights, And Responsibilities*, edited by A. E. Dick Howard (Washington, D.C.: Smithsonian Institution Press, 1992): 345-359; Nikolas Bowie, "Corporate Personhood v. Corporate Statehood," *Harvard Law Review* 132, no. 7 (May 2019): 2009-2041; James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States, 1780-1970* (Charlottesville : University Press of Virginia, 1970); Reuven S. Avi-Yonah, "Citizens United and the Corporate Form," *Wisconsin Law Review* 2010, no. 4 (2010): 999-1048; Margaret M. Blair, "Corporations and Expressive Rights: How the Lines Should Be Drawn," *DePaul Law Review* 65, no. 2 (Winter 2016): 253-292; Kent Greenfield, "In Defense of Corporate Persons," *Constitutional Commentary* 30 no. 2 (2015): 309-334; Tamara R. Piety, "Why Personhood Matters," *Constitutional Commentary* 30, no. 2 (Summer 2015): 361-390; Phillip I. Blumberg, *The Multinational Challenge To Corporation Law: The Search For A New Corporate Personality* (New York : Oxford University Press, 1993); Lynn A. Stout, "On the Nature of Corporations," *University of Illinois Law Review* 2005, no. 1 (2005): 253-268; Ronald J. Colombo, "The Corporation as a Tocquevillian Association," *Temple Law Review* 85, no. 1 (Fall 2012): 1-48; Jonathan Levy, "From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation," in *Corporations and American Democracy*, edited by Naomi R. Lamoreaux and William J. Novak (Cambridge: Harvard University Press, 2017): 213-244; Jonathan Levy, "The Brandeis/Citizens United Question," paper presented at "Louis D. Brandeis 100: Then and Now," Brandeis University, New York (2016); Turkuler Isiksel, *Corporations as Rights-Bearers* (draft on file with the author).

this debate were shaped in the early twentieth century, when legal scholars, pressed to explain the increasingly powerful corporation and justify corporate regulation in an increasingly powerful national government, engaged in a protracted academic battle over the true nature of corporate personality.[15] The idea motivating this ongoing debate is that knowing what the corporation *is* will shed light on the question of what rights it can invoke.[16] In spite of frustrated scholars routinely concluding that these categories are not reflective of actual corporations past or present, the questions of aggregate or entity, natural or artificial continue to dominate contemporary scholarship.[17]

In these conversations, historical conceptions of the corporation are classified as one or the other category, allowing scholars to make overbroad claims about a linear march through theories

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[15] See Arthur W. Machen, "Corporate Personality," Part I, *Harvard Law Review* 24, no. 4 (1911): 253-267; Arthur W. Machen Jr., "Corporate Personality," Part II, *Harvard Law Review* 24, no. 5 (1910-1911): 347-365; John Dewey, "The Historic Background of Corporate Legal Personality," *Yale Law Journal* 35, no. 6 (1926): 655-73; Adolf A. Berle and Gardner C. Means, *The Modern Corporation and Private Property* (New York, N.Y. : Macmillan Co., 1939) (1932); Oscar Handlin and Mary Flug Handlin, *Commonwealth: A Study of the Role of Government in the American Economy: Massachusetts, 1774–1861* (Cambridge: Harvard University Press, 1947); F.W. Maitland, *State, Trust, and Corporation*, edited by David Runciman and Magnus Ryan (Cambridge, UK ; New York, NY : Cambridge University Press, 2003); Frederick W. Maitland, "Moral Personality and Legal Personality", in *Collected Papers of Frederic William Maitland*, edited by H.A.L. (Cambridge: Cambridge University Press, 1911); Martin Wolff, "On the Nature of Legal Persons," *Law Quarterly Review* 54, no. 4 (October 1938): 494-521; Max Radin, "The Endless Problem of Corporate Personality," *Columbia Law Review* 32, no.4 (1932): 643-667; Merrick E. Dodd, "For Whom Are Corporate Managers Trustees?" *Harvard Law Review* 45, no.7 (1932): 1145-1163; George F. Canfield, "Scope and Limits of the Corporate Entity Theory," *Columbia Law Review* 17, no. 2 (1917): 128-143; Max Weber, *The Theory of Social and Economic Organization*, translated by A.M. Henderson and Talcott Parsons (Glencoe, IL: Free Press, 1947). American scholars drew from British and continental theorists who had been debating the philosophy of legal personhood for nearly a century. Machen, "Corporate Personality," Part II.

[16] Ciepley, "Member Corporations, Property Corporations, and Constitutional Rights," 34 (constitutional rights "are not instrumental rights, granted to a corporation to facilitate its achievement of its authorized purposes, but status-based rights, granted because of what a corporation *is*.").

[17] Even scholars who advocate reconceptualizing the corporation feel compelled to frame their proposals in relation to these binaries. Elizabeth Pollman, for instance, advocates for extending selective constitutional rights to corporations, while spending the majority of her article explaining why the existing theories of the corporation are insufficient. Pollman, "Reconceiving Corporate Personhood." David Ciepley, arguing that "corporations need to be placed in a distinct category—neither public nor private, but 'corporate'—to be regulated by distinct rules and norms," faces a similar challenge. Ciepley, "Beyond Public and Private", 139. Turkuler Isiksel, in a recent working paper, argues that corporate rights should not be modeled on those of human beings, yet also devotes a significant portion of the paper to discussing the various corporate personality theories. Turkuler Isiksel, "Corporations as Rights-Bearers" (unpublished article on file with the author). *See also* Colombo, "The Corporation as a Tocquevillian Association" (bemoaning "one size fits all" rules of recognizing corporate free speech rights).

of corporate personality from ancient times to the present.[18] Yet these neat categories, themselves historically contingent, have unduly constrained our understanding of what the corporation is and has been. John Dewey argued in 1926 that there was no overarching theory of the corporation; rather, various theories of corporate personality had been used by different actors at different moments to achieve the desired results.[19] Dewey was right. As this dissertation shows, these either-or categories were in fact crafted by legal actors over the course of corporate constitutional litigation in the nineteenth century. The sharp distinction between "public" and "private" presumes a division in the economy of the early Republic that simply did not exist.[20] Corporations in the early nineteenth century were effectively public-private partnerships, with specific public responsibilities.[21] Furthermore, early common law viewed the corporation as *simultaneously* aggregate and individual; the very definition of the corporation was a community of men operating as one person in law.[22] The division between "artificial" (created by the state) and "natural" (formed by private market actors) likewise presumes an antagonism between state regulation and economic activity that was not present in the first half of the nineteenth century.[23] Sorting the

[18] For instance, Reuvan S. Avi-Yonah, after mapping the transformations of the corporation from Roman times through the 21st century, makes the cringeworthy claim that "throughout all of these changes, spanning two millennia, the same three theories of the corporation can be discerned." Avi-Yonah, "Citizens United and the Corporate Form," 1048. Adam Winkler makes a similarly reductive argument that corporate lawyers throughout the nineteenth and twentieth century argued for the private, aggregate theory of the corporation, while proponents of corporate regulation argued that the corporation was a public, single entity. Winkler, *We the Corporations*. See also Blair, "Corporate Personhood and the Corporate Persona" (sorting the history of the corporation into three big categories); Colombo, "The Corporation as a Tocquevillian Association" (attempting to ascribe different theories of the corporation to certain broad historical periods).

[19] Dewey, "The Historic Background of Corporate Legal Personality," 669 ("The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the "real" personality of either "natural" or associated persons. Each theory has been used to serve the same ends, and each has been used to serve opposing ends.").

[20] Frances E. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96, No. 7 (May, 1983).

[21] Joseph K. Angell and Samuel Ames, Treatise of the Law of Private Corporations Aggregate, 1st edition (Boston: Hilliard, Gray, Little and Wilkins, 1832).

[22] Stewart Kyd, *A Treatise on the Law of Corporations*, Vol. 1 (London: J. Butterworte, 1793); Angell and Ames, *Treatise of the Law of Private Corporations Aggregate*, 1st edition.

[23] William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

history of the corporation into these categories ignores the interaction between the development of corporate constitutional personhood and the transformations in law, politics, and the economy of the nineteenth century.

Most notably, contemporary debates over corporate personality ignore the influence of the broader context of rights-claiming on the arguments used in favor of corporate constitutional personhood. For instance, in their seminal scholarship on the 1886 case of *Santa Clara v. Southern Pacific Railroad*, Gregory Mark and Morton Horwitz convincingly show that the aggregate theory of corporate personhood underlay judicial decisions extending Fourteenth Amendment rights to corporations in the late nineteenth century.[24] However, Mark and Horwitz do not explain *why* the Supreme Court adopted the aggregate theory. In the context of the seismic post-Civil War shift in the meaning of rights-bearing legal personhood, the aggregate theory of corporate personhood had a particular power. Corporate lawyers and federal judges emphasized this aspect of the corporation to argue that corporate shareholders, as rights-bearing persons, possessed constitutional rights that could not be trampled over simply because they chose to incorporate.[25] In other words, something Horwitz and Mark missed is that the aggregate theory did *work*: it allowed the Supreme Court to lionize the rights of corporate shareholders and minimize the difference between corporations and natural rights-bearing persons, thereby justifying the extension to corporations of constitutional rights.[26]

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[24] Horwitz, "*Santa Clara* Revisited"; Mark, "The Personification of the Business Corporation."

[25] David Ciepley observes that "constitutional rights have been extended to corporations by tying them in some manner to natural persons … who *are* expressly protected by the Constitution." Ciepley, "Member Corporations, Property Corporations, and Constitutional Rights," 35.

[26] Adam Winkler has recognized that dueling visions of the nature of the corporation as public/private, entity/aggregate were important in the development of corporate personhood, but like Mark and Horwitz does not delve into why these categories were useful in different ways in different historical periods. Winkler, *We the Corporations*. In addition, lawyers on both sides were not committed to particular categories, but rather were happy to draw on different aspects of the complex nature of the corporation in order to make specific legal arguments.

Setting aside the impulse to view the history of corporate personhood through forced binaries, a new picture of the corporation emerges. Tracing the grassroots origin of seminal corporate constitutional rights cases, this dissertation explores how members of the public, politicians, and jurists mobilized competing visions of the corporation in the nineteenth century to support arguments for and against corporate constitutional rights. Although these political and legal debates overlap in some ways with the theoretical debate by corporate personality scholars, they show a complexity and ambivalence about the nature of the corporation that lasted throughout the nineteenth century and continues today. The dominant question in town-hall, legislative, and newspaper debates over corporate control and regulation concerned the relationship between the corporation and the public. Was the corporation primarily an instrument for the public welfare ("public"), or a vehicle for market transactions ("private")? Or was it a combination of the two?

The broad arc of the corporation's transformation from public service entity to private profit-making market actor is well known.[27] Scholars have attributed the public nature of early American corporation to the idea that incorporation was a "grant" of state powers, claiming that the rise of general incorporation statutes, allowing anyone to incorporate, ultimately undermined the grant theory and recast the corporation as private.[28] This description, however, is inaccurate and incomplete. General incorporation did not undermine the perception that the corporation had the responsibility to serve the public; rather, claims that the corporation had public duties

[27] See, for instance, John Majewski, "Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800-1840," in *The Economy of Early America Historical Perspectives and New Directions* (Pennsylvania State University Press, University Park, Pa, 2006); Pauline Maier, "The Revolutionary Origins of the American Corporation," *The William and Mary Quarterly* 50, no. 1 (1993): 51-84; Colleen Dunlavy, "From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights," in *Constructing Corporate America: History, Politics, Culture*, edited by Kenneth Lipartito and David B. Sicilia (Oxford: Oxford University Press, 2003); Hurst, *Legitimacy of the Business Corporation*, 17.

[28] See Pollman, "Reconceiving Corporate Personhood," 1640; Horwitz, *Transformation of American Law, 1870-1960*, 27; Lyman Johnson, "Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood," *Seattle University Law Review* 35, no. 4 (Summer 2012), 1146.

persisted even as general incorporation accelerated. This is because incorporation was not just a grant of state power to private actors. Rather, incorporation bestowed legal *status* on the entity of the corporation, creating a reciprocal, hierarchical relationship of benevolent care and control in exchange for obedience and service, similar to that of master-servant and parent-child. This relationship was not between the corporation and the state, per se, but between the corporation and the public, via their legislative representatives. This view of corporations as existing in a familial relation with the public persisted throughout the nineteenth century, and was mobilized by lawyers and judges who favored state oversight of corporations in counterargument to the claims of corporate lawyers.

Taking its cue from this evidence, this manuscript adopts the household as a unit of analysis.[29] The *household* can be defined as: a social, political, and economic unit structured via hierarchical relations of power that involve reciprocal obligations and duties, in which members, either voluntarily or under compulsion, contribute productive or reproductive labor, often according to their ascriptive statuses, like race, gender, class, or in this case, incorporation. These reciprocal, hierarchical relations are justified by putatively affective bonds among the household's members.

The household as an analytical category achieves the following:

1) It brings relations and hierarchies of power to the fore.
2) It illuminates links between status and labor.
3) It highlights reciprocal obligations and duties.
4) It exposes a contrasting, or complementary, social structure to that of the capitalist marketplace.

5) In legal history, a household analysis challenges the classical liberal biases that tend to animate legal sources, allowing us to expand focus from the individual to the individual as embedded within a specific and intimate community.

The household as a unit of analysis has previously been employed in the context of gender and labor relations, but never applied to corporations.[30] Yet doing so illuminates power dynamics between corporations and local communities and individuals that are not apparent if the relationship examined is only between the corporation and the state.

At first it may seem bizarre to claim that corporations were considered members of the household, in company with women, children, servants, and enslaved persons.[31] Yet in examining the way corporations were discussed in movements for popular control and oversight of corporations, the use of terminology specific to the household is impossible to ignore. In contrast to the modern presumption that the corporation is purely a self-contained market actor, popular discourse around corporate regulation in the nineteenth century routinely discussed the corporation as having a primary duty of care to aid the public. This affective identity of the corporation took on different valences in different contexts. Sometimes the corporation was portrayed as a servant; sometimes a paternal caretaker; sometimes a child. Yet whatever the

[30] For examples of works adopting a household lens, see Fox-Genovese, *Within the Plantation Household*; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995); Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (Cambridge: Cambridge University Press, 2008); Peter Bardaglio, *Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South* (Chapel Hill: The University of North Carolina Press, 1995), Evelyn Atkinson, "Out of the Household: Master-Servant Relations and Employer Liability Law," *Yale Journal of Law and Humanities* 25, no. 2 (2013): 205-270.

[31] The household patriarch and his dependents (wife, children, servants, and slaves) exercised reciprocal duties of care and obedience, respectively. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1765); Janet Halley, "What is Family Law?: A Genealogy Part 1," *Yale Journal of Law and Humanities* 23, no.2 (2011): 189-294):[]; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850-2000," in *The New Law And Economic Development: A Critical Appraisal* 19, 32 (David Trubek and Alvaro Santos eds., 2006); Robert Steinfeld, *The Invention of Free Labor : The Employment Relation in English and American Law and Culture, 1350-1870* (Chapel Hill ; London: The University of North Carolina Press, 1991), 56-59, 64.

specifics, each view located the corporation within a status hierarchy based on mutual responsibility and care, not contractual market relationships.

Proponents of state regulation of corporations relied on this widespread view of the corporation as a member of the family and community. Their vision of the corporation was multifaceted and nuanced; they acknowledged that corporations were technically composed of individuals, often specifically personifying the corporation as coextensive with the majority shareholders or corporate officers. However, for purposes of rights and duties, they considered the corporation itself to be a distinct entity, ultimately subject to the control of the legislature if it failed to fulfill its familial duty to the public.[32] In contrast, corporate lawyers framed the nature of the corporation as either/or, arguing that corporations were not state creations subservient to public oversight and control, but private, profit-making entities that possessed the same constitutional rights as individuals. By the end of the nineteenth century, the view of the corporation as a private, rights-bearing market actor had largely triumphed in the Supreme Court.

This dissertation is the first to situate corporations within the well-developed narrative of the move of subordinate persons out of the household and into the market.[33] In pre-industrial Anglo-American law, one's status was determined by one's place within the household and the community.[34] Enlightenment political theory and industrial capitalism, however, undermined this traditional social and legal structure by emphasizing the equality of rights-bearing individuals.[35]

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[32] Later in the century, the term "quasi-public" was used to describe certain corporations, primarily those that exercised monopoly power and on which the public depended, such as railroads and telegraphs.

[33] Karl Polanyi, *The Great Transformation* (New York, Toronto: Farrar and Rinehart, Inc. (1944); Olsen, "The Family and the Market"; Amy Dru Stanley, *From Bondage to Contract : Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge ; New York : Cambridge University Press, 1998); Janet Halley and Kerry Rittich, "Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism," *The American Journal of Comparative Law* 58, no. 4 (2010): 753-775.

[34] Novak, "The Legal Transformation of Citizenship," 94; Polanyi, *Great Transformation*, 46.

[35] Kennedy, "Three Globalizations of Law and Legal Thought," 35.

As Amy Dru Stanley, Christopher Tomlins, and others have discussed, the core right belonging to the free-willing, independent individual was the right to contract, particularly in the marketplace.[36] In 1866, reflecting on the recent history of Anglo-American law, Sir Henry Maine posited that "we may say that the movement of the progressive societies has hitherto been *from Status to Contract*."[37] Adopting the association of contract with equality and rights-bearing personhood, supporters of emancipation and women's rights fought for the erosion of duty-based, hierarchical status relationships, and their replacement with contracts formed by putatively freely-willing individuals.[38] As feminist activist Virginia Woodhull asserted in the context of marriage, "There is neither right nor duty beyond the uniting – the contracting – individuals."[39] In discussing the rights of personhood, legal scholars distinguished sharply between relationships that were based on status, the terms of which were established by the state, and those based on contract, governed solely by terms set by the parties.[40]

Corporations took advantage of and promoted the erosion of the system of household government to effect their transition out of their hierarchical relationship with the public and into

[36] Stanley, *From Bondage to Contract*; Christopher Tomlins, "The Ties That Bind: Master and Servant in Massachusetts, 1800-1850," *Labor History* 30, no.2 (1989): 193-227.
[37] Henry Sumner Maine, *Ancient Law* (London: George Routledge and Sons, 1910) (originally published 1866), 141. See also Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75, no.2 (1988): 474-500.
[38] Stanley, "Conjugal Bonds and Wage Labor," 474; Stanley, *From Bondage to Contract*, 39. Stanley points out that not all freedpeople embraced contract, as some feared signing labor contracts with their former masters was a gateway back into slavery. Stanley, *From Bondage to Contract*, 40.
[39] Victoria Claflin Woodhull, *A Speech on the Principles of Social Freedom* (New York: Woodhull, Claflin and Co., 1872), 10. Women had much more trouble exiting the status relationship of marriage than workers did the master-servant relationship. Halley, "What is Family Law?," 196.
[40] Kennedy, "Three Globalizations of Law and Legal Thought," 33. Marriage was a strange hybrid, a status based on contract; individuals freely entered the contract, but the terms of the contract were established by the common or statutory law of the state. See James Schouler, *A Treatise of the Law of the Domestic Relations*, 5th ed. (Boston: Little, Brown, and Company, 1895), 26; Joel Prentiss Bishop, *Commentaries on the Law of Marriage and Divorce*, vol. 1, 5th ed. (Boston: Little, Brown, and Company, 1873), 2.

the contract-based market.[41] In this emancipation of the corporate person, the extraordinary comparison between corporations and racial minorities was not entirely inaccurate; like freedpeople, corporations were attempting to escape a hierarchical status relationship and recreate themselves as independent, rights-bearing legal persons.[42]

This story has important implications for the history of capitalism. The battle to keep the corporation within the household hierarchy reflects an alternative vision of capitalism in the nineteenth century, one that has been detailed in related contexts including labor movements, farmers' collectives, and railroads.[43] This alternative form of capitalism embraced cooperativism, morality, and regionalism over self-interested profit-making, monopoly power, and national free trade.[44] As corporations challenged public oversight in legal cases, they both reflected and shaped an emerging vision of capitalism as centered on the free-willing, rational, economic individual. Through debating the nature of the corporation and the rights and duties of private market actors more broadly, litigation over corporate constitutional rights helped develop a legal conception of capitalism as individualistic rather than collaborative.[45] This history supports scholarship arguing that the late nineteenth-century Supreme Court promoted a particular version of capitalism by

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[41] The term "household government" was popularized by Henry Maine as part of Victorian historiography's construction of the family/market distinction. Carole Shammas, *A History of Household Government in America* (Charlottesville : University of Virginia Press, 2002), 3.

[42] Stanley, *From Bondage to Contract*, 20.

[43] Elizabeth Sanders, *Roots of Reform : Farmers, Workers, and the American State, 1877-1917* (Chicago: University of Chicago Press, 1999); Victoria Saker Woeste, *The Farmer's Benevolent Trust : Law And Agricultural Cooperation In Industrial America, 1865-1945* (Chapel Hill : University of North Carolina Press, 1998); Gerald Berk, *Alternative Tracks : The Constitution Of American Industrial Order, 1865-1917* (Baltimore : Johns Hopkins University Press, 1994); Charles Postel, *The Populist Vision* (Oxford ; New York : Oxford University Press, 2007); Charles Perrow, *Organizing America : Wealth, Power, And The Origins Of Corporate Capitalism* (Princeton : Princeton University Press, 2005); Charles Sellers, *The Market Revolution : Jacksonian America, 1815-1846* (New York : Oxford University Press, 1991); Richard White, Railroaded: The Transcontinentals and the Making of Modern America (New York : W.W.Norton, 2011).

[44] Postel, Populist Vision, 5; Berk, Alternative Tracks, 4-5; Sanders, *Roots of Reform*, 4; Woeste, *The Farmer's Benevolent Trust*, 8.

[45] See Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Washington, D.C.: Beard Books, 1975).

protecting economic rights, prioritizing the constitutional freedom of contract, and solidifying the public/private distinction.[46]

Chapter Outline

Each chapter focuses on a seminal case or cases involving corporate claims to a particular constitutional right. These cases form nodes of conflict in which courts were faced with major decisions that would determine the course of constitutional interpretation as well as the nature of the corporate legal person. By unearthing the grassroots conflicts that ultimately gave rise to these cases, these chapters illuminate the forces at play in the courts' decision-making. They also reveal the equally viable roads not taken, and the consequences for both corporate personhood and constitutional law that rippled out from these signal decisions.

The dissertation begins with *Charles River Bridge v. Warren Bridge* (1837), in which an internal improvement corporation claimed the right to constitutional protection under the contract clause for the first time. This chapter re-reads the Supreme Court's opinion in light of the political, economic, and social context of the movement for a "free bridge" in Boston in the 1820s-30s, out of which the case emerged. Although *Charles River Bridge* has most often been read as a case involving the Court's intervention in the trajectory of economic development in the early United States, situating the case in context of the free bridge movement reveals that the case was at its core about the nature of the corporation and its relationship to the public and the state.

[46] Kennedy, *The Rise and Fall of Classical Legal Thought*; Horwitz, *Transformation*.

Proponents of the Warren Bridge, dubbed "the people's bridge" because of the benefit to the public it would provide, viewed the corporation as a creature of the state. Merchants, farmers, and travelers, who relied on the Charles River Bridge to access the commercial metropolis of Boston, considered the primary purpose of corporations to be to serve the public welfare, and only incidentally to make profit for shareholders. They also considered popular sovereignty over corporations to be vital to the preservation of American democracy. The Charles River Bridge corporation, it was claimed, had veered from its duty to serve the public by charging extortionate tolls, putting the profit of its already-wealthy shareholders above the public good. It was thus the legislature's prerogative to charter a competing bridge company that would challenge the Charles River Bridge's existing monopoly.

Daniel Webster, however, argued on behalf of the Charles River Bridge company that internal improvement corporations were not beholden to the public, but private entities with the same constitutional rights to contract as natural persons, and whose sole object was to make private profit. He based his argument on one he had first put forward in *Dartmouth College v. Woodward* (1819), a case in which the Supreme Court for the first time held that a corporation (here, a private eleemosynary corporation, Dartmouth College) could claim constitutional protection against state impairment of contracts. Although in *Charles River Bridge* Justice Roger Taney did uphold the state legislation at issue, the case set vital precedent for future corporate constitutional rights-claiming for two reasons. Firstly, the case held for the first time that internal improvement corporations could claim constitutional rights under the contract clause, albeit with the caveat that corporate charters must be read narrowly in the public interest. Secondly, in his opinion, Taney accepted Webster's vision of the corporation as a private market actor with constitutional rights, rather than a servant of the public.

The second chapter examines the failure of corporate litigation involving the privileges and immunities of citizenship under Article IV. In exploring why corporations did not succeed in claiming constitutional rights in this instance, the chapter works backward from the decisive case of *Paul v. Virginia* (1868), arguing that state and federal courts were influenced by several factors in their denial of corporate citizenship. First was the conception of the corporation as a state creation designed to serve the public interest, with rights and duties distinct from natural persons. This factor was informed by the fact that the predominant litigators of corporate citizenship rights were insurance companies. In public perception and in insurance industry advertising, insurance companies were portrayed as benevolent, paternal caretakers of the family and the community, not as profit-seeking market actors.

The second factor was the context of interstate economic relations in an increasingly fraught political environment in which vitriolic sectionalist sentiment was widespread. Less economically-developed states in the West and South enacted protectionist regulation against insurance companies chartered in wealthy East Coast states, on the grounds that allowing these "foreign" corporations to operate within their borders would undermine the local insurance industry, subject the state's economy to control by wealthier states, and put their insuring public at risk.

The third factor was the implications of corporate privileges and immunities cases for slavery. Cases involving the interstate movement of enslaved persons, both fugitives and those transported by their enslavers, were heard simultaneously with and raised similar questions as those involving the interstate operations of corporations. Both presented serious challenges to state control over their internal economic and social orders and threatened the delicate balance between state sovereignty and federalism. This is exemplified by the cases of *Bank of Augusta v. Earle* (1848),

involving a foreign corporation, and *Prigg v. Pennsylvania* (1852), involving a fugitive slave. In attempting to resolve the conflict over the interstate operation of corporations and the transit of enslaved persons, the Supreme Court crafted the doctrine of interstate comity. Limiting the privileges and immunities of citizenship to only fundamental rights, which it held did not include state-created statuses like incorporation or enslavement, the Court held in *Bank of Augusta* and *Prigg* that although states were not required to recognize these statuses, they would be presumed to under the principle of comity. The foundational precedent established by these cases, particularly *Bank of Augusta*, would guide cases involving corporations as well as enslaved persons, including the well-known cases *Dred Scott v. Sanford* and *Lemmon v. People of New York*, as well as *Paul v. Virginia*.

The third chapter introduces how the Fourteenth Amendment opened the door to robust corporate claims of constitutional rights in the Granger Cases (1876). It focuses on attempts by railroad corporations to combat state regulation by claiming the protection of the due process clause of the nascent Fourteenth Amendment. Delving into the social and economic context of the push for railroad construction and regulation in Wisconsin in the 1870s, the chapter reveals that the conflict over railroad regulation that resulted in the Granger Cases was primarily driven by dueling conceptions of the nature of the corporation and its relationship to the public. As in the *Charles River Bridge* case, farmers, merchants, and customers of Wisconsin railroads viewed the railroad corporation as inherently the "servant" or even "child" of the public, their master, and attempted to re-enforce this hierarchical relationship via regulation. Again, in challenging these regulations, railroad lawyers argued that corporations were private, rights-bearing market actors the same as natural persons.

Although scholarship on the Granger Cases has focused on *Munn v. Illinois* (1876), in which the Court wrote its central opinion and which did not involve a corporation, an examination of

the five other Granger Cases reveals that the debate over the nature of the corporation was central to the lower court litigation and the briefing before the Supreme Court. The five other cases all involved railroad corporations; yet by choosing to write its guiding opinion in *Munn*, which involved a partnership, the Court intentionally avoided ruling on the question of the nature of the corporation and its relationship to the public. Ignoring the states' claims to public control over their corporate creations, the Court indicated that corporations possessed the same constitutional due process rights, subject to the same protection and the same degree of regulation, as those of private partnerships or individual market actors. By unearthing the background of these five understudied cases, the chapter reveals that the Granger Cases were instrumental to the legal transformation of corporations from children of the state designed to serve the public welfare, to private market entities that wielded constitutional rights.

The fourth and final chapter focuses on corporations' successful claims to Fourteenth Amendment equal protection rights in the Railroad Tax Cases (9th Cir. 1882), culminating in *Santa Clara v. Southern Pacific Railroad* (1886), the case credited with attributing equal protection rights to corporations. Tracing the intertwined history of *Santa Clara* and *Yick Wo v. Hopkins* (1886), a bedrock of modern civil rights jurisprudence, the chapter argues that central to the success of corporate equal protection litigation was a comparison between corporate shareholders and persecuted minorities, namely African Americans and Chinese immigrants.

To illuminate how lawyers and judges could draw this comparison between corporate shareholders and persecuted minorities, this chapter highlights the intertwined relationship of corporations and Chinese laborers in California in this period. By simultaneously bringing cases involving both corporations and Chinese immigrants, corporate lawyers and sympathetic federal judges crafted a broad interpretation of equal protection in order to draw a through-line from

African Americans, to Chinese immigrants, and finally to corporate shareholders. This analogy depended on the view of corporations as simply aggregations of private, rights-bearing individuals. Corporate lawyers' expansive interpretation of equal protection and the aggregate theory of corporate personhood ultimately triumphed in the Supreme Court with the twin cases of *Yick Wo* and *Santa Clara*.

This narrative disrupts the contemporary scholarship on the nature of the corporation and the development of constitutional rights-claiming in the nineteenth century by highlighting the political and ideological ambivalence of corporate personhood. As these seminal cases show, by the end of the nineteenth century the corporation had transformed from an obedient public servant, embedded in a hierarchy of community and familial duties, into an association of private profit-seeking, rights-bearing individuals. Yet even as the corporate rights-bearing person broke free of the familial hierarchy, it was not a wholly destructive force. In recasting itself as a private, constitutional rights-bearing market actor, the corporation positioned itself at the vanguard of constitutional rights litigation, with important ramifications for individual rights and constitutional doctrine broadly. As Frank Bellew might have said, the corporation had become an "American Frankenstein."

CHAPTER ONE

The "People's Bridge": Popular Sovereignty and the *Charles River Bridge* Case

In March 1827, the citizens of Charlestown, Massachusetts met in Town Hall. The meeting "was one of the most numerous and spirited ever held in that town."[1] In the town square, "groups, squads, multitudes, all anxious, all zealous," gathered in opposition to Governor Levi Lincoln's veto of a bill to create a free bridge from Charlestown to Boston.[2] Anger at the Governor's veto was felt across the Charles River in Boston as well. Men "who had hitherto been generally satisfied" with the conduct of the governor "now arroused themselves[sic]" in "disapprobation of this measure."[3] The free bridge controversy, one local newspaper opined, was "the most important subject that has been before the Legislature for years – perhaps we may say, since the constitution was formed."[4]

The free bridge controversy was about many things: market access, public improvements, state regulation, private property. But fundamentally, it was a debate over the nature of the corporation and the fragility of democracy. Supporters of the free bridge saw the contest as one pitting popular sovereignty – exemplified by the right of the state to charter and control corporations to benefit the public welfare – against "aristocratic monopolies," vestiges of an English feudal system that threatened to undermine America's nascent democratic project.[5] The viability

[1] "Great Meeting at Charlestown," *American Traveller*, March 27, 1827.
[2] "Great Meeting at Charlestown," *American Traveller*, March 27, 1827.
[3] "The Traveller: Legislature," *American Traveller*, March 13, 1827.
[4] "Charlestown Free Bridge," *Salem Gazette*, March 9, 1827.
[5] Johann N. Neem, *Creating A Nation Of Joiners Democracy And Civil Society In Early National Massachusetts* (Cambridge, Mass.: Harvard University Press, 2008), 18; Kevin Butterfield, *The Making of Tocqueville's America: Law and Association in the Early United States* (Chicago: University of Chicago Press, 2015), 5-6.

of democracy, in the eyes of free bridge advocates, turned on the question of the relationship between corporations and the state: were the people sovereign over the corporations that they, via the legislature, had created for the purpose of achieving public improvements? Or were such "internal improvement" corporations private, profit-making entities who could claim the federal Constitution as a shield against state control?

The Charles River Bridge Corporation, which controlled passage over the Charles River between Charlestown and its environs and the Boston metropolis, and which fought tooth and nail against competing free bridges, embodied the aristocratic monopoly free bridge supporters so feared. The struggle to diminish the power of the Charles River Bridge Corporation by chartering a competing free bridge was an attempt by local farmers, merchants, and travellers to reassert democratic control over their economic wellbeing. Their endeavor was premised on the belief that the purpose of corporations – particularly internal improvement corporations like bridge companies – was to serve the public, rather than garner private profit. In the Supreme Court case that resulted from this conflict, *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge* (1837), the bridge monopoly challenged this view, presenting a competing vision of the corporation as a private entity, the primary goal of which was to make profit for shareholders, not serve the public interest.

The *Charles River Bridge* case is commonly considered a turning point in American legal history. The traditional narrative is that in this case, a vanguard of Supreme Court justices led by Chief Justice Roger Taney forsook an older vision of robust protection of private property rights in favor of allowing state action that favored free enterprise and economic development, even when

private rights were impaired in consequence.[6] The case has also been framed as primarily a political contestation over the best way to promote the construction of internal improvements, such as bridges, turnpikes, and railroads.[7] The issue of what level of government, state or federal, should fund and construct internal improvements – or whether internal improvements should best be left to private development, or some combination of public and private – was a key point of tension between the emerging Jacksonian and Federalist parties in the 1820s-30s.[8] Taney, in this reading, threw the weight of the Supreme Court behind the Jacksonian platform of promoting state control of internal improvements.

Although not incorrect, these readings are too simplistic. None of the literature on the case has examined the grassroots movement for a free bridge that culminated in the chartering of the Warren Bridge Corporation, or the way in which the movement's language of popular sovereignty percolated through the legal arguments and decisions as the case made its way to the Supreme Court.[9] To do so reveals that *Charles River Bridge* was not merely a case of two corporations competing with each other for bridge traffic; nor was it a purely a political move by Justice Taney to redirect the Court to promote a Jacksonian political agenda; nor simply an endorsement of state control of internal improvements over federal or private development. Rather, it was a contestation about the nature of the corporation, which implicated the foundation of American

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[6] *See* Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Philadelphia: J.B. Lippincott Co., 1971), 5; James Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 27-28; Herbert Hovenkamp, *Enterprise and American Law 1836-1937* (Cambridge, Mass. : Harvard University Press, 1991), 110; Stephen Campbell, "Internal Improvements," in *A Companion to the Era of Andrew Jackson* (New York : Blackwell Pub., 2013), 144; Charles W. Smith, Jr., *Roger B. Taney: Jacksonian Jurist* (Chapel Hill: University of North Carolina Press, 1936), 110; Bernard Schwartz, *A History of the Supreme Court* (New York : Oxford University Press, 1993), 77.

[7] Hovenkamp, *Enterprise and American Law*, 111; Campbell, "Internal Improvements," 144.

[8] John Lauritz Larson, *Internal Improvement : National Public Works and the Promise of Popular Government in the Early United States* (Chapel Hill : University of North Carolina Press, 2001); Campbell, "Internal Improvements."

[9] Daniel Walker Howe has called the *Charles River Bridge* case "a vindication of both state sovereignty and economic development," which is a more accurate reading. Howe, *What Hath God Wrought : The Transformation of America, 1815-1848* (New York : Oxford University Press, 2007), 443.

democracy itself. Free bridge supporters advocated a theory of popular sovereignty over corporations in which the public, via the legislature, exercised a robust right to direct their own economic wellbeing by limiting aggregations of wealth that threatened to undermine popular democracy. In contrast, supporters of the Charles River Bridge monopoly embraced the federal Constitution as a shield against state regulation, prioritizing private rights over public duties and individual profit over public welfare.

Scholarship on the case has neglected the importance of *Charles River Bridge* in the development of an alternative theory of the corporation that emerged in this period. The theory of popular sovereignty driving the free bridge movement focused on the nature of the internal improvement corporation and such corporation's relationship to the public and the state. Proponents of free bridges saw internal improvement corporations, including bridge, turnpike, and railroad companies, as entities created primarily to promote the public interest, the shareholders of which had no more rights than were explicitly set out in their charters. As creatures of the state, corporations were subject to public oversight and control, and the state always had the right to charter competing corporations when in the public's interest. The Warren Bridge Corporation was designed to be, and functioned as, such a public-service corporation.

The Charles River Bridge Corporation, however, argued for a conflicting conception of the internal improvement corporation as a private rather than a public entity, which possessed constitutional rights that could trump legislative determinations of the public good. This newer conception of the corporation had been introduced a decade or so earlier in the case of *Dartmouth College v. Woodward* by Justice Story. Although the Warren Bridge Corporation ultimately prevailed, the Supreme Court's decision reinforced *Dartmouth College*'s holding that the Contract clause of the federal Constitution applied to corporations, and extended this protection to internal

improvement companies for the first time. In so doing, the Court endorsed this competing vision of the corporation as a private entity with constitutional rights that potentially conflicted with those of the public. The *Charles River Bridge* decision thus laid the foundation for future challenges to the exercise of state control over corporations, opening the door to other claims of corporate constitutional rights.

Corporations in Early America

The corporation in early America was a unique creature. This "nation of joiners" embraced the incorporation of associations generally as a means of organizing civil society, and the corporate form was available to anyone who could obtain a legislative charter.[10] Not only were corporations formed for quotidian purposes like musical societies, but commercial corporations were an essential means of growing the American economy.[11] In the development of America's physical and financial infrastructure, incorporation was a means of pooling scarce resources to aid the social and economic development of the community.[12] In other words, the corporation in early America was a democratic vehicle for community collaboration to promote the public welfare.

Corporations were legal "persons" from the beginning of Anglo-American corporate law.[13] This was, in fact, the purpose of incorporation; as an early American commentary on corporations

[10] Neem, *Creating A Nation Of Joiners.* 18; Butterfield, *The Making of Tocqueville's America,* 2.
[11] John Majewski, *A House Dividing: Economic Development In Pennsylvania And Virginia Before The Civil War* (Cambridge, UK ; New York, NY : Cambridge University Press, 2000), 9.
[12] Hurst, *Legitimacy of the Business Corporation*, 23.
[13] David Cieply, "Beyond Public and Private: Toward a Political Theory of the Corporation," *American Political Science Review* 107, no. 1 (2013): 139-158, 154. For an exposition of Anglo-American corporate law as it existed at the time of the Founding, *see* Samuel Williston, "History of the Law of Business Corporations before 1800. I," *Harvard Law Review* 2, no. 3 (1888): 105-124; Samuel Williston, "History of the Law of Business Corporations before 1800. II," *Harvard Law Review* 2, no. 4 (1888): 149-166.

explained, the object of the creation of corporations was "to enable numerous bodies of men, acting under a charter,… to negotiate as an individual."[14] Yet the common law also recognized that corporations had a dual nature: they were both an aggregate of individuals *and* a separate legal person, with special rights and duties distinct from those of "natural" persons.[15] Reflecting this, the first American treatise on corporations, published in 1832 by Joseph Angell and Samuel Ames, defined the corporation as a consolidation of individuals who "are then considered as *one person*, which has but one will, – the will being ascertained by a majority of the votes."[16] The identity of the corporation was a thus a combination of individuals into a singular, "artificial person" in law. This recognition of the dual identities of the corporation is shown in the practice of participants in the free bridge debates of speaking of the corporation in the plural: "the corporation *are*."[17]

In contrast to the modern-day belief that corporations' central purpose is to increase shareholder profit, the primary duty of corporations in early nineteenth century America was to promote the public welfare, and only secondarily to advance private gain. In their treatise, Angell and Ames explained, "The object in creating a corporation is… to gain the union, contribution and assistance of several persons for the successful promotion of some design of general utility."[18] Secondarily, the treatise acknowledged, "the corporation may, at the same time be established for the advantage of those who are members of it."[19] In other words, corporations were public-private

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[14] "Corporations," *The American Jurist and Law Magazine* 4 (Boston: Freeman and Bolles, 1830): 298-308, 398. See Chief Justice Marshall in Providence Bank v. Billings, 4 Pet. 514, 562 (1830) ('The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.').

[15] *See* John Dewey, *"The Historic Background of Corporate Legal Personality." Yale Law Journal* 35, no. 6 (1926): 655-73, 656 (1926); Frederick W. Maitland, edited by H. A. L., *Collected Papers of Frederic William Maitland* (Cambridge: Cambridge University Press, 1911), 307.

[16] Joseph K. Angell and Samuel Ames, *Treatise of the Law of Private Corporations Aggregate*, vol. 1 (Boston: Hilliard, Gray, Little and Wilkins, 1832), 7 (emphasis in original).

[17] *See, e.g.*, "Free Bridge to Charlestown," *Boston Commercial Gazette*, February 26, 1827 (emphasis added); "Letter to Editor," *American Traveller*, March 30, 1827.

[18] Angell and Ames, *Treatise of the Law of Private Corporations Aggregate*, 1: 7-8

[19] Angell and Ames, *Treatise of the Law of Private Corporations Aggregate*, 1:7-8. Limits on authorized capital and earnings for business corporations were not unusual. *See* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 550-554 (1933) (Brandeis, J., dissenting); Maier, *Revolutionary Origins*, 76-77.

partnerships designed first to promote the public welfare, and only secondarily to garner private profit. Pauline Maier notes that in early Republic Massachusetts, corporations in the late eighteenth century were universally seen as "agencies of government… for the furtherance of community purposes."[20] John Majewski has discussed how in Pennsylvania in the early Republic, internal improvements were seen as public-spirited investments in community welfare, with stock ownership open to a broad democratic base.[21] As such, Majewski notes, residents willingly bought stock in corporations, such as railroads, that would benefit their communities but were unlikely to turn a profit.[22] Similarly, Colleen Dunlavy has revealed that in the late eighteenth and early nineteenth century, shareholders were commonly considered to be equal members of a "democratic" corporation; in about one-third of the corporations chartered between 1825-1835 that she examines, including in Massachusetts, shareholders were entitled to one vote per person, rather than one vote per share.[23] Even in England, where the British East India company exercised an inordinate amount of power, a late eighteenth-century British treatise on corporations emphasized that "lay" corporations, which included banks, insurance companies, and bodies for "the regulation of trade, manufactures, and commerce, such as the East India Company," were "established for the maintenance and regulation of some particular object of public policy," while acknowledging that corporations could also operate to benefit their members.[24] Corporations, in other words, were "the grant of the whole people of certain powers to a few individuals, to enable them to effect some specific benefit, or promote the general good."[25]

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[20] Pauline Maier, "The Revolutionary Origins of the American Corporation," *The William and Mary Quarterly* 50, no. 1 (1993): 51-84, 55, 56 (internal quotes omitted).
[21] Majewski, "Toward a Social History of the Corporation," 297.
[22] Majewski, *A House Dividing*, 8-9.
[23] Colleen Dunlavy "From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights," in *Constructing corporate America: history, politics, culture* (ed. Lipartito and Sicilia) (Oxford: Oxford University Press, 2003), 73.
[24] Stewart Kyd, *A Treatise on the Law of Corporations*, vol. 1 (London: J. Butterworte, 1793), 29, 28, 192-93.
[25] Kyd, *A Treatise on the Law of Corporations*, 1:307.

This joint private-public partnership was necessary in the early years of the American Republic, when an "absence of great wealth was common" and state governments were impoverished.[26] As the treatise explained, "a State would have accomplished but little in the way of banking and insurance, and in turnpike and railroads, had not the absence of great capitalists been remedied by corporate associations, which aggregate the resources of many persons."[27] Corporations also had the benefit of promoting "our republican institutions," as they "yield the advantage of great capitals without the supposed disadvantages of great private fortunes."[28] State legislatures were eager to grant corporate charters for turnpike, canal, and railroad corporations as the primary means of building such "internal improvement" projects, in addition to liberally chartering social and charitable organizations like churches, schools, and even musical societies, that were considered important to the general welfare of society.[29] Although a small return on investment was necessary to encourage individuals to contribute to these projects, the primary purpose of the corporation was not profit, but public service.

Importantly, though a legal person, early American corporations exercised only limited rights. In this, the distinctly American internal improvement corporation differed from English- and European-chartered corporations like the East India Company or Massachusetts Bay Colony, which exercised significant autonomy and governing powers.[30] The rights of early American corporations were not coextensive with those of their shareholders, but were confined to those set out in the corporate charter, such as exemption from taxation or the power to exercise eminent

[26] Joseph Angell and Samuel Ames, *Treatise of the Law of Private Corporations Aggregate*, 5th ed. (Boston: Little, Brown and Co., 1855), 57; Hurst, *Legitimacy Of The Business Corporation*, 23.
[27] Angell and Ames, *Treatise of the Law of Private Corporations Aggregate*, 5:57. *See* Maier, "Revolutionary Origins," 55.
[28] Angell and Ames, *Treatise of the Law of Private Corporations Aggregate*, 5:57.
[29] Maier, "Revolutionary Origins," 53-54.
[30] Henry S. Turner, *The Corporate Commonwealth: Pluralism and Political Fictions in England, 1516-1651* (Chicago: University of Chicago Press, 2016), 108; Neem, *Creating A Nation Of Joiners*, 18; Gerard Henderson, *The Position of Foreign Corporations in American Constitutional Law* (Cambridge: Harvard University Press, 1918), 19.

domain, and in the common law of corporations, such as the right to own property, contract, and sue and be sued as one person in law.[31] Limited liability was not typical in early American corporate law, emerging in its modern form only in the 1850s.[32]

The corporation also bore special duties that "natural" persons did not.[33] Shareholders in corporations possessed "certain property, income, or rights" and were "subject to certain burdens, distinct from other men."[34] These burdens, outlined in the charters, could include provisions specifying the par value of shares; limiting the number of shares investors could purchase; or even requiring unlimited liability for shareholders.[35] Beyond their explicit charter duties, corporations also bore a more existential duty to operate in the public welfare, as this chapter will show. The corporation was thus an "artificial", "legal" person with rights and duties distinct from "natural" persons.[36]

Because corporations were chartered by the state to promote the public welfare, legislatures – the representatives of "the people" – had the right to control and limit the operation of corporations in a way they could not for private individuals. This aspect of corporate personality has been called the "grant" or "concession theory" – the idea that because legislatures "grant" or

[31] Kyd, *Treatise*, 1:13; Hurst, *Legitimacy Of The Business Corporation*, 22-23; Dewey, *Historic Background of Corporate Legal Personality*, 657; Maitland, *Collected Papers*, 306.
[32] Maier, "Revolutionary Origins," 55; Phillip I. Blumberg, "Limited Liability and Corporate Groups," *Journal of Corporation Law* 11 (1986): 573-632, 575-76; Hurst, *Legitimacy Of The Business Corporation*, 28; Ron Harris, "A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing," SSRN.com, last updated March 28, 2020, available at SSRN: https://ssrn.com/abstract=3441083.
[33] According to Blackstone, "Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic." William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1768), vol. 1 (3d ed.) (1765), 123.
[34] "Corporations," 298.
[35] John Majewski, "Toward a Social History of the Corporation," 301; Naomi Lamoreaux, "Antimonopoly and State Regulation of Corporations in the Gilded Age and Progressive Era," unpublished paper (October 28, 2020), 7.
[36] Avi-Yonah, "Citizens United and the Corporate Form, 1001; Blair, "Corporate Personhood and the Corporate Persona," 799.

"conceded" certain powers to corporations, they have the power to regulate them.[37] Yet the idea of a "grant" or "concession" does not accurately capture the relationship between the state and the corporation, as the case of the Free Bridge movement makes clear. Rather than a concession of state functions to private parties, the corporation itself was a distinct entity, with public duties. The relationship of the public to the corporation was hierarchical and benevolent: in exchange for the privilege of incorporation and limited profit, the corporation was expected to promote the public welfare. States did not "concede" powers, but created corporations to exercise certain functions the state could not, in a limited manner under strict oversight. The relationship of the public, via their representatives in the state legislature, to a corporation was more akin to the relation of parent and child or master and servant, than to private individuals contracting in a marketplace.[38] Writing in 1765, English jurist William Blackstone explained that society was constructed around four relationships: magistrates and the people; husbands and wives; parents and children or guardian and ward; and master and servant.[39] Each was a mutually beneficial relationship of benevolent authority and obedient service. Had Blackstone been writing in early nineteenth century America, he may well have added the relationship of "people and corporation" to this list.[40] Like the subordinate statuses of servant or child, the status of incorporation entailed the state's protection and care of the corporation – its grant of special privileges and the right to act as a single person in law – in exchange for obedience to public oversight and control.

[37] Hurst, Hurst, *Legitimacy of the Business Corporation*, 17; Horwitz, "*Santa Clara* Revisited," 181; Pollman, "Reconceiving Corporate Personhood," 1634; Avi-Yonah, "Citizens United and the Corporate Form," 1001.
[38] Cieply, "Beyond Public and Private," 140.
[39] Blackstone, *Commentaries*, 146, 422.
[40] As Alexis de Tocqueville noted, voluntary associations, including corporations, were much more prevalent in the United States than in England, a product of the necessity of pooling private resources to effect social and economic improvements that impoverished state governments were unable to provide. De Tocqueville, *Democracy in America* (New York: H.G. Langley, 1840), vol. 2, 107. *See* Butterfield, *The Making of Tocqueville's America*, 2.

Fear of corporate power was intermixed with Americans' embrace of the corporate form. With firsthand experience of monopolistic trading corporations and the colonial companies themselves, Americans understood that the privileges of incorporation, particularly perpetual succession and internal self-government, threatened to create a class of aristocratic shareholders who would place private profit above public welfare.[41] The power of the state to oversee corporations and hold them to their community responsibilities was considered a necessary safeguard to protect the nascent American democracy.[42] Yet while English common law recognized the ultimate authority of the sovereign over would-be renegade corporate monopolies, one distinct feature of American law erected a significant hurdle to public oversight of corporations: a written Constitution that enumerated specific individual rights.[43]

The ink on the Constitution was barely dry before corporations began to challenge this relationship of special privileges in exchange for public duties.[44] They argued that corporations were not state creations with limited rights and unique responsibilities, but constitutional-rights bearing, private profit-making entities.[45] In support of this argument, corporate lawyers reframed the corporation not as a group of individuals authorized to act as one "artificial", "legal person"

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[41] Neem, *Creating A Nation Of Joiners*, 18; Butterfield, *The Making of Tocqueville's America*, 5-6. Thomas Hobbes, castigating the presence of powerful self-governing bodies within and distinct from the commonwealth, called corporations "worms in the entrails of a natural man." Hobbes, *Leviathan* (London: George Routledge and Sons, 1886) (2d ed.), 152.

[42] Henderson, *Position of Foreign Corporations*, 19; Maier, "Revolutionary Origins", 62, 76-77; Naomi R. Lamoreaux, "Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture," in *Constructing Corporate America: History, Politics, Culture*, edited by Kenneth Lipartito and David B. Sicilia (2004): 29-65, 33.

[43] Williston, "History of the Law of Business Corporations before 1800. Part I."

[44] *Dartmouth College,* 17 U.S. 518, and *Charles River Bridge*, 36 U.S. 420, are examples. These cases extended the constitutional protection against impairment of contracts to eleemosynary corporations and business corporations, respectively.

[45] This has been called the "natural" or "real entity" theory of the corporation, that corporations are naturally-emerging market entities controlled by their managers. Avi-Yonah, 1001; Blair, "Corporate Personhood and the Corporate Persona," 805; Pollman, "Reconceiving Corporate Personhood," 1642.

for certain purposes, but as solely an aggregation of its shareholders.[46] By framing the corporation simply as an collection of individuals, corporate lawyers were able to argue that shareholders did not forsake their constitutional rights simply because they happened to do business as a corporation.

In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, these two competing conceptions of the corporation came head to head. The Supreme Court attempted to strike a balance between these visions of the corporation, holding that the corporate charter was a contract protected by the Constitution against state infringement, but which must be construed narrowly so not to injure the public interest. In so doing, the Court cast the corporation as a constitutional rights-bearing entity whose interests were potentially at odds with those of the public, not a public servant subordinate to the state.

The Free Bridge Movement

In the summer of 1823, local merchants John Skinner, Isaac Warren, and several other citizens of Charlestown and Boston introduced a petition to the Massachusetts legislature calling for a free bridge between the fast-growing settlement and the metropolis. The Charles River

[46] This is called the "aggregate" or "associational" theory. Horwitz, "*Santa Clara* Revisited," 182; Mark, "Personification of the Corporation," 1464; Hovenkamp, "The Classical Corporation in American Legal Thought," 1597; Pollman, "Reconceiving Corporate Personhood," 1662. Morton Horwitz argues that the aggregate theory was short lived because of the increasing separation of management and control, and that the "entity" theory replaced the aggregate theory in the early twentieth century. Horwitz, "*Santa Clara* Revisited," 182. However, *Citizens United*, *Hobby Lobby*, and other recent cases have relied on an aggregate view of the corporation to justify extending freedom of speech and religion to corporations.

Bridge, chartered in 1785, already existed between the two towns; yet public discontent with the high tolls and inconvenience of this bridge was strong, and the citizens now demanded free passage over the river. The Massachusetts Legislature debated the issue for four years, and in 1827, over the objections of the Charles River Bridge Corporation, at last passed a bill approving the construction of a new bridge. The "public convenience and necessity," the Legislature announced, required the construction of the Charlestown Free Bridge, also to be called the Warren Bridge after local Revolutionary War hero Joseph Warren, petitioner Isaac Warren's father.[47] Governor Levi Lincoln, however, promptly vetoed the bill. He explained that chartering a new, free bridge would "*necessarily* and *inevitably*" destroy "the interest and stock of the proprietors" of the Charles River Bridge Corporation, and undermine investor confidence in undertaking future internal improvement projects.[48] Such legislative action, he claimed, could only be justified when it was abundantly clear that "the public exigency demands it," and here the legislature had not made the case that it did.[49]

The bridge veto caused outrage throughout the nearby counties. At the heart of the controversy was a deep-seated fear that the monopoly exercised by the Charles River Bridge Corporation was creating an aristocratic class of shareholders that threatened to undermine the commonwealth's young democracy. By charging tolls, it was argued, the proprietors of the bridge had grown rich on the backs of the local farmers and merchants who were compelled to cross the bridge to access the markets of the metropolis. A free bridge, advocates claimed, would not only

[47] Letter to Editor, *American Traveller*, March 26, 1830.
[48] "House of Representatives," *Salem Gazette*, March 13, 1827.
[49] "House of Representatives," *Salem Gazette*, March 13, 1827.

destroy the monopoly through competition, but would restore the founder's vision of popular democracy by creating a "'people's avenue' to the city."[50]

In 1828, the Massachusetts Legislature again passed a bill chartering the Warren Bridge Corporation. Under the bill's provisions, the company was to take tolls for just long enough for the proprietors to recoup their costs plus 5% interest, not to exceed six years or $60,000, after which the bridge would revert to the city, and, it was understood, become free.[51] In framing the bill, the Legislature emphasized the imperative public necessity of the bridge, and this time, the Governor signed the bill into law.[52] Construction on the Warren Bridge began in June and was completed by Christmas Day 1828, to "[c]onsiderable parade" and "demonstrations of joy."[53] When it opened to the public, "[s]alutes were fired" and "a very numerous procession was formed, which after crossing and re-crossing the bridge, passed through the principal streets in the city."[54] After a five-year battle, the "People's Bridge" was complete.[55] As the proprietors of the old bridge had feared, the new bridge promptly took two-thirds of the traffic that had previously travelled over the Charles River Bridge.[56]

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[50] "Warren Bridge," *American Traveller*, January 2, 1829.
[51] "Special Report on Charlestown and Cambridge Bridges," *Documents of the City of Boston for the Year 1874*, vol. 1 (Boston: Rockwell and Churchill, City Printers, 1875), 46.
[52] "Charlestown Free Bridge," *Salem Observer*, March 15, 1828. Untitled, *Gloucester Telegraph*, March 15, 1828; "Charlestown Free Bridge," *American Traveller*, March 21, 1828.
[53] "Warren Bridge," *American Traveller*, December 26, 1828.
[54] "Warren Bridge," *American Traveller*, December 26, 1828.
[55] "Warren Bridge," *American Traveller*, December 26, 1828.
[56] "Deposition of Isaac Blanchard of Charlestown," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections; "Deposition of Moses Seavey of Medford," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections.

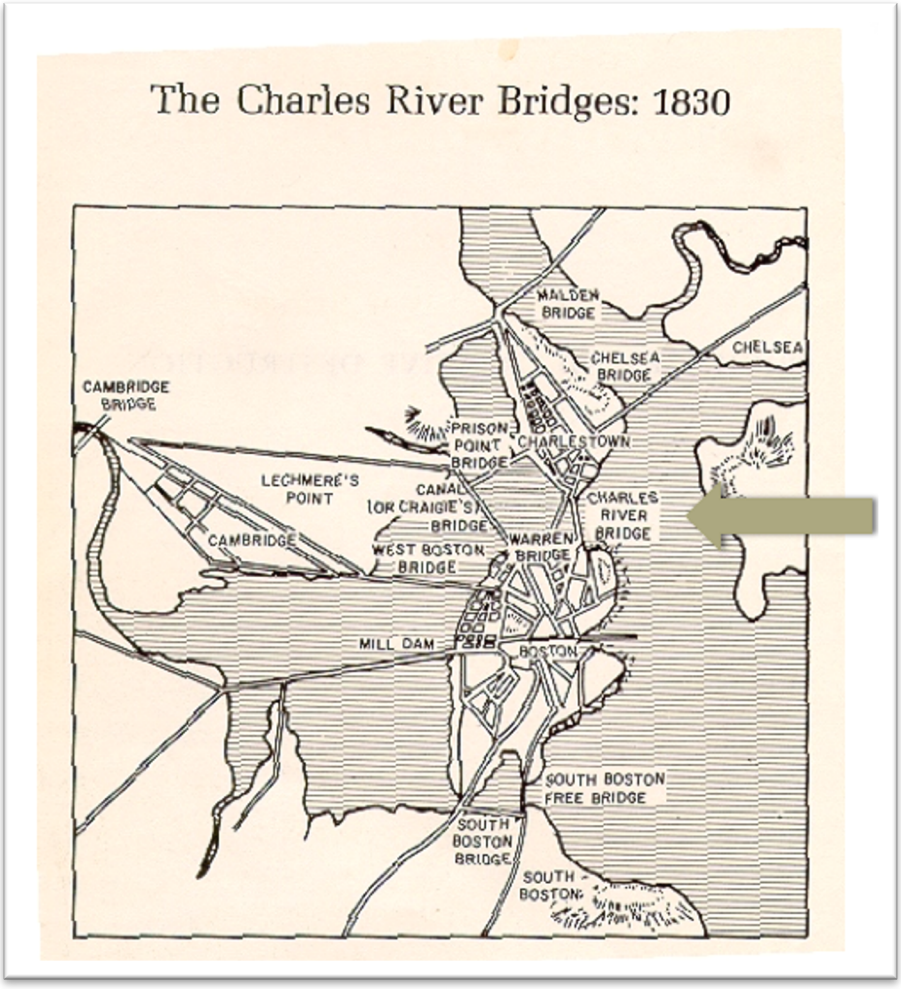

Image 2: *Map detailing the locations of the Charles River Bridge and Warren Bridge.*

The Charles River Bridge Corporation had not always been the subject of such opprobrium. When its proprietors first petitioned for a charter in 1785, they did so with the strong support of the community. The bridge was seen as vital to the economic welfare of the region, which was still recovering from the devastating effects of the Revolution. Appealing to the Legislature to support the bridge, a committee of representatives from the small settlement of Charlestown petitioned to "humbly sheweth" that as a result of the "calamities of war" recently

suffered, namely the burning of Charlestown, they had been "reduced to a state of indigence."[57] Although they were grateful for the present ferry across the river, they explained, it was inconvenient, especially in the winter. They emphasized the need for greater commercial connection with the capital; a bridge to Boston would allow them to "enjoy[]the advantages of a considerable trade with the metropolis" and to "hope for the pleasure of seeing their town arise from its ashes to its former state."[58] With the Charles River Bridge, the surrounding areas would "become places of considerable trade, by means whereof, people from the country may with facility dispose of their produce, and make their purchases without loss of time."[59] The promotion of the public's economic welfare – greater access to markets and consequent prosperity – was the driving force behind early support for the Charles River Bridge.

The incorporation of the Charles River Bridge illustrates the process by which state legislatures in early America partnered with prosperous community members to create internal improvement projects. Yet the internal improvement corporation's identity as a public interest enterprise funded by private persons created a dilemma regarding the extent to which state legislatures could control these "creatures of public policy."[60] The limited public purpose of the corporation justified public sovereignty over the corporation, proponents of regulation claimed; in fact, state oversight was necessary so that private interests did not co-opt the public function of the corporation.[61] It was widely feared in the early decades of the republic that the privileges bestowed on corporations – particularly that of perpetual succession and property ownership, by which

[57] "Petition from Citizens of Charlestown for Charles River Bridge," 1785, *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections.
[58] "Petition from Citizens of Charlestown for Charles River Bridge," 1785, Charles River Bridge v. Warren Bridge. Records, 1828, Harvard Law Library Special Collections.
[59] "Petition from Citizens of Charlestown for Charles River Bridge," 1785, Charles River Bridge v. Warren Bridge. Records, 1828, Harvard Law Library Special Collections.
[60] Joseph Angell and Samuel Ames, *Treatise of the Law of Private Corporations Aggregate*, 7th ed. (Boston: Little, Brown & Co., 1861), 22-23.
[61] Maier, "Revolutionary Origins of the American Corporation," 76-77.

corporate property could be owned and accreted indefinitely – threatened to create a landed aristocracy that would undermine the nascent democracy.[62] Experience with powerful corporations divorced from the needs of the communities in which they operated – such as the corporations that ran the British colonies, or trading monopolies like the East India Company – underlay this fear.[63] In other words, the very utility of the democratic project of combining small assets to fund public works was threatened by the legal privileges necessary to effect that work.

The prevalence of corporations in early America made the concern about a corporate aristocracy particularly salient. As Alexis de Tocqueville quipped, Americans had a penchant for association unseen anywhere in Europe: "Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kids: religious, moral, grave, futile, very general and very particular, immense and very small." But in all seriousness, he mused, "Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States."[64] As Kevin Butterfield has revealed, the corporate form was incredibly popular for all types of associations.[65] No less than John Adams questioned, "Are there not more legal corporations – literary, scientifical, sacerdotal, medical, academical, scholastic, mercantile, manufactural, marine insurance, fire, bridge, canal, turnpike, etc. – than are to be found in any known country of the whole world?... and are not all these nurseries of aristocracy?"[66] Strict popular oversight of corporations was necessary, advocated a jurist in 1830, so "that corporations may be protected and wisely directed in effecting the great public and private good, of which they are capable, and restrained from

[62] Maier, "Revolutionary Origins of the American Corporation," 68-69.
[63] Henderson, *The Position of Foreign Corporations in American Constitutional Law*, 19.
[64] de Tocqueville, *Democracy in America* , 489.
[65] Butterfield, *The Making of Tocqueville's America.*
[66] John Adams letter to John Taylor, April 15, 1814, quoted in Henderson, *The Position of Foreign Corporations,* 20-21 n.4.

inflicting the public and private evils within their power, and to which they are often tempted by their own views of interest."[67] As such, "the whole people ought to have the power to control the operations," through such means as limiting the duration of incorporation, capping the profit margin, and even revoking the charter.[68]

This vision of the corporation as primarily a public servant, but one that had to be restrained from becoming a corporate aristocracy, underlay the conflict over the construction of the Warren Bridge as a competitor to the wealthy Charles River Bridge corporation. The debate provides a window into both popular and legal conceptions of the corporation and its purpose in the early decades of the American republic, and reveals how corporations began to challenge their duty of subservience by appealing to the federal Constitution as a shield against state regulation.

The Charles River Bridge opened in 1786 on the anniversary of the Battle of Bunker Hill, in which Charlestown had been razed. Citizens "who were warmed by sentiment, or inspired by patriotism, almost wept at the recollection" of the battle and its contrast with "the joyous scenes which were now everywhere presented."[69] A parade of more than six thousand persons marched from the State House over the bridge, while thirteen cannons were fired.[70] "The streets, the windows and eminences in the neighborhood of the bridge swarmed with spectators to the amount of at least twenty thousand," and the bridge proprietors provided an "elegant dinner for eight hundred persons" at their own expense.[71] Those less inclined to sentiment were "abundantly pleased" at the prospect of the "golden harvest" that increased business with the metropolis would

[67] Kyd, *A Treatise on the Law of Corporations*, 301.
[68] Kyd, 307. See Maier, "Revolutionary Origins of the American Corporation," 82.
[69] *The Ferry, The Charles-River Bridge and The Charlestown Bridge. Historical Statement Prepared for the Boston Transit Commission By Its Chairman.* (Boston: Rockwell and Churchill Press, 1899), 6 (quoting *The Independent Chronicle and Universal Advertiser*).
[70] *The Ferry, The Charles-River Bridge and The Charlestown Bridge*, 6.
[71] *The Ferry, The Charles-River Bridge and The Charlestown Bridge*, 6.

afford.[72] The Charles River Bridge, they claimed, "exhibit[ed] the greatest effect of private enterprise within the United States" and portended the blossoming future of the young Republic.[73]

Yet by the 1820s, the Charles River Bridge was insufficient to meet the needs of local citizens. In their petitions for a free bridge, Warren Bridge advocates repeatedly emphasized that the "public convenience and necessity" required the construction of a new bridge. They explained that travelers over the Charles River Bridge were forced to pass through Charlestown's main square, which was "narrow, and often crowded, to the danger and inconvenience of the traveller."[74] The drawbridge was frequently raised to accommodate passing ships, compelling bridge users to wait for five to ten minutes to cross.[75] The street on the Boston side into which the bridge emptied was similarly narrow and crowded.[76] The situation was exacerbated by the undeniable fact that "travel from the north and east to Boston has greatly increased" in recent years and was likely to "continue to increase far beyond the travel from any other section of the country."[77] Furthermore, since the Charles River Bridge had been constructed in 1785, the market center of Boston had shifted west. "Much the greater part of the population" of Boston as well as "much the greater part of the business of the place" was now conducted away from the current bridge's outlet.[78] A new, more centrally-located bridge was necessary, supporters argued, so that the farmers, mechanics, and merchants of surrounding towns could more conveniently access the markets of the city center.[79]

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[72] *The Ferry, The Charles-River Bridge and The Charlestown Bridge*, 6.
[73] *The Ferry, The Charles-River Bridge and The Charlestown Bridge*, 6.
[74] "Free Bridge to Charlestown," *Boston Commercial Gazette*, Feb. 26, 1827.
[75] "Deposition of Thomas Rand of Charlestown," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections.
[76] "Free Bridge to Charlestown," *Boston Commercial Gazette*, February 26, 1827.
[77] "To the Hon. Senate and House of Representatives," *Columbian Centinel American Federalist*, November , 1825.
[78] "Deposition of Robert Calder of Charlestown," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections.
[79] A Citizen, *An Appeal to the Good Sense of the Legislature and the Community, in Favor of a New Bridge to South Boston* (Boston: True and Green, 1825).

Yet the public convenience and necessity was just one small piece of the debate. The "marrow of the whole controversy," some argued, was not public necessity, but the collection of tolls.[80] By taking a toll on local farmers, merchants, and other travelers, the wealthy proprietors were now forcing poor citizens to "pay[] tribute to a corporation… for the express object of filling its already deeply loaded coffers."[81] A meeting of free bridge supporters in Boston in May 1827 resolved that "the pretensions, that the people are bound to submit to exactions, against their consent, and that they have no right to relieve themselves, by the erection of a FREE BRIDGE," were "absurd, calculated to impose burdens upon the many, for the 'EXCLUSIVE ADVANTAGE' of the few."[82] It was "a public injustice to subject the citizens of the Commonwealth to the further burthen of the payment of tolls."[83] Rather than serving the public interest, the corporation was now seen as actively opposed to the community's economic well-being.

Over the four decades since its chartering, the Charles River Bridge Corporation had grown increasingly wealthy and powerful. Its opposition to the Warren Bridge was nothing new; the company had striven to maintain a monopoly over the Charles River since its construction. In 1792, popular demands for additional avenues to the city had resulted in the chartering of the West Boston Bridge from Cambridge to Boston.[84] The Charles River Bridge Company opposed the construction of this second bridge, appealing to the Legislature that its investors had not yet recouped their investment and that their charter was an exclusive grant of a right to operate a

[80] "Charlestown Free Bridge," *Salem Observer*, February 24, 1827.
[81] T., "Free Bridge," *American Traveller*, April 17, 1827.
[82] "The Traveller: Free Bridge Meeting," *American Traveller*, May 8, 1827.
[83] "Free Bridge to Charlestown," *Boston Commercial Gazette*, February 26, 1827.
[84] "Deposition of Charles Bartlett,"; "Report by Joint Committee on petition by Andrew Craigie, Christopher Gore and others to build Canal Bridge Feb 1807," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections, Harvard Law School, Cambridge, MA.

bridge over the Charles River.[85] A Committee of the Legislature found "no ground to maintain" such a claim.[86] However, expressing sympathy for the company's claim that the building of the Charles River Bridge was "a work of magnitude and hazard" and that the erection of the West Boston Bridge "may diminish the emoluments of the proprietors of Charles River bridge," which could discourage future investments, the Legislature agreed to extend the company's charter by thirty years, for a total of seventy years' grant to take toll on passage over their bridge.[87] Proponents of the Warren Bridge, however, argued that the 1792 extension of the charter in fact had been "obtained by the fraudulent representation which were made of the amount of their dividends," and that the corporation had long since received "an ample and even exorbitant compensation" for its investment.[88] In 1805, the board of directors of the Charles River Bridge Corporation voted "to defend the interests of the Corporation… against the attempts of all other Corporations or persons, to erect another Bridge over Charles River to the Town of Boston," and "powerfully and pertinaciously" opposed an additional bridge from Lechmere's Point to Boston in 1806-07.[89]

Although they were unsuccessful in preventing the construction of this second bridge, stockholders in the Charles River Bridge Corporation continued to reap considerable returns on their investments. Between 1812 and 1823, Charles River Bridge stock was worth between $1,800 and $2,200 per share.[90] By 1826, Boston Mayor Josiah Quincy claimed, "an original proprietor of a single share had received back not only the principal of his investment with interest, but also a surplus of $7,000."[91] In 1833, a Legislative report found that the Charles River Bridge had cost

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[85] Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 7 Pick. 344, 385 (1829).
[86] *Charles River Bridge*, 7 Pick at 387.
[87] *Charles River Bridge* at 387..
[88] "Charlestown Free Bridge," *Salem Observer*, February 24, 1827; "Free Bridge to Charlestown," *Boston Commercial Gazette,* February 26, 1827.
[89] "Deposition of Charles Bartlett," *Charles River Bridge v. Warren Bridge* Records, 1828, Harvard Law Library Special Collections, Harvard Law School, Cambridge, MA.
[90] "House Committee Report," *H.R. 70 - Act to Establish the Warren Bridge Corporation* (March 1, 1827), 4.
[91] "The Ferry, The Charles-River Bridge and The Charlestown Bridge," 7.

$50,000 to build, yet the corporation since its construction had received more than a million dollars in tolls.[92] The proprietors of the Charles River Bridge protested the "nonsensical noise" involving these calculations, complaining that the value of money had increased significantly since 1786 and that by 1827 "there was but one share held by an original subscriber."[93] Public perception, however, was that the corporation's monopoly over passage between Boston and Charlestown and its environs had radically enriched the company's shareholders.

As a result, by the mid-1820s public sentiment towards the Charles River Bridge had shifted considerably. The monopoly power of the Charles River Bridge Corporation over travel between Charlestown and the metropolis had created a shareholder aristocracy, free bridge supporters argued. The bridge conflict pitted "an odious monopoly" against "the sovereignty of the state and the equal rights of the people."[94] This anti-republican combination of "the monied interest and chartered monopolists," it was claimed, had influenced Governor Levi Lincoln's 1827 decision to veto the Warren Bridge Bill against the wishes of the people.[95] In a satirical obituary, the *Boston Commercial Gazette* noted that "*Federalism* and *Democracy*, two personages most noted in the political history of Massachusetts since the commencement of the nineteenth century," had "*drowned in Charles River* on the 4th of March," the date of the veto.[96] Wrote the pro-Warren Bridge *American Traveller,* the corporation's monopoly over access to the city center was an "odious mischief" that "pervert[ed] the true spirit of our republican institutions" and "introduce[d] all the deplorable

[92] Nathaniel Austin, *Report of the Committee on Roads and Bridges, Senate Doc. 39* (Boston: Dutton and Wentworth, State Printers, 1833), 15.
[93] Charles Warren, "The Charles River Bridge Case," *The Green Bag* 20, no. 6 (1908): 284-296 (quoting letter from Peter C. Brooks to Josiah Quincy), 286-87.
[94] "The Warren Bridge," *American Traveller*, August 8, 1828.
[95] "Free Bridge Nomination," *American Traveller*, March 27, 1827; "Great Meeting at Charlestown," *American Traveller,* March 27, 1827.
[96] "Obituary Notice Extra," *Boston Commercial Gazette*, April 2, 1827 (internal quotes omitted).

effects of the oppressive monopolies founded under arbitrary governments."[97] By charging tolls to access the market, it reduced the citizens to "vassalage."[98] It was up to the people to "value the inheritance of our fathers, our self respect, and our self preservation" by "throw[ing] off the yoke of their common oppressors."[99] The "only sovereign acknowledged among us," proclaimed a small town paper, is "the will of the people, expressed by the votes of the majority" – and the majority had voted for the Warren Bridge.[100]

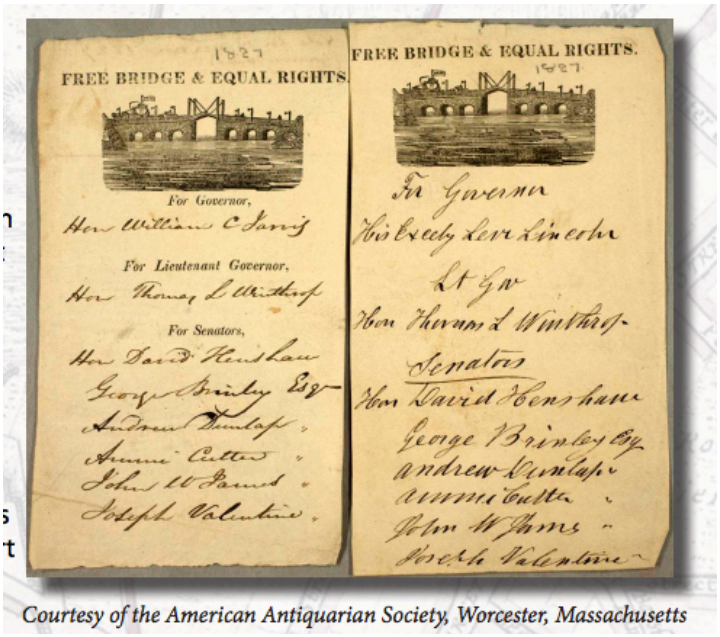

Image 3: *A "Free Bridge & Equal Rights" ballot for governor and state senators in the 1827 election.*

[97] "The Traveller: Free Bridge Meeting," *American Traveller*, May 8, 1827; "The Traveller: The Governor condemned in the house of his friends," *American Traveller*, March 27, 1827.
[98] T., "Free Bridge," *American Traveller*, April 17, 1827.
[99] "Great Meeting at Charlestown," *American Traveller*, March 27, 1827; "Free Bridge Nomination," *American Traveller*, March 27, 1827.
[100] "Charlestown Bridge," *National Aegis*, April 25, 1827.

Rhetoric around the free bridge debates emphasized the fragility of the democratic project on which the Founders had embarked and the need for ordinary citizens to vigilantly protect this nascent form of government.[101] References to the Founders, the Revolution, and the Constitution were rife. Invoking the long history of British colonial corporations in the New World, of which Massachusetts Bay Corporation itself had been one, supporters of the free bridge argued that "chartered monopolies," which privileged a class of elite shareholders over the needs of the "independent yeomanry of Massachusetts," were an undemocratic "inherit[ance] from the mother country."[102] Free bridge proponents also commonly compared bridge tolls to British taxation, which had furthered the establishment of British monopoly and aristocracy in the colonies.[103] One Warren Bridge supporter, signing himself "'76", asked, "What was the principle of the opposition, even to blood, of our renowned forefathers, to the tea tax? It was this, *they would not be taxed, without their own consent*. The opposition of their descendants, the people of this Commonwealth to the monopoly of their old Bridge, rests upon the same principle."[104] The *American Traveller*, exhorting citizens of Boston to vote Governor Lincoln out of office, asked, "shall the people live freemen, or become slaves and *pay tribute* to an aristocratic band of monopolists… the *would be nobility*?"[105] As William Austin, a Warren Bridge petitioner and lawyer for the Warren Bridge Corporation,

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[101] For the ambivalence and anxiety second-generation Americans felt about the achievements of the Revolutionary generation, see Alison L. LaCroix, "The Lawyer's Library in the Early American Republic," *in Subversion and Sympathy: Gender, Law, and the British Novel*, edited by Martha C. Nussbaum and Alison L. LaCroix (New York : Oxford University Press, 2013): 251-273, 254-56; Alison LaCroix, "The Interbellum Constitution: Federalism in the Long Founding Moment," *Stanford Law Review* 67, no. 2 (2015): 397-445, 399.

[102] Investigator, letter to editor, *American Traveller*, April 20, 1827; "The Traveller: Representative Election," *American Traveller*, April 27, 1827; "The Traveller: The Basis of the Senate," *American Traveller*, March 27, 1827; A Citizen, *An Appeal to the Good Sense of the Legislature and the Community, in Favor of a New Bridge to South Boston* (Boston: True and Green, 1825).

[103] For the Revolutionary-era belief in the legitimacy, or "legality within illegality" of "mob law" in opposition to British aristocracy, see John Phillip Reid, "In a Defensive Rage: The Uses of the Mob, the Justification in Law, and the Coming of the American Revolution," *New York University Law Review* 49, no. 6 (December 1974): 1043-1091, 1049; Jack Greene, "Law and the Origins of the American Revolution," in *The Cambridge History of Law*, vol. I, edited by Christopher Tomlins and Michael Grossberg (Cambridge : Cambridge University Press, 2008): 447-481, 469.

[104] '76, "The tea tax and the Charles River Bridge tax!," *American Traveller*, April 3, 1827.

[105] The Traveller: Representative Election," *American Traveller*, April 27, 1827.

explained in an open letter to Governor Lincoln, in the case of British taxation "there was no *necessity* to drink tea; yet, as it was a question of principle, the people resisted. The egg itself, as a simple egg, was not so terrible; but the people feared the cockatrice within, and they crushed the egg."[106] The case of the free bridge was "still more alarming; for there is a *necessity* for passing Charles River."[107]

By exacting a toll for access to the market, supporters of the Warren Bridge argued, the proprietors of Charles River Bridge threatened a central right of a democratic citizen – the right to trade. "[T]rade and commerce… for the benefit of all," was "essential for the attainment of the great objects of civil society."[108] "[F]ree communication to the city" and the protection of "FREE TRADE AND TRAVELLER'S RIGHTS" were the patrimony of the inheritors of the Revolution.[109] As an op-ed in the *Salem Gazette* emphasized, the purpose of government was to "legislate for the good of the public," which included promoting "free trade which is interested in no small degree in cheapness of transportation."[110] Just as the early advocates of Charles River Bridge in 1785 had touted the economic benefits sure to arise from improved communication between Boston and the hinterland, Warren Bridge supporters emphasized the economic well-being that would follow the creation of a bridge with more convenient access to the metropolitan market. That the free bridge movement was motivated by the goal of promoting market access was made clear in its opening day celebration. In the Warren Bridge's inaugural Christmas Day parade, "[a] heavy wagon, over which a flag was hoisted, loaded with granite, and drawn by nine white horses, led the way," followed by between two and four hundred "trucks, carts, and other

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[106] William Austin, "Free Bridge," *American Traveller*, June 1, 1827.
[107] William Austin, "Free Bridge," *American Traveller*, June 1, 1827.
[108] "Warren Bridge," *American Traveller*, March 12, 1833.
[109] One of the People, "Free Bridge," *American Traveller*, April 27, 1827; "The Traveller: Hale and Emmons," *American Traveller*, March 27, 1827.
[110] "Warren Free Bridge, No. II," *Salem Gazette*, February 26, 1828.

vehicles, in procession," laden with cotton, coal, iron, molasses, rum, and other goods.[111] The fact that the parade featured the crossing of "merchandize" illustrates the popular perception that the bridge's purpose was primarily to promote commerce between Charlestown and Boston.[112] After its completion, newspapers regularly reported on the immense quantities of goods passing over the Warren Bridge.[113] The threat posed by the aristocratic Charles River Bridge shareholders, therefore, was primarily a threat to the right of democratic citizens to engage in trade and commerce.

In addition to constricting the economic well-being of local citizens, the power of the Charles River Bridge proprietors also threatened the commonwealth's democracy by attempting to control the government. The failure of the free bridge bill in the 1826 legislative session was attributed to the proprietor's "undue influence over the Legislature."[114] Free bridge proponents accused the stockholders of the Charles River Bridge Company of pulling "every string" to gain influence over individual representatives, including offering bribes.[115] "How many shares of stock," one letter to the editor asked, "will bribe an impartial magistrate to become the advocate of a chartered monopoly?"[116] The *American Traveller* urged the public to elect "firm and independent men" to office "who will not be seduced by the smiles and attentions of a luxurious aristocracy" or "betray their constituents for *a slice of plumb cake* or *a glass of champaign* [sic]."[117] The solution to this perversion of the democratic process, Warren Bridge supporters claimed, was more

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[111] "Warren Bridge," *American Traveller*, December 26, 1828; "Free Bridge," *Massachusetts Spy*, December 31, 1828, Untitled, *Newburyport Herald*, Dec. 30, 1828; "Warren Bridge," *National Aegis*, December 31, 1828.
[112] "Free Bridge."
[113] *See, e.g.*, Untitled, *Boston Courier*, September 8, 1831 ("a Mr. Sheldon lately drew across Warren bridge with [sic] one yoke of oxen, on two wagons chained together, forty-three bales of cotton, weighing 350 lbs. each, making a total of 15,050 lbs.").
[114] Untitled, *Haverhill Gazette and Essex Patriot* , February 25, 1826.
[115] "The Traveller: Legislature," *American Traveller*, March 13, 1827.
[116] Investigator, Letter to Editor, *American Traveller*, April 20, 1827.
[117] "The Traveller: Representative Election," *American Traveller*, April 27, 1827.

democratic participation. Only with mass popular turnout in elections, the *American Traveller* emphasized, would the legislature truly "act in compliance with the wishes of their constituents."[118]

Advocates also argued that the press as well as the legislature had been corrupted by the power of the Charles River Bridge proprietors. The *American Traveller* emphasized that "the spirits of our institutions teach us, and the conceived opinions of mankind instruct us, that the sovereignty in fact resides in the people," as expressed through "the public press, which should be unshackled."[119] Yet, the newspaper complained, "by the machinery and subtle management of party" – namely, the Federalist Party, composed of established merchants and politicians who tended to side with the Charles River Bridge – "most of the newspaper presses in this city are muzzled with respect to the Bridge Question."[120] By controlling the press, a citizen signing himself "One of the People" argued, "the Charles River Bridge proprietors attempt covertly to control the opinions of the whole community."[121] The Charles River Bridge Company, in other words, threatened to crack the very foundations of democracy by creating an elite class of wealthy shareholders who usurped the legislature and the press from popular control.

In the theory of popular sovereignty articulated by the free bridge movement, the people via the legislature had the right to act to promote the public welfare by preventing the formation of aristocratic monopolies that threatened the foundations of democratic government. This theory of popular sovereignty was not local to the conflict but was rather part of a larger reconceptualization of the meaning of democracy sweeping the nation in the 1820s-1830s, exemplified by the rise of Andrew Jackson's Democratic party. Jackson's supporters endorsed a

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[118] "The Traveller - Legislature," *American Traveller*, March 13, 1827.
[119] "The Traveller: The Governor condemned in the house of his friends," *American Traveller*, Tuesday March 27, 1827.
[120] "The Traveller: The Governor condemned in the house of his friends," *American Traveller*, Tuesday March 27, 1827; Warren, "The Charles River Bridge Case," 288.
[121] One of the People, "Free Bridge," *American Traveller*, April 27, 1827.

vision of popular democracy that was based on an idealized vision of "the Republican simplicity of Jefferson's time," in which each white man had the right to participate in government regardless of wealth or social standing.[122] They favored a federal system of powerful states and a weak central government, including the idea that states could "nullify" federal laws they disagreed with. Their main target at a national level was the Bank of the United States, which they accused of being an aristocratic monopoly that threatened to erode popular sovereignty.[123] As a convention of Massachusetts Republican legislators asserted when endorsing Jackson, "It is evidently in contemplation by those who favor a '*National*' or consolidated government, to annihilate, with State sovereignties, all the State Banks."[124] Without state banks, the Bank of the United States alone could exercise banking privileges, which "would then swell the overgrown dividends of a few thousand or a few hundred stockholders who would have possessed themselves, perhaps, by their own votes in Congress, of this enormous bank monopoly."[125] The Bank of the United States evoked a similar danger as that of the Charles River Bridge Corporation – both threatened democratic government by creating an aristocratic class unaccountable to the majority of the people.[126]

As a result of the similarity of the concerns expressed locally in the free bridge movement and nationally in the Jacksonian democratic platform, the Charles River Bridge controversy became increasingly politicized. Whereas in the early years of the conflict proponents of the free

[122] "Address," *The Pittsfield Sun*, February 31831. For a discussion of Jacksonian ideas of popular sovereignty, see Daniel Walker Howe, *What Hath God Wrought*, 380.
[123] Brian P. Luskey, "The Ambiguities of Class in Antebellum America" in *A Companion To The Era Of Andrew Jackson* (New York : Blackwell Pub., 2013), 194-95; Howe, *What Hath God Wrought*, 376.
[124] "Address," *The Pittsfield Sun*, February 3, 1831.
[125] "Address," *The Pittsfield Sun*, February 3, 1831.
[126] Untitled, *The Gloucester Democrat*, October 30, 1835. See Luskey, "The Ambiguities of Class in Antebellum America," 194-95.

bridge had argued that the movement was divorced from any political party, by the mid-to-late 1820s supporters of Andrew Jackson began to adopt the free bridge cause as part of their platform.

The association with Jacksonianism posed a problem for free bridge advocates, as Massachusetts was far from a Jacksonian stronghold. Abolitionism and anti-Masonism had taken hold in the commonwealth, and Jackson was both a slaveholder and a Mason.[127] Supporters of Jackson were derided as radicals who sought to undermine the sanctity of private property. By associating the Warren Bridge advocates with Jacksonites, supporters of the Charles River Bridge hoped to tar and feather the free bridge movement. One pro-Charles River Bridge paper alleged that as the Warren Bridge's inaugural parade passed by, "[t]hrongs of men and boys" shouted "hurra [sic] for Jackson!"[128] Public figures like abolitionist William Lloyd Garrison weighed in on the conflict; Garrison criticized the "*Free Bridge* ticket" of the 1827 election as an instrument of "the little, insignificant Jackson cabal" that managed to "turn every variance to their account," and who were "almost to a man, the blustering champions of a free bridge."[129] He claimed that the Jacksonites "wickedly" appealed to the "sordid feelings, and selfishness, and prejudices" of the people by railing against "Aristocrats," "Trading Politicians," and "Base Monopolists."[130] As the local paper of the small town of Worcester opined, "It is unfortunate for the free bridge interest that they have the Jackson party for allies, as, whatever might otherwise be their chance of success, that must insure their defeat."[131]

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[127] Frank Towers, "The Rise of the Whig Party," in *A Companion to the Era of Andrew Jackson* (New York : Blackwell Pub., 2013): 328-347, 336.
[128] Untitled, *Newburyport Herald*, December 30, 1828.
[129] William Lloyd Garrison, *The Letters of William Lloyd Garrison: I will be heard, 1822-1835*, edited by Walter M. Merrill (Cambridge, Mass.: Belknap Press, 1871). 41.
[130] Garrison, *Letters*, 42.
[131] "State Politics," *Massachusetts Spy*, February 13, 1828.

Some free bridge advocates insisted that the movement was apolitical and that the need to protect democracy transcended party lines. As the *American Traveller* exhorted its readers during the 1827 gubernatorial election, "At such a time as this, all local and party feeling should be thrown aside; and the great question of *Bridge or no Bridge*, freedom from restriction, determine your votes."[132] Other proponents of the free bridge explicitly attempted to distinguish themselves from the Jacksonian party and its connotations of popular unrest. In dueling letters to the editor over the free bridge controversy after the Governor's veto in 1827, a pro-Charles River Bridge supporter was accused of unfairly leveling the charge of Jacksonism against a Warren Bridge advocate: he "outright calleth him a Jacksonite, wherewith he meaneth to hit him a grievous smite, under the fifth rib."[133] In response, the pro-Warren Bridge writer swore that he "always has been an advocate for John Q. Adams, and not of and belonging to the 'unprincipled opposition.'"[134] The *Lowell Mercury* pleaded in 1832, on the eve of Jackson's re-election, "Let not the Middlesex people be alarmed by the cry of Jacksonism. *You have got to have Jackson at all events*, and you had better also have a FREE BRIDGE."[135] The *Boston Courier* even argued that the policy of Jacksonian Democrats in Congress operated to the detriment of the free bridge movement, decrying the opposition of "a small Jackson majority in the House" to a Senate bill that would have apportioned the proceeds of public land sales among states for education and internal improvements.[136] This bill, the paper argued, would have enabled the state legislature "to buy up all the 'vested rights' in toll bridges and turnpikes," including the franchise of the Charles River Bridge, and make them all free.[137]

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[132] "The Traveller: Free Bridge and Equal Rights," *American Traveller*, March 30, 1827 (emphasis in original).
[133] Free Bridge and Travellers' Rights, Letter to the Editor, *American Traveller*, April 3, 1827.
[134] Free Bridge and Travellers' Rights, Letter to the Editor, *American Traveller*, April 3, 1827.
[135] "The Warren Bridge," *Lowell Mercury*, November 9, 1832 (reprinted from the *Boston Statesman*).
[136] "Materials for Thinking," *Boston Courier*, November 26, 1832.
[137] "Materials for Thinking," *Boston Courier*, November 26, 1832.

Instead, the "Jackson policy… has deprived the people of this State of the means of buying up these corporations, and extinguishing forever their right to demand toll."[138]

The accusation of Jacksonism was levied against the Warren Bridge's lawyers as well. In his Supreme Court argument for the Charles River Bridge Corporation, Daniel Webster claimed that the Warren Bridge controversy had begun "in a clamor about monopoly – that all bridges were held by the people - & that what the State wanted it might take."[139] This, he disdained, was "bad eno[ugh] in taverns & bar rooms of Garettes [sic] in Essex Co - & was very little better when dressed with more decorum of appearance, & advanced in this Court."[140] The Charles River Bridge company, he explained, contrary to the claims of the opposition, did not mean to arrest the "progress of improve[men]t," but merely to "arrest the progress of revolution – not in forms of gov[ernmen]t – but one ag[ains]t right of property - & against corporate franchises."[141] By portraying the advocates of Warren Bridge as revolutionaries who conspired in taverns and garrets to overthrow private property rights, Webster attempted to present the case as a conflict between established property holders and Jacksonian lower-class radicals. In a similar vein, after the case had concluded, Warren Bridge's lawyer Simon Greenleaf was accused of making a "radical" argument that was "agrarian in its character, & tended to the destruction of vested rights."[142] In response, Greenleaf, a professor at Harvard Law School, deposited his original notes from the case with the Harvard Law Library, explaining that he did so in order that "my pupils, at least, & any others, may see that the argument was not of that character; & that in this case I advanced no such

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[138] "Materials for Thinking," *Boston Courier*, November 26, 1832.
[139] "*Charles River Bridge vs. Warren Bridge*, Arguments of Counsel," Greenleaf Papers, Harvard Law Library Special Collections (emphasis Greenleaf's).
[140] "*Charles River Bridge vs. Warren Bridge*, Arguments of Counsel," Greenleaf Papers, Harvard Law Library Special Collections.
[141] "*Charles River Bridge vs. Warren Bridge*, Arguments of Counsel," Greenleaf Papers, Harvard Law Library Special Collections (emphasis Greenleaf's).
[142] "*Charles River Bridge vs. Warren Bridge*, Arguments of Counsel," Greenleaf Papers, Harvard Law Library Special Collections.

doctrine as has been unjustly imputed to me; but that, on the contrary, I placed the defence [sic] on the acknowledged principles of constitutional & common law."[143]

Yet other free bridge supporters embraced the movement's association with the Jacksonian platform. In so doing, they emphasized the belief in popular sovereignty and the opposition to aristocratic monopolies that underlay both. In January 1831, a convention of Republican members of the Massachusetts Legislature met to nominate candidates for the upcoming gubernatorial and presidential election.[144] Distinguishing themselves from the "'National' Republican party," which the convention accused of promoting "a strong, consolidated, if not monarchical government," the convention endorsed Jackson for president.

For governor, the convention endorsed Marcus Morton, the Massachusetts Supreme Judicial Court justice who had recently ruled on the *Warren Bridge v. Charles River Bridge* case at the state level, deciding in favor of Warren Bridge.[145] Both Morton and Jackson, the convention resolved, represented the "the people of the United States" rather than those "in favor of an elective monarchy."[146] Like Jackson, the convention proclaimed, Morton was "not nursed in the lap of wealth. He sprung from the people – he is one of them."[147] Because he was "the architect of his own fortune," he was "not bound to the Aristocracy" but would promote the interests of the public.[148] Endorsing Morton in his subsequent campaign for governor in 1833, the *Boston Statesman*, edited by state senator and Jackson supporter David Henshaw, emphasized that Morton was "against the exclusive priviliges [sic] given to corporations, by which public improvement is

[143] "*Charles River Bridge vs. Warren Bridge*, Arguments of Counsel," Greenleaf Papers, Harvard Law Library Special Collections.
[144] "Address," *The Pittsfield Sun*, February 3, 1831.
[145] ""Address," *The Pittsfield Sun*, February 3, 1831.
[146] "Address," *The Pittsfield Sun*, February 3, 1831.
[147] ""Address," *The Pittsfield Sun*, February 3, 1831.
[148] "Address," *The Pittsfield Sun*, February 3, 1831.

checked, and one class of men can riot in opulence on wealth unjustly drawn from the humble and poor."[149] For proof, the paper offered, one need only "witness his judicial opinion in the Warren Bridge case."[150]

The free bridge movement, therefore, had much in common with the larger Jacksonian democratic platform, but the movements were not one and the same. Although the free bridge movement was embraced by Jackson's supporters in Massachusetts state politics, many supporters of Warren Bridge did not identify with Jacksonism. Yet the driving concern of both Jacksonites and free bridge supporters was a shared theory of popular sovereignty, the belief that the public via the state had the right to act in the public interest to stymie the threat of aggregations of wealth and power posed by large corporations like the Charles River Bridge Corporation and the Bank of the United States.

The framing of the free bridge controversy as a battle between "the people" and aristocratic shareholders was supported by the backgrounds of its individual proprietors. Charles River Bridge supporters argued that a number of "widows and orphans" owned stock in the bridge; Daniel Webster, in his argument before the Supreme Court in 1836, claimed that Charles River Bridge stock was "diffused every where, thru the community – holden by the public charities, widows – one son took his whole share of the patrimony in this bridge, & has lost it all."[151] In fact, however, the largest shareholders were wealthy, well-established members of the community.[152] For instance, the family of Thomas Russell, who had been an original petitioner of the Charles River Bridge and "one of the most eminent merchants in Boston," continued to hold eight of the 150

[149] "State Election," *Hampden Whig*, October 16, 1833. See Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln* (New York : Norton, 2005), 294.
[150] "State Election," *Hampden Whig*, October 16, 1833.
[151] Notes, Greenleaf Papers, Harvard Law Library Special Collections (emphasis Greenleaf's).
[152] "Charlestown Bridge," *American Traveller*, March 20, 1827; H.R. No. 7, *An Act to Establish the Warren Bridge Corporation* (1828), 21-23.

shares in 1827.[153] Peter C. Brooks, who owned 11 shares, served as Director of the New England Marine Insurance Company and Vice President of the Massachusetts Hospital Life Insurance Company; in 1839 he owned almost $500,000 worth of real and personal property.[154] Charles R. Codman, an affluent merchant, owned seven shares; while Samuel A. Eliot, six shares, was from a longstanding Boston banking family who over the course of his career served in the Massachusetts legislature, as mayor of Boston, and in the House of Representatives in Congress.[155] Even the smaller shareholders were members of the Bostonian elite. Boston Mayor Josiah Quincy and his wife Ann (three shares), were of "an ancient family"; Henry and Elizabeth Cabot (four shares) likewise hailed from the "old Cabot stock, which has been distinguished in New England for the last two centuries."[156] The class status of shareholders belied the company's claim that destroying its revenue would destroy the livelihoods of widows and orphans. Rather, in light of the "superabundance of wealth" of the Charles River Bridge shareholders, one commentator smirked, would it not be well "for the Legislature to turn the attention of said corporators to the relief of the aforesaid widows and orphans"?[157]

In contrast, the proprietors of the Warren Bridge did not represent the city's monied elite, but its mid-level merchants and bankers, those most interested in the creation of a new, free bridge that would promote trade between the outlying towns and the metropolis. Indeed, famed Unitarian preacher William Ellery Channing, scion of a patrician New England family, blamed the passage of the Warren Bridge bill on middling merchants, "men of business, who were anxious

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[153] *An Act to Establish the Warren Bridge Corporation*, 21; Alden Bradford, "Thomas Russell," *Hunt's Merchant's Magazine* vol 1, no. 1 (1839), 347.
[154] *List of Persons, Copartnerships, and Corporations who Were Taxed Twenty-five Dollars and Upwards in the City of Boston, in the Year 1839* (Boston: John H. Eastburn, 1840), 18; A. Forbes and J.W. Greene, *The Rich Men of Massachusetts* (Boston: W.V. Spencer, 1851), 18.
[155] *List of Persons,* 24; Forbes and Greene, *The Rich Men of Massachusetts,* 21; "Eliot, Samuel Atkins," *Appletons' Cyclopædia of American Biography*, vol. 2 (New York: D. Appleton and Co., 1888), 324.
[156] Forbes and Greene, *The Rich Men of Massachusetts,* 81.
[157] A Guardian, Letter to Editor, *American Traveller*, March 30, 1827.

to push a more lucrative trade" at the expense of what he considered an "assault on property."[158] The corporators of Warren Bridge were also respected men in the community. Isaac Warren, one of the main petitioners for the Warren Bridge, had earned his fortune as a cloth merchant in Boston; by the time the bridge petition was introduced he was a widely-respected philanthropist and "an active and useful citizen" who was deeply involved in a number of local religious and charity organizations.[159] John Skinner, the other lead petitioner of the Warren Bridge and its first director, was likewise a small-scale merchant, an importer of such diverse goods as beef, pork, butter, lard, candles, linseed oil, cotton, rice, and merino sheep.[160] Skinner was also the hayward – the officer in charge of looking after the cows on the common – for the city of Boston, and the director of a local Charlestown bank.[161] Other Warren Bridge incorporators included small-scale merchants, lawyers, and legislators.[162] For the most part, however, there was little talk in local

[158] William Ellery Channing, *Self Culture* (Boston: James Munroe and Co., 1839), 41. In their advocacy for popular democracy to promote the public good, the advocates of the free bridge movement bear similarities to the "middling merchants and artisans" discussed by Sean Wilentz. Sean Wilentz, *Chants Democratic: New York City and the Rise of the American Working Class, 1788-1850* (UK: Oxford University Press, 2004), 14. Wilentz uses the term "middling merchants" to refer to merchants conducting a modest trade who were interested in democratic politics in New York in the early 19th century.

[159] A deacon of the First Church of Charlestown, Issac Warren was also the President of the "Middlesex Auxiliary Society for Educating pious youth for the Gospel Ministry," a trustee of Massachusetts Missionary Society, and a major donor to a local youth religious academy. Advertisement, *Columbian Centinel*, April 2, 1800; Advertisement, *Columbian Centinel*, January 16, 1805; "Massachusetts Mutual Fire Insurance Company," *Columbian Centinel*, June 5, 1822; "Obituary," *New-Bedford Mercury*, March 28 -1834; "Second Council," *Boston Recorder*, June 25, 1829; "Massachusetts Missionary Society," *Boston Recorder*, May 31, 1823; "Middlesex Education Society," *Boston Recorder*, June 29, 1827; "Woburn Academy," *Trumpet and Universalist Magazine*. In addition, he served as President of the American Education Society, treasurer of the Massachusetts Agricultural College, and a contributing member of the Prison Discipline Society. "American Education Society," *Boston Recorder*, June 18, 1829; *Columbian Centinel*, November 26, 1825; "Prison Discipline Society," *Boston Recorder*, July 14, 1830. Upon his death in 1834, he was praised in newspapers as far away as New York City for his extensive "liberality," as he had left $3,000 of his estate to Middlebury College, as well as significant bequests to the American Education Society, the Massachusetts Missionary Society, the American Bible Society, the American Board of Foreign Missions, the American Tract Society, and the "excellent, benevolent, and charitable Society, the Eye and Ear Infirmary." Untitled, *American Traveller*, August 12, 1834; "Middlebury College," *Boston Recorder*, June 14, 1834; "Obituary," *New-Bedford Mercury,* March 28, 1834; "Liberality," *New-York Spectator*, August 14, 1834. Wrote the *New-Bedford Mercury*, "The church and society of which he was for so long a time a member, will mourn his loss, and bear in affectionate remembrance his liberal purposes and deeds." "Obituary," *New-Bedford Mercury,* March 28, 1834.

[160] "For Sale by John Skinner and Co.," *The Repertory*, Februrary 28, 1815; "Port of Boston," *Boston Gazette*, May 29, 1815; "Merino Sheep," *Independent Chronicle*, August 24, 1815.

[161] "Town Meeting," *Independent Chronicle*, June 2, 1819; "Bank Directors," *Boston Commercial Gazette*, February 3, 1823.

[162] These included legislator Nathaniel Austin, lawyer William Austin, Jonathan Chapman, Samuel Jaques, Jr, John Cofran, Thomas Hooper, Ebenezer Banker, and Timothy Thompson, Jr.

papers and town halls about the proprietors of the Warren Bridge themselves, as compared to the significant focus on the monied status of the Charles River Bridge's proprietors.

In petitioning for the Warren Bridge, Isaac Warren, John Skinner, and the other corporators swore they were acting solely in the public interest. They assured the public that the bridge was not "the private speculation of a few individuals," and took pains to "dissipate such an impression" by "invit[ing] every man in the community to become a subscriber."[163] On its initial public offering in March 1828, 500 shares in Warren Bridge, worth $50,000, were sold to 290 subscribers.[164] The Warren Bridge proprietors emphasized that they advocated for the bridge "not for our own interest distinct from that of the public," but were rather "willing to accept of a charter on terms most liberal to the community."[165] They simply asked for a small return on their investment – five percent or no more than $60,000 – before they turned the bridge over to the state. As a Senate Report on the Warren Bridge in 1833 emphasized, "The proprietors in erecting the bridge, have rendered to the public a great and important service, and it deserves to be remembered to their credit, that from the first they have had no other object than the public convenience and accommodation."[166] The House Joint Committee on Roads and Bridges, which happened to be chaired by Nathanial Austin, an original petitioner of the Warren Bridge, claimed that "[w]hile others engaged in similar enterprises have been actuated by motives of private gain, the Proprietors of this Bridge have devotedly served the public without the hope or prospect of any private emolument."[167] Rather than a private enterprise, the Warren Bridge was presented as an

[163] "The New proposed Bridge over Charles River to Boston," *Columbian Centinel*, June 2, 1824.
[164] Untitled, *Essex Gazette*, April 26, 1828; *Salem Gazette*, April 22, 1828.
[165] "To the Hon. Senate and House of Representatives," *Columbian Centinel*, November 5, 1825.
[166] Austin, Chairman, *Report of the Committee on Roads and Bridges.*
[167] "Warren Bridge," *American Traveller*, March 12, 1833.

opportunity for public investment in an internal improvement project that would in short order become the property of the public at large.

Charles River Bridge and Warren Bridge presented two very different conceptions of the corporation and its relationship to the public. The conflict between the two highlights the precarious relationship between the democratic state and its corporations. On the one hand, internal improvement corporations were necessary to the development of infrastructure on which the public depended; on the other, aggregations of wealth in the hands of a few shareholders stoked fears of aristocracy. Although Governor Levi Lincoln was resoundingly maligned for his first veto of the Warren Bridge charter, closer examination reveals that Lincoln was not simply a puppet of the Charles River Bridge, as free bridge supporters accused him of being. In fact, his reasons for vetoing the bill reflect larger concerns about the nature of corporations that actually mirrored those of the free bridge movement. This is revealed in his veto of the charter of the Salem Mozart Society, issued less than a month before his Warren Bridge veto.

Citizens of Salem had successfully petitioned the legislature to incorporate the Salem Mozart Society for the purposes of "improving the performance of Church Music."[168] The legislature passed the bill of incorporation, but Lincoln vetoed it. Although the intention of the Society was "entirely commendable," Lincoln wrote in his veto message, he saw "no possible necessity for an act of incorporation" to accomplish this purpose.[169] On the contrary, incorporating such a society posed a danger to the democracy. The Society's charter provided that it could own $10,000 in real estate and $10,000 in personal property, which would pass in perpetual succession to future members. This, Lincoln warned, "locked up" $20,000 worth of

[168] *Resolves of the General Court of the Commonwealth of Massachusetts* (Boston, Dutton and Wentworth, 1828), 474.
[169] *Resolves of the General Court of the Commonwealth of Massachusetts*, 474.

property "from the mass of transmissible wealth." [170] Already, he pointed out, in five year's time corporations formed for "local and minor purposes" had been granted charter rights to hold more than $30 million dollars, "an amount equal to one fifth… of the taxable property of the Commonwealth."[171] This threatened to lead to "an unlimited and infinite accumulation" of wealth in the hands of a small number of people, which would promote the "worst evils of a monopoly of wealth and possessions in corporations" and the "consequent poverty and dependence in individuals."[172] If this continued, the Governor warned, "at no far distant period, a humble and dependent tenantry will take the place of that high minded and independent yeomanry" of the democracy, and possibly lead to "popular excitement and revolution."[173] It was the job of the legislature to prevent this from happening by only "sparingly and cautiously" chartering such corporations, even those as benign as the Mozart Society.[174]

Notably, Lincoln exempted from his objections corporations "created to facilitate important business operations, and for the general improvement of country," such as banking, insurance, and transportation companies.[175] He explained that such corporations involved "high objects of public interest" and so "the facilities of acts of incorporation, with the power to hold and manage the necessary funds, should be granted."[176] Yet even here, he suggested, "there should be some limitation of time, when the Legislature might exercise the power of revision and revocation" of the corporate charter.[177] He explained, "In a free government, nothing of artificial arrangement should be perpetual, but the great charter of the people's rights. All else should be subject to an

[170] *Resolves of the General Court of the Commonwealth of Massachusetts*, 475.
[171] *Resolves of the General Court of the Commonwealth of Massachusetts*, 477, 475. Lincoln exempted Banking, Insurance, Turnpike, or Canal Companies from this calculation.
[172] *Resolves of the General Court of the Commonwealth of Massachusetts*, 476.
[173] *Resolves of the General Court of the Commonwealth of Massachusetts* 475-476.
[174] *Resolves of the General Court of the Commonwealth of Massachusetts*, 477.
[175] *Resolves of the General Court of the Commonwealth of Massachusetts*, 476, 475.
[176] *Resolves of the General Court of the Commonwealth of Massachusetts*, 476-77.
[177] *Resolves of the General Court of the Commonwealth of Massachusetts*, 477.

occasional conformity to the public weal."[178] The public weal in this case required the "preservation of political freedom" and "equality of personal condition" guaranteed by limitations on the perpetual succession of property through the hands of a small group of individuals.[179] In other words, Lincoln was concerned that the multiplication of corporations would create groups of wealthy persons – an aristocracy – that would undermine the political liberty and equality of individuals. In this, his concerns about corporations echoed that of the opponents of the Charles River Bridge.

Yet less than a month later, in March 1827, Lincoln vetoed the charter of the Warren Bridge Corporation. He vowed that he had "neither concern nor sympathy of feeling" with either corporation involved, stating, "Of their past or present proprietors, their profits or losses, their condition or prospects, I neither know, nor do I care to know any thing."[180] His veto was based on his understanding that the right to take toll was essential to the existence of the Charles River Bridge Corporation and that destroying the ability to toll, which the creation of a free bridge would unquestionably do, would not only violate the state's compact with the proprietors but would stymie future works of private enterprise.[181] Importantly, Lincoln acknowledged the legislature had the power to charter a free bridge, but only "*whenever the public necessity may require it*" – and here the bill had not indicated that such was the case.[182] Echoing his Mozart Society veto, Lincoln admonished the legislature not to "unsparingly and with an unguarded hand… multiply private corporations, and grant privileges without limitation, until only the form and very shadow of

[178] *Resolves of the General Court of the Commonwealth of Massachusetts*, 477.
[179] *Resolves of the General Court of the Commonwealth of Massachusetts*, 477.
[180] *Resolves of the General Court of the Commonwealth of Massachusetts*, 520.
[181] *Resolves of the General Court of the Commonwealth of Massachusetts*, 515, 517.
[182] *Resolves of the General Court of the Commonwealth of Massachusetts*, 519. To the contrary, he noted that the 1827 bill provided that if the Charles River Bridge Corporation were willing to surrender its bridge to the state by December 1831, the Warren Bridge would not be built before then, showing that there was no immediate need for a second bridge. *Resolves of the General Court of the Commonwealth of Massachusetts*, 518.

sovereignty remains."[183] As noted above, his veto was criticized by free bridge supporters as "high-toned," "anti-republican," and friendly to "a few aristocratic personages."[184] Yet other commentators appreciated his attempt to stem the "dangerous tendency" of the legislature toward the "multiplication of corporate bodies on trivial pretences."[185] Taking Lincoln's public necessity requirement to heart, the following year the legislature passed a reworked Warren Bridge Bill that emphasized the immediate public need for a new bridge, and Lincoln signed the bill into law.[186]

As can be seen in Lincoln's veto messages and in the popular discourse surrounding the bridge controversy, free bridge proponents and the Charles River Bridge proprietors expounded two different theories of the nature of the internal improvement corporation. For Warren Bridge supporters, the corporation was a creation of the public, via the legislature, which was intended to achieve a public good. Although it was conceded that shareholders in the corporation were entitled to some profit, this pecuniary gain was to be limited; furthermore, membership in the corporation was available to anyone who could afford to purchase stock.[187] Belief in popular sovereignty was central to this view of corporations. Privileges granted to corporations, emphasized Warren Bridge's lawyer William Austin, "depend entirely on the will and pleasure of the sovereign power."[188] Governor Lincoln likewise believed that although corporations had charter rights that the legislature should respect, including the right to take toll, these rights were subordinate to the public interest.

In their endorsement of the Warren Bridge Corporation and opposition to the Charles River Bridge Corporation, free bridge supporters presented an alternative vision of the corporation

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[183] *Resolves of the General Court of the Commonwealth of Massachusetts*, 520.
[184] "The Traveller - Legislature," *American Traveller*, March 13, 1827.
[185] "General Intelligence," *National Aegis*, March 21, 1827.
[186] "Charlestown Free Bridge," *Salem Observer*, March 15, 1828.
[187] "The Traveller: Legislature," *American Traveller*, March 13, 1827.
[188] William Austin, "Free Bridge," *American Traveller*, June 1, 1827.

as distinct from other free market, profit-making enterprises. The Warren Bridge proprietors proposed a form of private-public partnership in which limited private profit was consideration granted in exchange for the construction of public works. Shares in the enterprise were, ostensibly, open to the public – at least every member of the public who could afford the purchase price of $100 per share. The shareholders' pecuniary gain was capped at a modest amount - $60,000 in total, or $120 per share. Furthermore, the investor's property rights in the bridge were of limited duration, as the bridge would become free and accessible to all within a defined time.

In contrast, proprietors and supporters of the Charles River Bridge presented an alternative vision of the corporation as a private enterprise designed to promote the financial gain of its shareholders, with limited accountability to the public. Daniel Webster, who served as lead counsel for the Charles River Bridge Corporation, argued before the Massachusetts Supreme Judicial Court that the Charles River Bridge Corporation was "a private civil corporation," not "a public corporation over which the legislature have a control [sic]." [189] As a result, "[a]ny notion, therefore, which may be entertained, that the grant of our bridge is connected with the public benefit, is of no consequence."[190] The legislature's attempt to charter a competing bridge was derided as an infringement on the contract and property rights of the bridge's investors. The corporation's charter, Charles River Bridge supporters argued, was "a compact between them and the Public," the same as any private contract, and any change to its terms – here, the allegedly implied right to an exclusive "line of travel" over the Charles River – was "an infringement of the rights already vested," "an act of violence, against the constitution, and laws of the state."[191] Such a violation of the "the Constitutional rights" of the proprietors would "unsettle the security of

[189] *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 7 Pick. 344, 443 (1829).
[190] Proprietors of Charles River Bridge, 7 Pick. at 443.
[191] Civis, Letter to the Editor, *Essex Register*, March 29, 1827; "Warren Bridge," *American Traveller,* March 12, 1833; "Massachusetts Legislature," *Gloucester Telegraph*, March 17, 1827.

private property."[192] Rather than a servant of the public, the corporation was a private business enterprise, the owners of which possessed "rights of property" in their franchise that that the legislature was constitutionally forbidden from violating.[193]

As a private, profit-making enterprise no different than other market actors, supporters of the Charles River Bridge contended that the corporators had the right to make as much money as they could off their investment. Arguing that the wealth of the bridge's investors had no bearing on the question of whether the legislature could charter a competing bridge, the *Salem Gazette* announced, "Whether the bridge has been productive or unproductive is immaterial."[194] In their brief to the Massachusetts Supreme Judicial Court, Charles River Bridge's lawyers likewise argued that "the question how much they have received is rendered wholly immaterial" to the question of whether their vested rights had been violated.[195] In this view, corporations were private enterprises upon which the public depended, but over which the public had no control. The *Charles River Bridge* case that resulted from this conflict helped introduce this competing understanding of the nature of the corporation into American constitutional law.

The Free Bridge Movement and the Law

By the early 1830s, the *Charles River Bridge* case had become thoroughly politicized. Yet contrary to much scholarship on the period, the decision itself was not simply a political endorsement of state-sponsored economic development over common law property rights. Rather,

[192] "State Legislature," *American Traveller,* March 13, 1833.
[193] "Charlestown Free Bridge," *Salem Gazette*, March 9, 1827.
[194] "Warren Free Bridge – No. 1," *Salem Gazette*, February 22, 1828.
[195] Proprietors of Charles River Bridge, 7 Pick. at 362.

it was a fundamental contestation over the nature of democratic government and the relationship between corporations and the state.

The Charles River Bridge Corporation was not prepared to cede its monopoly power without a fight. As soon as the bill chartering the Warren Bridge had passed, the Charles River Bridge Corporation brought suit, alleging that the new bridge violated its charter rights to a "line of travel" across the Charles River, in violation of the contract clause of the federal Constitution.[196] The Massachusetts Supreme Judicial Court, evenly divided, in 1829 denied the claim so that the case could be appealed to the United States Supreme Court.[197] The case languished on the Supreme Court's docket for eight years, as the makeup of the Court underwent significant change.[198] Finally, in 1837, Chief Justice Taney, in one of his first major decisions as Chief Justice, found for the Warren Bridge Corporation, and the legal controversy was at last ended.[199]

In their legal arguments and in Chief Justice Taney's opinion, the dominant concerns about popular sovereignty and monopoly that motivated the free bridge movement figured heavily. Yet although the Warren Bridge, and the people of Charlestown and Boston, prevailed in the short term, the decision had lasting positive effects for corporations. Firstly, the case solidified the ability of corporations to claim the protection of the federal Constitution against state action via the contract clause. Secondly, it endorsed the vision of the corporation propounded by Daniel Webster as an entity separate from and potentially at odds with the public. Taney's decision implied that the internal improvement corporation was not simply a servant of the public chartered to fulfill a

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196 "Warren Bridge," *American Traveller,* March 12, 1833.
197 "Charles River Bridge Vs. Warren Bridge," *New-Bedford Mercury*, January 15, 1830.
198 Chief Justice John Marshall and Justice William Johnson died, and Justice Gabriel Duvall retired. They were replaced by Jackson appointees Roger Taney, James Wayne, and Philip Barbour. Kutler, *Privilege and Creative Destruction*, 55-61.
199 The Charles River Bridge opinion has been called Taney's first major decision on the court. Daniel Feller, *The Jacksonian Promise : America, 1815-1840* (Baltimore : Johns Hopkins University Press, 1995).

public purpose; it was private, profit-making entity whose goals and priorities potentially differed from those of the community and whose shareholders were protected by the federal Constitution against unjustified state infringement of their rights.

The nature of the corporate charter was the central issue in the case. Webster, on behalf of the Charles River Bridge Corporation, argued that the contract clause of Constitution applied to their charter, and that this clause should be read broadly to protect their implied exclusive right to control bridge travel between Charlestown and Boston.[200] Webster's argument was based on *Fletcher v. Peck* (1810), which had held that state contracts with individuals were contracts protected by the Constitution, and the recent case of *Dartmouth College v. Woodward* (1819), which extended *Fletcher* to hold that state grants of corporate charters were contracts that were likewise constitutionally protected.[201]

The *Dartmouth College* case, although involving an eleemosynary corporation, presented an entering wedge for internal improvement corporations like the Charles River Bridge company to claim constitutional rights against state regulation.[202] The case involved a suit by the trustees of Dartmouth College contesting the New Hampshire state legislature's attempt to unilaterally change the charter of the college. The Republican legislature, concerned about the Federalist and Congregationalist leanings of the trustees, attempted to secularize the college by increasing state oversight of its operations.[203] Daniel Webster, on behalf of the trustees, argued that this legislation

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[200] Article I, Section 10 of the Constitution stated in pertinent part that no state shall "pass any… Law impairing the Obligation of Contracts."

[201] *Fletcher v. Peck*, 10 U.S. 87 (1810), *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 682-83 (1819). This reading was solidified in *Providence Bank v. Billings*, 29 U.S. 514, 560 (1830).

[202] *Trustees of Dartmouth College*, 17 U.S. 518. Eleemosynary corporations were those with charitable purposes, such as educational institutions, churches, libraries, charities, etc.

[203] Mark D. McGarvie, "Creating Roles for Religions and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic," *Journal of College and University Law* 25, no. 3 (Winter 1999): 527-568, 547.

impaired Dartmouth's charter in violation of the contract clause. The Supreme Court agreed, holding that a corporate charter was a contract and extending for the first time the protection of the contract clause over corporations.[204]

To support this holding, Chief Justice John Marshall focused on the aggregate quality of the corporation. He explained that the corporation was not a single, monolithic entity, but as "a collection of individuals, united into one collective body."[205] Marshall held that individuals did not forsake their rights when they incorporated; rather, they continued to have "vested rights, in their character, as corporators," which prohibited the state from unilaterally impairing those rights.[206] This included the constitutional right against state impairment of contracts.[207]

Justice Joseph Story's concurrence separated the corporation from its public responsibilities by drawing a stark division between "public" and "private" corporations. Adopting Marshall's theory of the corporation as an aggregate of individuals, Story argued that the character of the corporation depended on the character of its stockholders. According to Story's formulation, public corporations were owned wholly by the state. Where a corporation's stock was held by private persons, it was "a private corporation, although it is erected by the government, and its objects and operations partake of a public nature."[208] In other words, Story defined "public" corporation very narrowly – only a corporation owned by the state was public, whereas corporations like the Charles River Bridge Corporation that acted in the public interest but were

[204] United States Constitution, Art. I, § 10.
[205] *Dartmouth College, 17 U.S.* at 667.
[206] *Dartmouth College*, 17 U.S. at 701.
[207] One could read Marshall's statement as indicating that a corporation's members had particular rights by virtue of their incorporated status, not necessarily that all the rights they enjoyed as individuals could be ascribed to the corporation. Regardless of Marshall's understanding of the scope of the rights that a corporations' members possessed, his ruling did remove the corporation from the control of the state legislature and interpose the court as the final arbiter between state power and corporate rights.
[208] *Dartmouth College*, 17 U.S. at 669.

privately owned were exclusively private. Corporate charters of private corporations, Story concluded, were protected from state impairment the same as the private contracts of individuals would be. As such, the state could not single-handedly alter the charter of public corporations – unless, he noted, they reserved the right to do so in the original charter of incorporation.[209] By categorizing corporations as either one or the other, Story significantly limited the public's ability to exert control over corporations, including public works corporations like the Charles River Bridge company.

Marshall's view of the corporation as an aggregate of rights-bearing shareholders and Story's bifurcation of the corporation into public or private ignored the complex nature of the corporation in the early nineteenth century as a public-private partnership whose rights and duties were distinct from its individual members. Both proponents and opponents of the free bridge recognized that corporations were composed of individuals, routinely discussing "the corporation" in the plural – the "Charles River Bridge Corporation *are*."[210] For instance, in the legislative debates, one representative stated that "the corporation should be protected in *their* rights" until "the corporation [had] been remunerated for *their* risk."[211] If "the Corporation claim equity at our hands," the Speaker of the House announced, "*they* must most assuredly show that they themselves have behaved with equity and good conscience in relation to the Commonwealth."[212] Regarding

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[209] *Dartmouth College*, 17 U.S. at 669. Naomi Lamoreaux and Ruth Bloch argue that the impact of *Dartmouth* was actually limited, because reservation clauses states included in statutes and corporate charters post-*Dartmouth* gave legislatures back the power that contract clause protection had taken away. Bloch and Lamoreaux, "Corporations and the Fourteenth Amendment," in *Corporations and American Democracy*, edited by Naomi R. Lamoreaux and William J. Novak (Cambridge, MA and London, England: Harvard University Press, 2017): 286-326. Yet as Chapter 3 shows, cases in the 1860s-70s reveal that many railroad charters did not have reservation clauses, and for those that did scope of the power conferred on the state by the reservation clauses was in dispute.

[210] "Free Bridge to Charlestown," *Boston Commercial Gazette*, February 26, 1827 (emphasis added); A Guardian, Letter to the Editor, *American Traveller*, March 30, 1827.

[211] "Charlestown Free Bridge," *Salem Gazette*, March 2, 1827 (emphasis added). See also "Warren Bridge," *National Aegis*, April 16, 1828 ("The Corporation have many things to encourage them…"); "Lowell Rail-Road," *Boston Courier*, June 7, 1830 ("he could not see that any guarantee was necessary to secure to the corporation a fair profit on their investment.").

[212] "Charlestown Bridge," *American Traveller*, March 20, 1827 (emphasis added).

the Supreme Court decision, one paper likewise reported that the Warren Bridge Corporation "*have* expressed great anxiety to hasten this decision as much as possible."[213] Yet although corporations were seen as aggregates of individual shareholders, this did not mean that the shareholders retained whatever rights they possessed as individuals when they joined a corporation. Rather, as detailed above, free bridge supporters believed that because of its public purpose, the rights, privileges, and duties of corporations were distinct from those of its individual members. Yet in *Dartmouth,* Marshall and Story disregarded this more nuanced conception of the corporation.

Marshall and Story also viewed the corporate charter not as a testament of public duties in exchange for specific rights, but as the equivalent of a private contract protected by the federal Constitution. Debates regarding the Charles River Bridge conflict reveal that even after *Dartmouth*, this understanding of the corporate charter was hotly contested. Supporters of the Charles River Bridge Corporation pointed to the *Dartmouth* opinion, arguing that the charter was indeed "a contract, between the State on the one hand, and the members of the corporation on the other."[214] Free bridge proponents, however, insisted that corporate charters were not protected by the contract clause at all. As the *American Traveller* explained, the original purpose of the contract clause had been "to impose a restriction upon the passing by the state of tender laws, stop laws, and laws of that nature, to defeat or delay creditors in the recovery of their debts."[215] Early claims that corporate charters were protected by the contract clause, the paper explained, had been treated "treated with ridicule" – "the notion of a contract between the government, and the Corporation"

[213] "Governor's Speech," *Newburyport Herald*, January 16, 1835 (emphasis added).
[214] "Charlestown Free Bridge," *Boston Weekly Messenger*, April 5, 1827 (emphasis added).
[215] "Free Bridge," *American Traveller*, March 27, 1827.

was "*too fanciful*, to need any observation."[216] It was not until the *Dartmouth College* decision, the paper pointed out, that this claim was treated with any seriousness.[217]

Supporters of the Warren Bridge argued that because corporations like bridge and other transportation companies were created to promote the public interest, their charters should not be treated as the equivalent of private contracts, but rather should be subject to state oversight. Some free bridge proponents accepted that the charter did give the incorporators certain rights, admitting that the legislature could not "*repeal* or *alter* the original act of incorporation," but contending that the legislature was free to charter competing industries if in the public's interest.[218] Governor Lincoln's acknowledgement in his veto message that the Charles River Bridge shareholders did have vested property rights, but that the legislature could override these granted rights when the public necessity demanded it is, a key example of this line of thinking. According to the Joint Legislative Committee's 1827 Report on the free bridge, the Legislature possessed the "equitable right… to interfere *indirectly*" with the corporation's charter "for the relief of the public" from the inconvenience of the Charles River Bridge.[219] As a free bridge pamphleteer wrote, "A charter is granted, for erecting a bridge or building a turnpike, to advance the public interest, and

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[216] "Free Bridge," *American Traveler,* March 27, 1827.

[217] "Free Bridge," *American Traveller*, March 27, 1827. *Dartmouth* became the scapegoat for proponents of corporate regulation for the rest of the nineteenth century. In 1853, the Supreme Court of Ohio declared that the case of Trustees of Dartmouth College v. Woodward (1819) had become "a subterfuge for fraud and a means of shielding corporations from responsibility and correction for the abuse of their corporate franchises." The distinction between public and private was "arbitrary"; it was "unreasonable" to claim that simply because the shareholders were private, corporations "must be denominated *private institutions*, and for that reason placed beyond the reach of… the State by which they were created." Bank of Toledo v. City of Toledo, 1 Ohio St. 622, 629 (1853). As the Wisconsin Supreme Court bemoaned in 1874, states suffered from "the thraldom of that decision," which had effectively put corporations "above the law of the land." The Wisconsin court faulted the doctrine emerging from *Dartmouth* for "applying old names to new things," suggesting that if "Judge Story had lived to see" the powerful railroads and banks of the mid-nineteenth century, he would not have called corporations "private" that were "of such great and various public relation and public significance." Attorney General v. Chicago and N.W. Ry. Co., 35 Wis. 425, 568 (1874).

[218] "The Traveller: Free Bridge," *American Traveller*, March 27, 1827. Contending for a broader state power over corporations, Warren Bridge incorporator William Austin contended that corporate charters depended "entirely on the will and pleasure of the sovereign power." William Austin, "Free Bridge," *American Traveller*, June 1, 1827.

[219] "Free Bridge to Charlestown," *Boston Commercial Gazette*, February 26, 1827.

serve the public conveniences, not to secure a monopoly to individuals at the expense and inconvenience of the public."[220] All such charters, the author claimed, were granted with the "implied understanding" that "if other persons can find a shorter or more eligible route, that will accommodate the public more in the same way, they have an equal, if not a greater claim, for their grants."[221] David Henshaw, a Massachusetts state legislator and Warren Bridge advocate, wrote that it was "a principle well established" that any grant authorizing the creation of a public improvement "is always done under the implied condition… that when individuals will propose a greater improvement, either by saving distance or saving money, that the public not only have the right to adopt, but that they will sooner or later adopt, that which most promotes the public interest."[222] The Charles River Bridge Corporation's charter, one Massachusetts state representative argued, "was granted to accommodate the public in their travel to and from Boston," not to "fill to overflowing the coffers of the corporation."[223] The nature of the corporation as a state creation for a public purpose therefore gave the public the ultimate right to control the corporation's destiny; where the corporation had begun to "prey… on the public," it was the legislature's "duty to prevent the corporation from receiving another dollar."[224] As William Wirt, representing Warren Bridge, argued, a corporate charter must "be construed most favorably to people – private must yield to public."[225] In other words, the legislature had the right to pass laws for the public good even when those laws impacted previously granted corporate charters.

Building off *Dartmouth*, Daniel Webster and other counsel for the Charles River Bridge argued that the charter of an internal improvement corporation like a bridge was protected by the

[220] A Citizen, *An Appeal to the Good Sense of the Legislature and the Community*, 7.
[221] A Citizen, 7.
[222] [David Henshaw], "Free Bridge," *American Traveller*, March 30, 1827
[223] "Charlestown Free Bridge," *Salem Gazette*, March 2, 1827
[224] "Charlestown Free Bridge," *Salem Gazette,* March 2, 1827.
[225] Notes, Greenleaf Papers, Harvard Law Library Special Collections.

contract clause of the Constitution, just as was the charter of a charitable corporation like a university. This was a novel claim when applied to internal improvement corporations. The only public duties of the bridge company, they claimed, was to adhere to the express terms set forth in their charter, such as regarding the "place where the bridge is to be built; its dimensions, materials, lights, draws and other details."[226] Outside of the charter terms, the legislature had no power to interfere with the "rights and property" of the shareholders.[227] These included the "private," "exclusive," "chartered rights" of the individual stockholders to remuneration from their investment in the bridge.[228] Because the charter was simply a contract, the lawyers for Charles River Bridge contended that the same rules of contract interpretation that governed contracts between the state and private individuals – here, that such contracts were to be construed in favor of the grantee – governed the interpretation of a corporate charter as well.[229] Furthermore, they argued, because "as reason and experience will warrant," legislatures were "not the safest guardians of private rights," it was the responsibility of the courts to intervene between the state and the corporation to ensure the rights of the shareholders would be protected.[230]

Faced with the *Dartmouth College* precedent, both the lawyers for Warren Bridge and Chief Justice Taney were compelled to concede that corporate charters were contracts protected by the contract clause. The Warren Bridge's lawyer admitted, "That the act of incorporation is a contract, we do not deny; and if the recent act violates that contract, and so is repugnant to the constitution of the United States, we concede that it is in the power of the Court to declare the recent act to be void."[231] As Jackson's Attorney General, Taney had previously admitted, "It is now too well settled

[226] *Charles River Bridge*, 36 U.S. at 438.
[227] *Charles River Bridge*, 452, 454.
[228] *Charles River Bridge*, 438.
[229] *Charles River Bridge*, 525.
[230] P *Charles River Bridge*, 461.
[231] *Proprietors of Charles River Bridge,* 7 Pick. at 422.

to be disputed, that a charter granted by a state to a company incorporated to make a road or canal, where the funds for the work are provided by individuals, is a contract on the part of the state, and the public cannot by subsequent legislation, alter the terms of the charter."[232]

Yet while Taney did not challenge the Charles River Bridge Corporation's claim that its nature was essentially private, he was sympathetic to the argument by William Wirt that a corporate charter must be construed favorably to the public. This was in contrast to the common law rule of construction, in which ambiguous contract terms were to be construed in favor of the grantee. "While the rights of private property are sacredly guarded," Taney explained, "we must not forget, that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation."[233] The proper rule of construction was more than just a dry legal point – it posed heavy consequences "not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist."[234] To construe ambiguous charter terms against the interests of the public would be to constrain "the object and end of all government," which was "to promote the happiness and prosperity of the community by which it is established."[235]

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[231] Austin, "Free Bridge"; "The Traveller: Free Bridge," *American Traveller*, March 27, 1827.

[232] The question regarded several New Jersey transportation companies' assertion that their charter guaranteed them the right to monopolize traffic over certain routes. R. B. Taney, "The Opinion of Mr. Taney," *Niles Weekly Register*, vol. 45 (Baltimore, 1833), 151. Justice Henry Baldwin, however, devoted the entirety of his concurrence to the "all-important" question of "whether a charter to a corporation, is a contract within the tenth section of the first article of the constitution." Concurrence (Baldwin) (published separately in *Baldwin's Constitutional Views*, p. 134-169), 136. Ultimately, Baldwin concluded, the contract clause did apply to corporate charters, and the reason again was the aggregate nature of the corporation: "The persons of the members of corporations are on the same footing of protection as other persons, and their corporate property secured by the same laws which protect that of individuals." *Baldwin's Constitutional Views*, 137. Baldwin, however, was primarily concerned with the effect of a contrary holding on corporations of a non-business character; if a state could revoke one aspect of its charter with a corporation, "there is no principle of law, or provision of the constitution, that can save the charter of a borough, a city, a church, or a college, that will not equally save any other." *Baldwin's Constitutional Views*, 138. Baldwin therefore declined to distinguish between the allegedly "public" purpose of corporations chartered to effect internal improvements versus the purposes of other corporations.

[233] *Charles River Bridge*, 36 U.S. at 548.

[234] *Charles River Bridge*, 536.

[235] *Charles River Bridge*, 547.

Justice Taney's opinion in the *Charles River Bridge* case has sometimes been dismissed as the product of his Jacksonian political ties and his partiality towards entrepreneurs.[236] It has also been characterized as shifting legal doctrine "from the strictest protection of contract property rights towards a new emphasis on the welfare of the community."[237] Yet Taney's approach to the questions presented in the case in fact stemmed from a political philosophy based on a robust understanding of popular sovereignty, as well as a commitment to an older order that prioritized public welfare over newer claims of vested private rights – a philosophy he shared with supporters of the free bridge movement, which was happening concurrently.[238] Taney's writings as an official in the Jackson administration reveal the basis of this political philosophy and explain his willingness to limit the charter rights of corporations when they conflicted with the public interest.[239] As Attorney General, Taney had concluded that the New Jersey legislature did not have the ability to grant an monopoly to a canal company, on the grounds that to do so overstepped the legislature's delegated power. The legislature was "the agent of the sovereign power," the people, "and when it steps beyond the limits of its authority, its acts are void and do not bind the people by whom it was chosen."[240] Such a non-competition agreement was clearly opposed to the public welfare, as it would deprive the people of New Jersey "of the power of prosecuting such works of internal improvements as they may deem necessary to advance their interest and promote the prosperity of the state."[241]

[236] Hovenkamp, *Enterprise and American Law*, 110.
[237] Smith, *Roger B. Taney*, 110.
[238] Howe, *What Hath God Wrought*, 443. Even Howe however sees Taney's opinion as equally "a vindication" of economic development. See also Novak, *People's Welfare*.
[239] Smith, *Roger B. Taney*.
[240] Taney, "The Opinion of Mr. Taney," 151.
[241] Taney, "The Opinion of Mr. Taney," 151.

Taney's message to Congress as Secretary of Treasury regarding withdrawal of the federal deposits from the Bank of the United States also reflected the free bridge supporters' concerns about the nature of the corporation and the threat that corporate aggregations of wealth posed to American democracy. Taney argued that the Bank "was created to be the agent of the public; to be employed for the benefit of the people," and that "the peculiar privileges and means of private emolument, given to it by the act of incorporation, were intended as rewards for the services it was expected to perform."[242] Yet the Bank had superseded this mandate and become a private, political force. Small bank corporations, Taney emphasized, did not pose this risk; they were "managed by persons who reside in the midst of the people who are to be immediately affected by their measures; and they cannot be insensible or indifferent to the opinions and peculiar interests of those by whom they are daily surrounded, and with whom they are constantly associated."[243] On the other hand, a corporation as large as the Bank of the United States, owned by an elite group of wealthy American and foreign shareholders, did not possess this community accountability. The existence of "such a powerful moneyed monopoly" was "dangerous to the liberties of the people, and to the purity of our political institutions."[244] As Treasury Secretary, Taney emphasized, he had a statutory right to act in the public interest, and the public interest demanded that federal funds not go to aid a corporation that benefited a small class of wealthy people at the expense of the public.[245]

The distinction between the Bank of the United States and local banks was the same drawn by free bridge proponents when voicing their support of the Warren Bridge over the elite, wealthy Charles River Bridge Corporation. One was the vehicle of the wealthy elite, disconnected from the

[242] "Removal of Public Deposites [sic], Letter from the Secretary of the Treasury," Dec. 4, 1833, 12.
[243] "Removal of Public Deposites," 20.
[244] "Removal of Public Deposites," 4.
[245] "Removal of Public Deposites," 2.

needs of the community, and the other was embedded in the local community and sensitive to the public's interest. Reading Taney's Attorney General opinions in the context of the free bridge movement shows that underlying both was a belief that the corporation was a public servant, not a private profit-making entity, and that state control of corporations were necessary to protect democratic government from the threat of shareholder aristocracy.

These same concerns are present in Taney's *Charles River Bridge* opinion. Emphasizing the threat corporate monopolies posed to popular sovereignty, Taney cited an English case, *Proprietors of the Stourbridge Canal v. Wheely*, to support the claim that corporate charters should be read narrowly. The charter, that decision held, was "a bargain between a company of adventurers and the public," and "any ambiguity in the terms of the contract, must operate against the adventurers, and in favor of the public."[246] It "would present a singular spectacle," Taney wrote, "if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies," the Supreme Court of the United States "should be found enlarging these privileges by implication; and construing a statute more unfavorably to the public, and to the rights of community, than would be done in a like case in an English court of justice."[247] The United States, after all, was a democracy, and it would destroy popular government "if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation," and those powers "transferred to the hands of privileged corporations."[248]

Taney also expressed consternation at the audacity of the Charles River Bridge Corporation in claiming an implied right to monopoly power. Warren Bridge's argument that the legislature had the power to override corporate charter rights in the public interest was grounded

[246] *Charles River Bridge*, 36 U.S. at 544 (quoting *Proprietors of the Stourbridge Canal v. Wheely*).
[247] *Charles River Bridge*, 545-46.
[248] *Charles River Bridge*, 548.

in historical practice. Prior to this case, Warren Bridge's lawyers pointed out, states routinely chartered new corporations that competed with and even effectively destroyed previously chartered companies or franchises.[249] As the Massachusetts Senate Report on Roads and Bridges noted, commenting on the case in 1833, "until the charter of the Warren Bridge, the right of the Legislature to make such grants has been deemed too clear to be made the ground of controversy before any judicial tribunal."[250] The *American Traveller* derided the Charles River Bridge Corporation's claim to exclusive rights: "The spectre of *vested rights* which the legal necromancers have raised from the Tombs of the dark ages, provoke more ridicule than they occasion terror."[251] In his oral argument, Warren Bridge's lawyer Samuel Greenleaf offered a list of ferries and turnpikes whose businesses had been impaired or even destroyed by the subsequent chartering of competing bridges, canals, turnpikes, and railroads.[252] Furthermore, the question of the legislature's ability to charter competing corporations had been routinely affirmed. For instance, in 1807, when the West Boston Bridge petitioned against the construction of the Canal Bridge, the Joint Legislative Committee reported that after examining the charters of the extant bridges, and reflecting on "the pretended conflicting rights," the Committee "can discern nothing in the said grants or the supposed rights of other Corporations, or in the principles of Justice and equity, that can be construed into an abridgement of the power of the Legislature to authorize the erection of any other Bridge."[253]

[249] Charles River Bridge vs. Warren Bridge, Arguments of Counsel, Greenleaf's Memoranda, Harvard Law Library Special Collections.
[250] Austin, *Report of the Committee on Roads and Bridges*, 15.
[251] Equal Rights, "Free Bridge," *American Traveller*, March 23, 1827.
[252] Charles River Bridge vs. Warren Bridge, Arguments of Counsel, Greenleaf's Memoranda, Other Papers; Harvard Law Library Special Collections.
[253] *Report by Joint Committee on petition by Andrew Craigie, Christopher Gore and others to build Canal Bridge* (February 1807), Charles River Bridge v. Warren Bridge. Records, 1828, Harvard Law Library Special Collections (emphasis in original).

Although the legislature's power to authorize competing bridges was widely accepted, it appears that new bridge corporations routinely provided formal or informal compensation to old bridge corporations for the loss of revenue. The record in the Charles River Bridge case reveals numerous instances of such transactions. The Charles River Bridge Corporation itself received an extension of its charter to seventy years as compensation when the West Boston Bridge was built. When the West Boston Bridge was later challenged by the newly-chartered Canal Bridge, the legislature included a provision that the Canal Bridge proprietors should pay the West Boston Bridge $333.33 per annum in compensation.[254] Similarly, when the Chelsea Bridge, which competed with the Malden Bridge, was constructed, "the Proprietors of Chelsea Bridge agreed to let the Proprietors of Malden Bridge become part owners in Chelsea Bridge."[255] The Malden Bridge proprietors "received this interest in Chelsea Bridge as an indemnity for the injury which the[y] might sustain by it."[256] The South Boston Free Bridge, although it reduced the profits of the nearby South Boston Bridge, did not face the same objections by the older bridge's proprietors, as "it so happened, that many of the Proprietors of the old bridge, were large owners of lands, situate [sic] near the new bridge, and would probably gain more by the rise of their lands, than they would lose by the lessened value of their shares in the old bridge."[257] Yet in other instances, businesses were ruined by newly-chartered corporations and no compensation was made. The Massachusetts Supreme Judicial Court noted several such instances; most of these involved ferries that were put out of business by the construction of new bridges.[258] Notably, in none of these cases was indemnification legally required. As the Massachusetts House Committee pointed out in its

[254] *Proprietors of Charles River Bridge*, 7 Pick. at 389.
[255] "Deposition of Jacob Forster," Charles River Bridge v. Warren Bridge Records, 1828, Harvard Law Library Special Collections
[256] Deposition of Thomas Williams, Charles River Bridge v. Warren Bridge Records, 1828, Harvard Law Library Special Collections.
[257] *Review of the Case of the Free Bridge Between Boston and Charlestown* (Boston: Dutton and Wentworth, Printers, 1827), 46.
[258] *Proprietors of Charles River Bridge*, 7 Pick. at 396-97.

1792 Report, the extension of the Charles River Bridge's charter in response to the chartering of the West Boston Bridge was given purely out of acknowledgment of the "magnitude and hazard" of the original enterprise, not because the Charles River Bridge company had any "exclusive grant of the right to build over the waters of that river."[259]

Pointing to this long history of legislative action to charter competing corporations, Taney commented that "corporations have, in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling," yet "in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the state."[260] Contrary to the age-old "practice and usage of almost every state in the Union," this case presented "the first instance in which such an implied contract has been contended for."[261] The Court, he held, was not willing to veer from historical practice so drastically.[262] By holding that the contract clause did apply to the charters of internal improvement corporations, but that such charters should be construed in favor of the public, Taney imposed an important qualification on the constitutional rights of corporations recognized in *Dartmouth*.

Taney's opinion, along with the arguments made by the lawyers in the case, reveals that the concerns that motivated the free bridge movement played a key role in shaping how the conflict was framed. This was not simply a fight between two corporations in which the Court for political and policy reasons denied the protection of traditional common law rights in favor of economic advancement. Rather, the case was a fundamental contestation over the nature of democratic governance and the right of the people to control their economic destiny. Were the people

[259] Report of the Committee of the House in consideration of the Petition of Francis Dana and Oliver Wendel to charter the West Boston Bridge, Greenleaf Papers, Harvard Law Library Special Collections.
[260] *Charles River Bridge*, 36 U.S. at 551-52.
[261] *Charles River Bridge*, 551.
[262] *Charles River Bridge*, 552-53.

sovereign over corporations that they, via their representatives, had created to promote the public welfare, or could such corporations defy the public interest by claiming constitutional rights? Furthermore, the rights claimed by the Charles River Bridge Corporation were not age-old common law rights, but novel claims of protection that challenged states' historical power to charter competing corporations when in the public interest. In conjunction with the trustees of Dartmouth College, the Charles River Bridge Corporation adopted a new strategy: invoking the federal Constitution as a shield against public control.

Conclusion

In the short term, the *Charles River Bridge* decision was seen as a victory for the people of Massachusetts and supporters of the free bridge movement. The *Boston Advocate*, a pro-Warren Bridge paper, crowed that the decision was "a glorious triumph of free principles over monopoly; of enlightened liberality over bigoted exclusiveness; of the rights of the many over the usurpations of the few." [263] In the years in which the case was pending, the Massachusetts Legislature had continually extended Warren Bridge's right to take tolls, in order to store up funds for a potential damages payment in case the Warren Bridge Corporation lost the suit.[264] On March 2, 1836, however, it allowed the bridge to become free.[265] At midnight "the toll-sign was removed and a hundred guns fired, which salute was answered from Cambridge, Medford and West

[263] "Warren Bridge Declared Free by the Supreme Court," *New Bedford Gazette and Courier*, February 20, 1837.
[264] "General Court," *Essex Gazette*, March 8, 1834; "There was a great hubbub," *The Gloucester Democrat*, March 31, 1835; George A Tufts, *Report of the Special Joint Committee on the Subject of the Warren Bridge* (March 18, 1835), 12; "Warren Bridge Now Free," *American Traveler*, November 6, 1835.
[265] "Warren Bridge is Free!" *Boston Courier*, March 3, 1836.

Cambridge."[266] A "numerous procession, consisting of all sorts of vehicles, filled with passengers from Charlestown, Medford, and other towns in the vicinity, passed up and down State street, making the welkin ring with their obstreperous huzzas."[267] The full benefit of a free bridge on the economic life of the community could finally be realized; as the *Boston Commercial Gazette* extolled, "It cannot but be obvious to everyone, that the opening of Warren Bridge, as a free avenue… will have a most beneficial influence, not only upon the business and prospects of this city – but upon every town in the neighborhood, particularly Charlestown."[268]

The passage into freedom of the Warren Bridge was celebrated as a victory of the people over corporations and aristocracy. The triumph of the free bridge movement, the *Boston Advocate* proclaimed, heralded "a glorious *era* in the history of equal rights," for it had "proved that corporations are not immortal or invincible" and struck a "first great blow… at the doctrine of everlasting vested wrongs."[269] Announced the *Gloucester Democrat,* "The many have triumphed over the few" who had attempted "to hold in bondage a large portion of the community, as tributary slaves."[270] The paper reported a celebration in Charlestown in which toasts were given to Warren Bridge Corporation President John Skinner and others: "God bless them, and may all the people say, Amen!"[271] D. Bryant, a representative from Bridgewater, applauded the "Warren Bridge *Corporation* – the only *corporation* that ever died without a struggle."[272] Warren Bridge's lawyer and free bridge activist William Austin even went so far as to pen a fictional story about the fight between a "poor widow" and the Charles River Bridge Corporation, in which the widow is plagued

[266] "Warren Bridge," *American Traveller*, March 4, 1836,
[267] "Freedom of Warren Bridge," *Norfolk Advertiser*, March 5, 1836.
[268] "Improvements in the Vicinity," *Boston Commercial Gazette*, March 24, 1836.
[269] Untitled, *The Gloucester Democrat*, March 4, 1836.
[270] "Warren Bridge," *The Gloucester Democrat*, March 14, 1836.
[271] "Warren Bridge," *The Gloucester Democrat*, March 14, 1836.
[272] "Warren Bridge," *The Gloucester Democrat*, March 14, 1836.

to death by the Corporation's attempt to seize her property to construct their bridge; before she dies, the widow prophesies: "The time is coming when there shall be no more passing over that bridge… And it shall be desolate… The voice of prosperity shall echo and re-echo across the river from all the hills of Boston, even to the heights of Charlestown…; but that spot shall become a solitude." [273] Indeed, Austin's vision was accurate; the Charles River Bridge ceased operation in 1836, and in 1841 was purchased by the state for $25,000.[274]

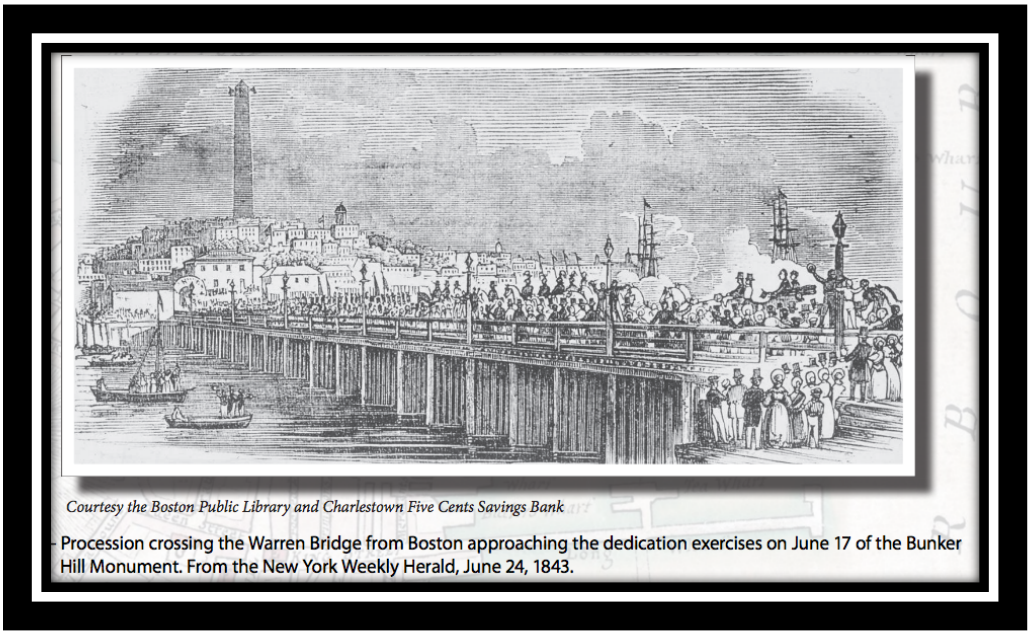

Image 4: *Procession crossing the Warren Bridge from Boston.*

Yet although the Warren Bridge Corporation prevailed, the decision in the long term proved a boon for corporate litigants claiming constitutional rights. *Charles River Bridge v. Warren*

[273] William Austin, "Martha Gardner or Moral Reaction," in *William Austin: The Creator of Peter Rugg*, edited by Walter Austin (Boston: Marshall Jones Company, 1925): 257-269, 268
[274] *The Ferry, The Charles-River Bridge and The Charlestown Bridge, Historical Statement Prepared for the Boston Transit Commission By Its Chairman* (Boston: Rockwell and Churchill Press, 1899), 9-10.

Bridge solidified the holding of *Dartmouth College* that corporate charters were contracts protected by the contract clause of the Constitution, and applied the *Dartmouth* holding to an internal improvement corporation for the first time. In so doing, the decision laid the groundwork for a new vision of the corporation in American law.

Free bridge supporters and the Warren Bridge's lawyers evinced the common law view of the corporation as a servant of the public whose primary purpose was to promote the public good. Charles River Bridge advocates, on the other hand, had championed an alternative vision – the corporation as a private entity that owed no particular duty to the public aside from those specifically laid out in the charter, driven not by the public welfare but the pecuniary interests of its shareholders. By holding that internal improvement corporations did have constitutionally-protected contract rights, but that these rights should be interpreted narrowly where they conflicted with the public interest, Justice Taney attempted to walk the line between these competing conceptions of the corporation. Although adhering to *Dartmouth*'s precedent that the corporate charter was a constitutionally-protected contract, Taney carved out the caveat that corporate charter terms should be interpreted more narrowly than the terms of private contracts. Yet by allowing corporations to claim constitutional contract rights at all, the Court endorsed a vision of the internal improvement corporation not as a servant of the public, but as a private, rights-bearing entity whose interests were potentially in conflict with the public welfare, and whose rights were protected from state regulation by the federal constitution. The rights of the public were now pitted against the rights of the corporation, and the Supreme Court was the arbiter of whose rights trumped in any given conflict.

Charles River Bridge was at the vanguard of a transformation in the conception of the nature of the corporation. The same treatise that a decade earlier had proclaimed that the primary

purpose of the corporation was to serve the public, soon adopted Webster's view. In their second edition, Angell and Ames wrote that with regards to bridges, canals, and banks, among other "like corporations," "the acts done by them are done with a view to their own interest, and if thereby they incidentally promote that of the public, it cannot reasonably be supposed they do it from any spirit of liberality."[275] The "sole object" of these "assentially [sic] private" corporations was "to derive profit."[276] By extending the protection of the contract clause to internal improvement corporations, the *Charles River Bridge* decision opened the door to future claims of corporate constitutional rights, based on the claim that corporations were not public servants, but private, profit-making actors, whose interests must be weighed against those of the public.

[275] Joseph K. Angell and Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* (Boston: Little and Brown, 1846) (3rd ed.), 28.
[276] Joseph K. Angell and Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* (Boston: Little and Brown, 1846) (3rd ed.), 29.

CHAPTER TWO

Carpet-Bagging Corporations: Insurance, Slavery, and the Privileges and Immunities of Citizenship

In February 1867, members of the Board of Fire Underwriters gathered for dinner at Delmonico's steakhouse in New York City.[1] The recently-formed association of fire insurance companies had just celebrated their first annual convention, and the insurance executives were giddy with the possibilities of a unified organization. Mark Howard of the Hartford Fire Insurance Company raised a toast to their new collaboration: "Without a combination of this kind, Insurance Companies would be in the position of Kilkenny cats. They would devour each other, and leave nothing but the tips of their tails."[2] As the audience laughed, William Pitt Palmer, introduced as the "poet-laureate" of the underwriting profession, recited an original poem, "The Poetry of Fire Insurance":

> *But who the poetical rapture can tell,*
> *Of a President, roused by the City Hall bell*
> *To some warehouse in flames, as he chuckles: 'O-ho!'*
> *Our policy there expired some hours ago!...*
> *And the poor wretch whose homestead the Fire-Fiend devours,*
> *Would give the whole lot for some five lines of ours…*
> *He has but to flourish our two-leaved brochure,*
> *Whose gist is the three words, 'DO HEREBY INSURE,'*
> *And, presto! the demon of ruin takes flight*
> *Like a late ghost caught napping by morn's sudden light.*[3]

[1] "Annual Convention of Board of Fire Underwriters," *The United States Insurance Gazette* 24, no. 139 (Nov. 1866-May 1867), 237.
[2] "Annual Convention of Board of Fire Underwriters," 237.
[3] "Annual Convention of Board of Fire Underwriters," 237.

The festivities continued to a late hour.

In the years immediately following the Civil War, executives of the major East Coast fire and life insurance corporations formed national boards to address a problem that had vexed insurance companies for decades: protectionist state regulations that hamstrung the ability of out-of-state ("foreign") insurance corporations to operate within their borders. These laws required foreign insurance corporations to submit to burdensome deposits, licensing fees, and reporting requirements that did not apply to home companies. Some state restrictions were so severe that they served "to drive Eastern and foreign insurance companies out of the market" altogether.[4]

Foreign insurance companies tried various tactics over the years to combat state protectionist regulation. In advertising and internal industry publications, they promoted a vision of insurance companies as responsible, paternal protectors of the local community. They also initiated legal cases, arguing that protectionist laws violated the privileges and immunities clause of Article IV of the Constitution, which required states to afford the same "privileges and immunities" to "citizens of different states" inside their borders.[5] Insurance companies claimed that they were "citizens" who were entitled to the attendant privileges and immunities of citizenship, one of which was to do business across state lines on the same terms as domestic companies. Yet this argument consistently failed in state and federal courts, which were unwilling to attribute citizenship to corporations in this particular context.

By the end of the Civil War, legal precedent limiting foreign corporations' rights, along with the patchwork of onerous state regulation with which insurance companies had to negotiate, prompted Eastern insurance executives to think creatively about other strategies. In addition to

[4] "Legislation Against Insurance Companies," *San Francisco Evening Bulletin*, November 11, 1865.
[5] U.S. Const. Art. IV § 2.

lobbying state legislatures and Congress, associations of insurance companies determined to initiate a Supreme Court test case to overturn prior precedent limiting the rights of foreign corporations. The case that arrived at the high court was *Paul v. Virginia*, in which the Court definitively rejected the insurance companies' claims.[6] *Paul* would become a "celebrated case…, famous the world over" for its holding that corporations were not citizens and could not claim the constitutional privileges and immunities of citizenship.[7]

This is a story of failure. Corporations' claims to citizenship provide the sole instance in which corporations were unsuccessful in an otherwise accelerating trend towards expanding corporate constitutional rights in the nineteenth century. *Paul* was the culmination of this half-century of litigation, the final nail in the coffin of corporate citizenship claims. Yet there was ample precedent for courts to have gone the other way. Such precedent included not only the original intent of the privileges and immunities clause, but the fact that corporations were already recognized as "citizens" for the purposes of federal jurisdiction. So why did the Court refuse to recognize corporate citizenship under Article IV?

The answer lies in the political, economic, and social forces at play in the backdrop of the corporate privileges and immunities cases. First was a widespread perception of insurance corporations, in particular, not as arms-length market actors but as members of the household and community. Second was the context of interstate economic relations in an increasingly fraught political environment in which vitriolic sectionalist sentiment was widespread. The third factor was the implications of corporate citizenship cases for the law of slavery.

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[6] Paul v. State of Virginia, 75 U.S. 168 (1868). In addition to the privileges and immunities claim, another last-minute, novel argument made in the case was that insurance was commerce subject to Congress's commerce power, and so outside the purview of state regulation.

[7] *Insurance Age* (New York: Matthew Griffin, Publisher, 1908), 421. *Paul v. Virginia* also held that insurance was not commerce, creating a bizarre outlier in an accelerating trend to view the commerce power as applying to almost any activity that was remotely economic in nature.

Cases involving the interstate movement of enslaved persons, both fugitives and those transported by their enslavers, raised strikingly similar questions as those involving the interstate operations of corporations. Foreign corporation cases involved whether a state must recognize a corporation chartered in another state, framed as whether the citizens who composed the corporation had a constitutional right to do business as a corporation across state lines. Transitory slave cases centered on whether states could be compelled to recognize the law of slavery of other states; specifically, whether a slaveowner had a constitutionally-protected property right in an enslaved person even when in a free state. These parallel sets of cases, heard by the same state and federal judges over the same period of time, presented serious challenges to states' control over their internal economic and social orders and threatened the delicate balance between state sovereignty and federalism.

The doctrine established by these cases developed in tandem and intersected at several defining moments. In both sets of cases, courts interpreted the "privileges and immunities of citizens" narrowly to apply to only "fundamental" or "constitutional" rights, not to state-created privileges like incorporation or slave ownership. However, emphasizing the need for national unity in a fraught political environment, the Supreme Court adapted the international law of comity to interstate relations, holding that states would be presumed to recognize incorporated or master-slave status bestowed by sister states unless they affirmatively declined to do so. This doctrine of limited privileges and immunities, complemented by the presumption of comity, was set forth in two seminal cases, *Bank of Augusta v. Earle* (1848) and *Prigg v. Pennsylvania* (1852), involving a foreign corporation and fugitive slave, respectively. The doctrine of interstate comity articulated in these cases, especially in *Bank of Augusta*, provided important precedent for cases involving both foreign corporations and interstate slavery. Developing in parallel, foreign corporation and transitory

slave cases converged in two consequential cases in the courts' interpretation of interstate relations: Justice Benjamin Curtis's dissent in *Dred Scott v. Sanford* (1857), which relied on the definition of comity set forth in *Bank of Augusta*, and the Supreme Court's opinion in *Paul v. Virginia*, which invoked the slave transit cases succeeding *Prigg*.

Placing the fiercely-contested issues of interstate corporations and interstate slavery side by side reveals how courts constrained the meaning of the privileges and immunities of citizenship and developed the doctrine of comity in order to carefully mediate between state sovereignty and federalism in two contentious, concurrent areas of constitutional litigation. In conjunction, these cases established precedent that influenced not only the question of corporate citizenship, but the development of constitutional rights-claiming for individual persons as well.[8] Cases involving corporate citizenship elucidated doctrine that was subsequently invoked in cases involving the rights of slave owners over enslaved persons; because the two sets of cases presented similar questions of state sovereignty and interstate relations, the same doctrine could be used to address both. Understanding this connection between corporate citizenship and slaveowner rights highlights the imbrication of corporate rights-claiming with other areas of rights-claiming in the nineteenth century, particularly regarding race. It also reveals the constitutive role of race even in seemingly-unrelated areas of American law, including corporate personhood.

Illuminating the role of corporate Article IV cases and cases involving slavery in the development of interstate comity doctrine also sheds light on the nature of the corporation in the antebellum period. By determining that incorporation, like enslavement, was a state-created status

[8] This is not to argue that without cases involving interstate corporations, the law of comity as it was crafted in slavery cases would not have been developed. In all likelihood, given the precedent of *Somerset v. Stewart*, the Supreme Court would have formulated the same doctrine even in the absence of the corporate cases. The notable point here is that whether or not the law *could* have developed without the corporate cases, the corporate cases as it were *did* play an important role in creating precedent that subsequently governed cases involving not just corporations but individuals – enslaved persons and slaveholders – as well.

rather than a right or privilege of citizenship, the Supreme Court drew on a long tradition of viewing the corporation as embedded in local communities with particular public duties and rights distinct from those of individual market actors. This conception of corporations as public servants was promoted by insurance companies, which portrayed themselves as members of the patriarchal household and community, not as profit-seeking entities or groups of private individuals. The focus on the public service nature of the corporation supported the Court's determination that incorporation was a special status created by the state to promote the public welfare, not an economic right available to any citizen.

"Look to the Men Who Govern It": Paternal Insurance Companies

Insurance companies led the charge on Article IV challenges to state legislation restricting out of state corporations. Insurance was a vital part of the emerging economy of the United States in the early decades of the republic.[9] Without insurance, trade, especially by ship, was incredibly risky, and marine insurance soon became a necessary complement to commerce.[10] As cities grew quickly, housing both people and goods in densely-packed wooden buildings, the risk of fire also skyrocketed, prompting an expansion of fire insurance.[11] Life insurance was the last to emerge, gaining popularity mid-century and escalating during and after the Civil War.[12]

[9] Robert E. Wright and Christopher Kingston, "Corporate Insurers in Antebellum America," *The Business History Review* 86, no. 3 (Autumn 2012), 448.
[10] Jonathan Levy, *Freaks of Fortune: The Emerging World of Capitalism and Risk in America* (Cambridge: Harvard University Press, 2014), 29; Hannah Farber, "The Political Economy of Marine Insurance and the Making of the United States," *The William and Mary Quarterly* 77, no. 4 (October 2020): 581-612, 600-01.
[11] Farber, "The Political Economy of Marine Insurance," 599.
[12] Sharon Murphy, *Investing in Life: Insurance in Antebellum America* (Baltimore: Johns Hopkins University Press, 2010), 8.

Insurance companies had a unique interest in broadening their customer base to encompass as wide a geographical scope as possible. The broader the base, the less likely a disaster in one locality would wipe out a company's capital.[13] This concern prompted insurance companies to expand their operations to other states even in the early years of the industry, in a way that was not present for most other types of corporations.[14] In the context of the uneven economic development of the different states of the Union, however, the interstate expansion of insurance corporations raised concern among states with less robust financial institutions, which feared that companies chartered in wealthy states would dominate regional markets and undermine local competitors.[15]

The conflict over out-of-state insurance companies first arose in the late 1820s, when insurance corporations from the financial hub of Hartford, Connecticut branched out into neighboring states.[16] Massachusetts responded by passing the first regulations restricting the operation for foreign insurance companies within their borders, in 1827, and the other New England states and New York followed.[17] As East Coast cities prospered and developed their own

[13] Murphy, *Investing in Life*, 120. A Louisiana newspaper explained, "It is within the compass of probability that a single fire, consuming one square of central stores, or a cotton press and its contents, would exhaust the whole capital stock of these domestic companies, and give a signal proof of the great advantage which would have accrued by putting some of these risks upon the capital of foreign companies, owned elsewhere." "Foreign Insurance Agencies," *The Daily Picayune*, February 28, 1852, 2; "Foreign Agencies," *The Baltimore Sun*, March 20, 1839.

[14] This concern was not present for banks, as most state charters prohibited bank corporations from establishing branches both within and outside the state. Jill M. Hendrickson, "The Interstate Banking Debate: A Historical Perspective," *Academy of Banking Studies Journal* 9, no. 2 (2010): 95-130, 95, 98. Branch banking raised concerns about the creation of a monopolistic banking system. *Id*. at 102. The federally-chartered Bank of the United States, however, was permitted to establish branch offices in different states, one of the reasons it was considered a monopoly and a threat to democracy and local financial industries. *Id*. at 98-99. Yet banks and insurance companies were also interconnected enterprises; insurance companies composed the largest domestic corporate investors in banks, and the same directors often sat on the boards of both banks and insurance companies. Farber, "The Political Economy of Marine Insurance," 603.

[15] Murphy, *Investing in Life*, 110.

[16] Peter R. Nehemkis Jr., "Paul v. Virginia: The Need for Re-Examination," *Georgetown Law Journal* 27, no. 5 (1939): 519-535, 523-24.

[17] Nehemkis, "Paul v. Virginia," 523. Massachusetts was followed by Pennsylvania (1829), Rhode Island (pre-1830), Vermont (pre-1830), New York (1830).

financial industries, corporations chartered in those metropolitan hubs attempted to increase their customer base down the Atlantic and out towards the Middle West. States in those regions, lacking the financial infrastructure of the old New England colonies, began to pass restrictive laws themselves.[18] These laws typically included such provisions as requiring companies to deposit a certain sum with the state treasurer; show proof of sufficient capitalization; purchase state licenses; pay high taxes; and/or submit to various reporting requirements.[19]

Image 5: *Refugees from the Burning Crosby Opera House in Chicago, 1871.*

Proponents of restrictions on foreign insurance corporations argued that unlike domestic companies, foreign companies were disconnected both socially and economically from local communities and therefore could not be trusted to act in the public welfare. A "push"[20] for the

[18] For instance, LA (1835), VA (1842); PA (1840), ME (1843).
[19] Murphy, *Investing in Life*, 117-19.
[20] A "push" was a newspaper endorsement of an insurance company.

Vermont Mutual Fire Insurance Company assured the readers of the *Bellows Falls Gazette* that the company "is not a stock-jobbing, speculating institution, similar to some foreign Insurance Companies that we know of."[21] "The officers of the institutions do not reside here," an editorial in the *Charleston Courier* explained, and so "their characters are known only by report."[22] In contrast, home insurance companies proudly proclaimed their local status in their solicitations for business. As a push for one Ohio company reminded the readers of the *Wooster Republican*, "During these crashing times among foreign insurance Companies, it behooves citizens to insure in safe, reliable and trusty home Companies."[23]

Sectionalism played a large role in opposition to foreign insurance companies. At a commercial convention in Charleston, attendees advocated for the creation of a Southern Insurance Company, to "meet those wants of the public, which are now supplied by foreign companies. It would be the means of retaining large sums of money now sent to foreign companies in the shape of premiums."[24] They admonished, "It is the duty of every business man to patronize those companies already established in the South; they are conducted by our own business men, whose reputations are subject to our criticism and amendable to our own laws."[25] A Texas paper advocated a restrictive law on the grounds that "[w]e need such a law to protect our people from frauds constantly practiced by Northern companies."[26] This criticism could go both ways; an editorial in the New York *Evening Post* lambasted a proposed bill to tax foreign insurance companies

[21] "Remarks," *Bellows Falls Gazette*, April 4, 1851.
[22] B.F. Hunt, "For the Courier," *Charleston Courier,* June 6, 1838.
[23] *Wooster Republican*, September 21, 1854.
[24] Southerner, "Commercial Convention," *Charleston Courier*, April 7, 1854
[25] Southerner, "Commercial Convention," *Charleston Courier*, April 7, 1854.
[26] *Texas State Gazette*, February 21, 1857.

as "a specimen of border-ruffian legislation" more reflective of Southern state legislatures than enlightened Northern ones.[27]

Proponents of restrictive regulation portrayed foreign insurance corporations as profit-seeking market actors that could not be trusted. They argued that strict regulation was necessary to protect the public: deposits made with the state treasurer guaranteed that their citizens would be reimbursed for their losses without the burden of having to litigate and attach assets located in a far-off state, while reporting requirements allowed the public to identify and avoid rapacious, poorly-run corporations. Without these measures, the *Charleston Courier* protested, "what security is there that these foreign offices are solvent?... an agent and his writing desk is all that we see."[28] There was no telling whether an out-of-state company "has its capital vested in Wild Cats or Bowie Knives, or such like hard currency."[29]

In contrast to unknown, untrustworthy foreign insurance corporations, home insurance companies emphasized the identities of their presidents and board of directors as upstanding, responsible, community-minded men. Exhorting its readers to examine a company carefully before insuring, a small-town Pennsylvania paper recommended its readers to "[l]ook to the *men* who govern it, as well as to the *nominal capital paid in* and proclaimed as the basis of their operation," for "[s]ound judgement and honesty of purpose are of far more importance, when added to mercantile experience, on the part of underwriters, than mere *capital paid in*; and policy holders should look well to the standing of the Directors in the community, as a guarantee for the faithful performance of contracts as underwriters."[30] Although admitting that the local company "cannot

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[27] "Dark Lantern Statesmanship at Albany," *The Evening Post*, February 23, 1857, 2.
[28] B.F. Hunt, "For the Courier," *Charleston Courier*, June 6, 1838.
[29] Quere?, "Foreign Insurance Companies," *Charleston Courier*, March 31, 1840.
[30] "Insurance Companies," *The Washington Examiner*, October 27, 1855 (emphasis in original) (quoting the *New York Courier and Enquirer*).

boast of hundreds of thousands of capital," the paper proclaimed, "SAMUEL HAZLETT, Esq., is President."[31] The endorsement concluded by warning, "When persons go abroad to insure their property, with a company like this at home, they can hardly expect to be pitied should they be swindled in the operation."[32] A letter to the editor in a D.C. paper similarly contended that although a new local mutual insurance corporation was "a company of modest pretensions," its directors would not "suffer any by comparison in point of talent, respectability, responsibility, and piety with the directors of any past, present, or future institution."[33] Endorsing a local company, the *Wisconsin Patriot* likewise focused on the reputation of the directors rather than the company's financial foundation: "It is a new company, it is true, having just been started, but if the reader will examine the names of the Directors, he will find among them such as cannot fail to give unlimited confidence in the enterprise."[34] A booster of one Philadelphia insurance company went so far as to boast that Benjamin Franklin was among the first directors of the company in 1752, and that although he did not do much as director, "Dr. Franklin's name was a sanction for *this* undertaking."[35] By associating the company with eminent members of the community, home insurance companies attributed the reputation and character of their officers to the companies themselves, substituting their status as gentleman for transparency about the companies' actual financial stability.

In response to these criticisms, foreign insurance companies hired upstanding local men – lawyers, local politicians, even judges – to serve as their agents.[36] These "honest and manly" agents

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[31] *Ibid*. (emphasis in original)
[32] *Ibid*. (emphasis in original)
[33] "Banking and Insurance," *Daily National Intelligencer*, December 28, 1855.
[34] "Wisconsin State Insurance Company," *The Weekly Wisconsin Patriot*, August 8, 1857, 3.
[35] "The Hon. Horace Binney's Address," *The United States Insurance Gazette and Magazine of Useful Knowledge* 3, no. 15 (1856): 129-165, 137 (emphasis in original).
[36] Murphy, *Investing in Life*, 59. This was not just window-dressing; foreign insurance companies faced concerns about the reputation, health, and solvency of potential customers, and relied on trustworthy agents who knew applicants to accurately assess the risk of insuring them.

embodied the corporation as a trusted member of the community.[37] For instance, the *Insurance Times* praised an agent of several New York and Connecticut insurance companies in Lafayette, Indiana for serving as a one-man "fire brigade," speeding to conflagrations in his self-financed fire engine and "big red fireman's hat" emblazoned with his initials. "In consideration of the great service to the public," the *Times* proclaimed, "Tom Underwood is recognized as a benefactor and a blessing… to every citizen and property-holder in Lafayette."[38] Insurance executives also took pains to portray themselves as gentlemen and to use their own status to vouch for the state of their companies. "I yet value my own character too highly to be interested in any bogus Insurance Company," protested James F. Babcock, board member of the City Fire Insurance Company of New Haven, in response to critical newspaper coverage.[39] Listing the names of the company's directors and stockholders, Babcock argued that the participation of such gentlemen "ought to satisfy the public, and doubtless will."[40]

Relying on their embodiment by "moral" and "honorable"[41] local gentlemen, both foreign and local insurance companies zealously portrayed themselves as paternal protectors of individual families and of the community at large.[42] Life insurance companies in particular were framed as substitute father figures, who took over the role of *pater familias* should the main provider pass away. As one advocate of life insurance contended, the business of insurance "is not at all a commercial enterprise undertaken for the purpose of profit," but a "moral" institution, intended "to alleviate…

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[37] Ezra, "Western Life Insurance Companies," *Insurance Times* 2, no. 1 (Jan. 1869): 64-65, 65.
[38] "Tom Underwood, A Sketch of a Zealous Agent," *Insurance Times* 2, no. 1 (Jan. 1869): 144-145, 144. Newspapers also praised insurance agents who evinced a moral compass even when the insurance companies themselves did not. The *Albany Journal* related one story in which an agent in Rhode Island unknowingly "took the agency of what turned out to be a bogus insurance company": "A poor man's house, insured for $400, was burned down. When he called for the money, just 13 cents were found in the company's vaults. When [the agent] learned this, he drew his own check for the amount, although in no way legally bound to do so." "A Noble Act," *Albany Journal*, July 2, 1858.
[39] James F. Babcock, "New Haven City Fire Insurance Company," *The Connecticut Courant*, February 2, 1856.
[40] James F. Babcock, "New Haven City Fire Insurance Company," *The Connecticut Courant*, February 2, 1856.
[41] "Bad Habits," *Insurance Times* 2, no. 1 (Jan. 1869): 58-59, 58.
[42] Murphy, *Investing in Life*, 109.

the sudden and distressing alternations of fortune that are unhappily so common in our community, to take away from families at least one pang caused by the death of a father, brother, or son on whom many were dependent, to promote family affection and to lessen family anxieties."[43] Life insurance, the *Insurance Times* praised, is "the aegis of our families. It is both father and mother to the orphan and to the helpless."[44] One company even named itself "the Widows' and Orphans' Mutual."[45] Foreign corporations especially drew on this imagery to argue that discriminatory laws were injurious to the deceased policyholder's family, characterizing such regulations as "a *wrong to widows and orphans* and to future generations."[46]

Insurance companies also claimed that by providing for families that would otherwise be cast into poverty, they benefitted the community at large by "generally diminish[ing] the number of calls upon public and private charity."[47] The *Insurance Monitor* proclaimed that insurance companies were "mutual aid societies, combinations of citizens to help each other."[48] Mutual insurance companies particularly had the appearance of a community project. Whereas in stock companies shareholders and consumers were separate, in mutual companies the consumers reaped the benefits of the company's success directly in the form of "dividends" applied as reductions to monthly premiums or as additional funds to be distributed upon death.[49] A proponent of life

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[43] "Life Insurance," *North American Review* 97, no. 221 (October 1863): 301-324, 303.
[44] "Watchman: What of the Night?" *Insurance Times* 2, no. 1 (Jan. 1869): 129.
[45] "Life Association of America," *Insurance Times* 2, no. 1 (Jan. 1869): 57.
[46] "Memorial of the Philadelphia Life Underwriters to the Senate and House of Representatives of Pennsylvania," *The United States Insurance Gazette* 28, no. 163 (1868-1869): 208-209, 208 (emphasis in original). Notably, insurance companies were active in removing the barriers coverture law posed to women who wished to purchase insurance, in order to encourage women to purchase policies on the lives of their husbands. Murphy, *Investing in Life*, Chp. 5.
[47] "Life Insurance," *North American Review*, 303. See Murphy, *Investing in Life*, 109.
[48] "National Insurance Department," in Nathaniel Tyler, *An Argument for A National Bureau of Insurance, Submitted to the Insurance Companies* (New York, 1879), 52 (reprinting an article from the *Insurance Monitor*).
[49] Murphy, *Investing in Life*, 168-69. Mutual companies were especially popular among middle class consumers as a complement to savings banks, since dividends could be distributed as rebates that lowered premium payments or added to the policy. Ibid., 167, 169, 175.

insurance argued that in a mutual company, "the insured constitute the company, its accumulations are theirs, its success is theirs."[50]

In their promotional materials, the identity of the insurance companies was merged with that of its directors or agents, who personified the corporation as a responsible patriarch and community leader. Emphasizing the familial and communal role of insurance companies minimized the profit-making aspect of the corporations as market actors, casting them instead as protectors of the household and local community. Yet foreign insurance companies also drew on the language of the free market and constitutional rights in their opposition to protectionist laws. They argued that the public welfare would be best served by competition between foreign and home companies on equal terms, so that the public could "insure with whatever companies offer the most advantageous terms of insurance."[51] A citizen of Wisconsin, opposing a bill to strictly regulate foreign insurance companies, complained that the real object of the legislation "is to protect our own Insurance Companies; that is, to give them a monopoly of the business; that is, to deprive our citizens of the free choice between different companies, and compel them to patronise [sic] those they have no confidence in."[52] The *Connecticut Courant*, advocating on behalf of the well-established Hartford companies, railed that restrictions on foreign insurance companies were "as effectual as the farmer's plan of ridding himself of rats, by setting his barn on fire. It will be the means of driving all foreign insurance from the State," which would "throw all the business into the hands of a few city companies" who would charge insurance "at any price those companies may designate."[53] The anti-monopoly argument of foreign insurance companies reflects public

[50] "Life Insurance," *North American Review*, 303. Conversely, its failure was also theirs. Mutual companies were also argued to be riskier than stock companies, as the dispersal of dividends depended on the companies' ability to pay anticipated death claims.
[51] *Merchants' Magazine and Commercial Review* 54-55, no. (1866): 146.
[52] J.Y.S., "Taxing Insurance Companies," *The Weekly Wisconsin Patriot*, March 12, 1859.
[53] "New York Insurance Law," *The Connecticut Courant*, February 16, 1856.

awareness that the profit-seeking aspect of corporations had the potential to overwhelm their chartered purpose to fulfill a public need. Foreign insurance companies invoked this fear to argue that free market competition promoted the public welfare, reconciling the economic goals of the corporation with its public duty. [54]

Image 6: *"Industrial Gems." Insurance companies continued to invoke paternal imagery through the late nineteenth century, as seen in this advertisement depicting the family who would be protected by the father's life insurance policy.*

In their advertising materials and internal industry publications, therefore, both domestic and foreign insurance companies invoked a vision of the corporation similar to that of Warren

[54] Even if home insurance companies genuinely intended to protect the public, proponents of foreign competition argued, they could not guarantee such protection because of the nature of insurance risks. As the *Chicago Times* explained, local fire insurance companies only had the capital to write a few thousand dollars on any one building in a block; "under existing circumstances, when the capital of home Companies is sufficient to give one-tenth part of the insurance required by our people, there exists a positive public necessity" for foreign insurance companies. "Insurance Legislation," *Insurance Gazette* 28:203 (quoting the *Chicago Times*)

Bridge supporters in the previous chapter, as a public-spirited organization embedded in the local community. Drawing on the ideology of household as distinct from market and status as distinct from citizenship, insurance companies portrayed themselves as paternal protectors, acting in furtherance of the well-being of individual families and the community at large. Utilizing tropes of masculinity, breadwinner responsibility, social respectability, and community relationships based on trust, they distinguished the insurance corporation from other capitalist market actors.

Creature and Citizen: *The Constitutional Rights-Bearing Corporation*

Yet even as they portrayed themselves as having special duties to policyholders' families and the public, foreign insurance corporations also employed another strategy: claiming constitutional rights. Accepting the characterization of insurance companies as economic actors, foreign companies and their supporters challenged restrictive legislation as violations of the "equality in the rights which are enjoyed by our companies" to access the market.[55] A state representative in the Indiana legislature emphasized that free trade among states was intended by the country's founders to be a constitutional right, and to impose restrictions upon foreign insurance companies was a "denial of free trade" and thus unconstitutional.[56]

Foreign corporations specifically contended that protectionist laws violated their "privileges and immunities" as citizens, in contravention of Article IV of the Constitution. In so doing, they often made no distinction between the rights of insurance companies and the rights of natural persons. Quoting Article IV directly, editor of the *Insurance Monitor* C.C. Hines advocated the

[55] An Old Merchant, "Foreign Agencies," *The Baltimore Sun*, March 20, 1839.
[56] "Indiana Legislature," *Daily State Sentinel*, February 21, 1857.

creation of a "National Insurance Bureau," complaining that states "impose burdens and restrictions upon the citizens and the trade of sister states that they impose not upon their own, and thereby violate the spirit of that broad and beneficent provision of the constitution which says: '*The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.*"'[57] The *Evening Post* likewise argued that a proposed tax on agents of foreign insurance companies "was clearly unconstitutional," explaining, "The business of insurance is a legitimate one, and open alike to all persons, natural as well as artificial, individuals as well as corporations," and so the imposition of such a tax "violates the article of the constitution which guaranties 'to the citizens of each state the privileges and immunities of citizens in the several states.'"[58] Equality of privileges and immunities among citizens meant "these companies should bear precisely the same burdens, and no other, either greater or less, than are borne by any other insurance companies, for it would be both unconstitutional and impolitic to impose unequal burdens upon the citizens of different states."[59] Elizur Wright, a prominent advocate of life insurance, castigated New York's restrictive laws: "They have the right to control their own creatures, but when a creature of Massachusetts comes in there to contract with citizens of New York, it is a pure ignoring of the rights of citizens, for the State of New York to interfere between us at all."[60] Reflecting his belief in freedom of

[57] *Insurance Gazette* Jan 1866, 116 (emphasis in original). They were perfectly happy to be regulated the same as home companies, foreign insurance corporations claimed, so long as they were also "permitted to enjoy all the rights and privileges extended by law to the local companies." "Memorial of the Fire Insurance Companies," *New York Commercial Advertiser,* February 16. 1841.

[58] "Dark Lantern Statesmanship at Albany," *The Evening Post*, February 23, 1857. The newspaper castigated an "impolitic, heathenish and unjust" "attempt to draw a distinction between the citizens of different states; to cultivate jealousies between them, and to deny them the rights and privileges which we claim in common for ourselves." Notably, this statement was made the same year Dred Scott was decided, when the privileges and immunities of citizens of different states was a live issue in the courts.

[59] "A Popular Fallacy About Insurance," *The Evening Post*, March 5, 1857. In 1837, the New York *Evening Post* criticized restrictions on "*foreign* capital," which it noted meant, "by a strange perversion of language, the capital of other states of this Union," as intending "to render all the securities established by our ancestors for the maintenance of equal rights, subservient to monopolies and exclusive privileges." Anti-Monopoly, "For the Evening Post," *The Evening Post*, January 25, 1837.

[60] "Life Insurance Convention," *United States Insurance Gazette*, 58-59.

contract as a fundamental right, he contended, "We have a right in the point of common sense to contract with each other to make a bargain, and I don't see why the State of New York… has a right to come to me, and treat me as a creature of Massachusetts. I am a creature of the United States so to speak."[61] Like other foreign insurance company advocates, Wright here elided any difference between corporations and individuals, speaking alternately of himself and his corporation as both "creature" and "citizen."

The dual vision of the corporation as both a servant of the public and a profit-making market entity thus figured prominently in debates over foreign insurance companies. Even as insurance companies advertised themselves as deeply embedded in the community and household, they simultaneously argued that they possessed the same constitutional right to access interstate markets as individuals. This maps onto the broader transformation in American law and society from "status to contract," as persons who formerly existed in a web of hierarchical status relations based on reciprocal duties of care and obedience in the home began to assert new legal identities as rights-bearing individuals in the market. This move "out of the household" by servants, women, and slaves recreated the identity of these formerly subordinated persons as now putatively rights-bearing, free-willing individuals, particularly with regard to their newfound economic relationships. Insurance companies followed this same path. The midcentury period of constitutional litigation involving foreign insurance companies bridged the corporations' dual identities as public servant and market actor, marking an important step in the corporation's move from household to market. The absence of any distinction between insurance companies and their members, as far as the right to equal access to the market was concerned, would form a central

[61] "Life Insurance Convention," 58.

part of the litigation strategy in cases where foreign insurance corporations claimed constitutional rights as citizens in order to do business across state lines.

The Janus-Faced Corporation: Bogus Insurance Companies

For some insurance companies, professions of duty to the public were just good marketing. Policyholders found out the hard way that both home and out-of-state companies' invocations of paternal protection and the involvement of respectable local gentlemen was no guarantee of a company's solvency or public commitment. The Janus-faced identity of the corporation as a capitalist enterprise as well as a public servant was made abundantly clear by "wild-cat," "bubble," "bogus" companies that offered "more *as*surance than *in*surance," which promised their customers paternal protection, only to defraud them.[62] These companies proliferated in the 1840s-50s as the practice of insurance became more common, reaching a crescendo from the mid-1850s through the 1860s.[63] The fraud perpetrated by these companies ranged from misrepresenting the companies' assets, to embezzlement, to falsely claiming to be an agent of a respected company.[64] The Henry Clay Insurance Company of New York, for instance, "held four mortgages professing to represent $102,000 of capital," yet it was discovered that a "considerable portion" of these mortgages covered "lands from one to eleven feet under water at high tide."[65] Other companies falsely swore that they possessed the requisite capital under state law, when really the capital consisted of borrowed money and the company actually operated "without a dollar in its

[62] Ezra, "Western Life Insurance Companies," 65; Lambert A. Wilmer, *Our Press Gang; Or, A Complete Exposition of the Corruptions and Crimes of American Newspapers* (J.T. Lloyd, 1860), 160; "Bogus Insurance Companies," *The United States Insurance Gazette* 3 (1856): 247, 246.
[63] Ezra, "Western Life Insurance Companies," 64.
[64] "Another Bogus Insurance Company," *Portland Advertiser,* October 30, 1855; "New York Fire Insurance Report for 1868," *Insurance Gazette* 28: 220; "Interesting Items from the South," *Trenton State Gazette*, September 6, 1854.
[65] *Charleston Courier*, December 21, 1855; "Bogus Insurance Companies," *National Aegis*, December 26, 1855.

treasury."[66] In New Orleans, the agents of a "bogus insurance company…, purporting to be a branch of the Merchants' Insurance Company of New York," absconded with $10,000 in premiums paid by unsuspecting German immigrants.[67] In Massachusetts, the Worcester *Spy* complained that its citizens had "suffered something like $100,000 by bogus insurance companies."[68]

Fraudulent insurance schemes were particularly a threat in the West and South, where insurance options were fewer. The *Insurance Times* warned, "Companies without capital spring up with fearful rapidity in certain parts of the country, under the skillful manipulation of as precious a set of scoundrels as ever sought to defraud a confiding or ignorant public… Adventurers, who once found New York State a fruitful field for their nefarious practices, have, like the star of empire, taken their way westward, and found there more congenial soil and less effective legislation in the way of their rapid growth."[69]

The saga of the nefarious Sinnissippi Insurance Company provides an example of how bogus insurance companies used sectionalist sentiment and community connections to defraud the unsuspecting public in less-economically developed states. Formed in 1865 in Indiana, the Sinnissippi was applauded as a respectable, patriotic home institution. A small-town newspaper push for the Sinnissippi exhorted its readers, "Indianans! You have been paying, and continue to pay to companies located in Illinois, Connecticut, New York and other States, hundreds of thousands of dollars per annum. This immense sum sent out of the State for insurance purposes

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[66] "Another Bogus Insurance Company," *Portland Advertiser,* October 30, 1855; Conservator, "The Boston Insurance Companies," *Boston Evening Transcript*, February 19, 1855; "Another New York Fraud," *Charleston Courier*, October 27, 1855.
[67] "Interesting Items from the South," *Trenton State Gazette*, September 6, 1854.
[68] "Consolation for the Afflicted People of Worcester, Mass.", *The State Gazette*, March 26, 1855) (quoting the Worcester *Spy*).
[69] "Fire Insurance Legislation," *Insurance Times* 2, no. 1 (Jan. 1869), 27.

can be retained among our own citizens, for which purpose THE SINNISSIPPI has been instituted."[70] "It should be the pride and pleasure of every citizen," the paper admonished, "to encourage home enterprise," particularly in such an "enterprising company… doing an extensive and flourishing business."[71] The paper then listed the directors of the company, including Representative William E. Niblack, a US congressman for Indiana's first district.[72]

The Sinnissippi presented itself as a "Grand Mutual Insurance company."[73] Its fleet of "Traveling Agents" spread throughout the rural countryside, encouraging "honest farmers" who "knew nothing about insurance" to take out policies, representing that "after the payment of the premium when the policy of insurance was taken, *nothing more whatever would have to be paid*, as the dividends or profits of this efficiently managed company would take up the notes given."[74] These agents presented potential customers with a list of the Sinnissippi's directors, most prominently Rep. Niblack, who "had been known to the people for many years, and besides being the representative of the people in Congress, and having filled other high offices of trust and profit, was understood, by all who knew him, to be a careful and shrewd business man, who would engage in nothing in which *he was likely to lose any money*." [75] The *Evansville Journal*, opposing the Democratic congressman's re-election, later explained that Niblack's name "was used with very great effect in this part of the State, in inducing the farmers, especially of his own party, to insure in the organization. Hundreds of policies were obtained which otherwise would not have been, except for the use of the name of NIBLACK as a Director – as one of the men, who would have the

[70] "Sinnissippi," *The Jasper Weekly Courier*, Oct 28, 1865.
[71] "Sinnissippi," *The Jasper Weekly Courier*, Oct 28, 1865.
[72] "Sinnissippi," *The Jasper Weekly Courier*, Oct 28, 1865; "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866. The President was listed as Elder Elijah Goodwin, a prominent "pioneer preacher." Madison Evans, *Biographical Sketches of the Pioneer Preachers of Indiana* (Philadelphia: J. Challen and Sons, 1862), 157.
[73] "Sinnissippi," *The Jasper Weekly Courier*, Oct 28, 1865.
[74] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[75] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.

management of its affairs and be responsible for its correct and fair dealing, and make good the representations of these traveling agents."[76]

Yet it was rapidly made clear that the Sinnissippi's agents had egregiously misled "these honest farmers and laboring men." [77] Shortly after paying the premiums, Sinnissippi agents returned to demand additional payments to cover "the *heavy expenses* of the Company, and the *occasional losses* by fire."[78] Since the Sinnissippi was a mutual company, its policyholders were bound to submit to assessments should the company's capital be insufficient to cover claims.[79] The "quiet and law-abiding citizens" who had taken out policies went to court to contest these demands, where "much to the amusement and the indignation of the people," the lawyer for the Sinnissippi was none other than "the very man whose name had been used to decoy them into the company, WILLIAM E. NIBLACK; the man who was their Representative in the highest Legislature of the nation, the man in whose integrity and business judgment they had so implicitly relied." [80] Through court filings, it was discovered that the assessments the mutual company demanded were not simply to cover losses by fire, but predominantly to pay "the wandering agents, the well-fed officers, the highly distinguished and shrewd Directors."[81] The Indiana Supreme Court concluded that it was "too plain to admit of construction" that the Sinnissippi's attempt to collect the assessments was illegal.[82] The Sinnissippi soon thereafter went into receivership.[83]

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[76] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[77] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[78] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[79] Sinnissippi Ins. Co. v. Taft, 26 Ind. 240, 241 (1866).
[80] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[81] "The Sinnissippi Insurance Company," *Evansville Journal*, September 21, 1866.
[82] *Sinnissippi Ins. Co.*, 26 Ind. at 242; Sinnissippi Ins. Co. v. Wheeler, 26 Ind. 336 (1866); Sinnissippi v. Farris, 26 Ind. 342 (1866).
[83] Boland v. Whitman, 33 Ind. 64, 65 (1870) (noting that the Sinnissippi was in receivership).

Yet Congressman Niblack emerged unscathed, winning his re-election and serving several more years in Congress before becoming a judge on the Indiana Supreme Court.[84] Meanwhile, the Sinnissippi's Secretary John R. Berry, seemingly the brains behind the operation, "pressed forward with his carpet-bag to Nashville," where he organized the Southern Fire Insurance Company.[85] The *Insurance Times* excoriated the company as "complete and baseless a fraud as was ever devised, but, what matter? It was southern in name, employed young men who had been in the confederate army, as agents, and, although there was not a southern man in the office, its motto was, 'Let southern men patronize only southern home institutions.'"[86] Berry, however, was exposed as a con artist and forced to flee; the *Insurance Times* smugly cautioned, "it ought at least to teach the South as well as the West that the cry of pretended home institutions for patronage on sectional grounds, is generally intended to hide their utter worthlessness, fraud, and treachery."[87]

The Sinnissippi scandal and other like revelations challenged the narrative of the insurance company as a member of the household and community, exposing the flip side of the nature of the corporation as a profit-making entity. Pointing to cases like the Sinnissippi, those who favored equal regulation and competition among insurance companies argued that the trustworthiness of a company should not be based on the status of its directors and agents, but on evidence of the company's financial stability and record of paying claims. One commentator warned, "Have no faith in high-sounding names and the announcement of large capitals – it is all smoke. Some men, pretending to respectability, unaccountably permit their names to be used in connection with these

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[84] "Niblack, William Ellis," *Biographical Directory of the United States Congress*, https://bioguide.congress.gov/search/bio/N000083 (last accessed February 21, 2021). Interestingly, the same year the Sinnissippi went under, Niblack presented a petition from constituents in favor of federal regulation of insurance companies. *Congressional Globe*, 39th Cong., 1st Sess. 1728 (1866).
[85] "A Lesson for the West and South," *Insurance Times* 2 no. 1 (Jan. 1869), 51.
[86] "A Lesson for the West and South."
[87] "A Lesson for the West and South."

swindles; and, as for capital, some of the 'companies' have no more than their office furniture."[88] "The insured is entitled to and ought to have a more thorough protection in his remedy than the mere integrity, honor and good faith of the insurer," sneered the San Francisco *Evening Bulletin*.[89] The newly-formed Massachusetts Insurance Commissioners, while not wishing "to cast reproach on all Foreign Companies," warned the public against being "entrapped and decoyed" into seemingly-genteel foreign firms, noting that "instances have occurred" in which officers of foreign companies "visited the Board in person, pledging their honor and integrity as men, to the truth and accuracy of their sworn statements," and yet it was later discovered "that the statements were false, and the assets of the Company nearly worthless."[90] By challenging the respectability of the directors as basis for assessing the companies' solvency and reliability, these commentators portrayed the insurance corporation as a self-serving market actor, whose pretensions of paternal respectability was only a disguise.

In this view, the basis of the relationship between insurer and insured was not trust and loyalty, but consumer information and state oversight. As concerns about fraudulent insurance corporations spread in the 1850s-60s, statewide movements for the creation of insurance commissions to regulate both foreign and domestic corporations gained momentum.[91] Proponents of regulation emphasized the artificial nature of insurance companies and the state's role in protecting the public welfare. Although general incorporation statutes for other types of businesses became increasingly common over the nineteenth century, legislatures were slower to allow general incorporation for insurance companies.[92] Warned the *Missouri Republican,* "the public welfare

[88] Wilmer, *Our Press Gang*, 159.
[89] "Specially Hazardous, Home and Foreign Insurance Companies," *Evening Bulletin*, December 10, 1861.
[90] "Remarks of the Massachusetts Insurance Commissioners in Reference to Their First Annual Report, Boston 1855," *United States Insurance Gazette* 3 (1856): 18, 17.
[91] Nehemkis, "Paul v. Virginia," 524.
[92] William G. Roy writes that the reason for this was that insurance companies, who were often required to purchase state bonds to ensure sufficient capital, provided a steady customer base for state bonds. Roy, "Socializing Capital: the

requires some security against the mismanagement and failures of Insurance Companies… the interest of the public [must] be guarded."[93] The susceptibility of insurance companies to state regulation was a function of their identity as a state creation to serve a public purpose. New York Insurance Commissioner William Barnes, speaking before the annual Life Insurance Convention in 1866, made this point clearly. Chastising insurance executives for complaining about regulation as "State interference", Barnes distinguished between corporations and natural persons: "In this country, if any gentlemen choose to form an association, I don't know of any law of the State that prohibits such association, or any individual member of it, from underwriting on his own personal responsibility; but the moment you go to the State Legislature and ask them to endow you with an artificial being, then you are created by the laws of that State, subject to the government of that State."[94] Because "State regulation and control is the very life blood, vitality, and the sole ground upon which you claim a corporate existence," reporting requirements "are simply legitimate sequences to your being born."[95] Proponents of equal regulation considered insurance companies to have a duty to the public, but argued that insurance companies could not be trusted to fulfill this duty themselves.

Piercing the Veil: Corporate Citizenship and the Diversity Clause

Rise of the Industrial Corporation," in *The Oxford Handbook of the Corporation*, Thomas Clarke, Justin O'Brien, and Charles O'Kelley, eds. (Oxford: Oxford University Press, 2019): 93-118, 108. The Panic of 1837 prompted a gradual move towards general incorporation for banks. The first general incorporation statute was passed in New York in 1849, followed by New Jersey in 1852 and Pennsylvania in 158. Nehemkis, 523 n.18. However, states continued to specially charter insurance corporations well into the latter 19th century.

[93] "Insurance Companies -- A Suggestion," *Daily Missouri Republican*, November 27, 1851.

[94] "Life Insurance Convention," *Insurance Gazette* 28: 50.

[95] "Life Insurance Convention."

These two visions of the corporation, which insurance companies professed simultaneously, underscored one of the main questions courts confronted in Article IV claims by foreign corporations. Were foreign corporations constitutional rights-bearing entities that could claim the privileges and immunities of citizenship, including the right to trade freely across state lines? Or was their identity based on a particular status, with attendant duties and rights different than those of individual market actors?

There was ample basis for concluding that corporations should be treated as citizens under Article IV.[96] As shown in Chapter One, the Supreme Court had been willing to pierce the corporate veil to look to the property and contract rights of the shareholders in the context of the contract clause of the Constitution. Even more compelling was the precedent set by cases involving corporate claims of citizenship for the purposes of accessing federal "diversity jurisdiction," which empowered federal courts to hear suits "between citizens of different states" and "a state and citizens of another state."[97] Since the early years of the Republic, the Supreme Court had looked behind the corporation to the citizenship of the incorporators to determine whether the litigants' citizenship was "diverse."

The Court confronted the question of corporate citizenship for the first time in 1809, in three diversity jurisdiction cases that were heard simultaneously.[98] Two involved insurance

[96] Stewart Jay argues that it would have been "logical" for the court to recognize corporations as citizens under Article IV. Stewart Jay, "The Curious Exclusion of Corporations from the Privileges and Immunities Clause of Article IV," *Hofstra Law Review* 44 (2015): 79-106, 84. While Jay's instinct is correct that the Court's refusal to do so is surprising, this chapter argues that the question was and is not about "logic" but about the historical factors at play in the Court's decision.

[97] US Constitution, Art. III § 2.

[98] Bank of U.S. v. Deveaux, 9 U.S. 61 (1809); Hope Ins. Co. of Providence v. Boardman, 9 U.S. 57 (1809); Maryland Ins. Co v. Wood (not separately reported). Although scholars have studied *Bank of Deveaux* extensively, its two companion cases involving insurance companies have rarely been examined.

corporations and the other involved the Bank of the United States.[99] In all three cases, the question was whether corporations were "citizens" entitled to sue in federal court. The crux of the issue, Chief Justice Marshall accurately distilled in the Court's controlling opinion, *Bank of the United States v. Deveaux*, was whether a corporation was a "mere legal entity," in which case it was "certainly not a citizen"; or whether it was a "company of individuals" who simply exercised the privilege of "transacting their concerns" under a separate legal name, but who still retained their constitutional right as citizens to access a federal forum.[100]

Examining English precedent, Marshall concluded that there were two avenues available. Although English common law defined the corporation as "a mere creature of the law, invisible, intangible, and incorporeal," Marshall found that English courts were willing to consider corporations "as having corporeal qualities," including the identity of "an inhabitant or an occupier."[101] These cases, Marshall concluded, were "strong in favour of considering the corporation *itself* as endowed for this special purpose with the character of a citizen."[102] Yet there was also English precedent for looking to the character of the corporations' members to determine jurisdiction.[103] Marshall chose the latter, holding that "on a question of jurisdiction," the Court will "look to the character of the individuals who compose the corporation."[104] For purposes of determining diversity, the court would pierce the corporate veil to consider the citizenship of the corporations' members, and attribute that citizenship to the corporate litigant itself.

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[99] *Deveaux* involved a tax levied by the Georgia legislature on the local branch of the Bank of the US, which was designed to drive the bank out of the state. *Hope Insurance Company v. Boardman* and *Maryland Insurance Company v. Wood* involved claims by insureds against the companies.
[100] *Deveaux*, 86, 87.
[101] *Deveaux*, 88, 89.
[102] *Deveaux*, 89-90. (emphasis added)
[103] *Deveaux*, 90-91.
[104] *Deveaux*, 91-92.

A second reason why the diversity cases provided compelling precedent for allowing corporations to claim the privileges and immunities of citizenship involved the connection between the diversity clause of Articles III and the privileges and immunities clause of Article IV. The right of citizens of one state to have their controversy with another State heard in federal court was considered by the framers of the Constitution to be the necessary corollary to Article IV's protection of the privileges and immunities of citizens of different states.[105] Although the Articles of Confederation had included a privileges and immunities clause, it left enforcement to state courts, which were accused of bias against non-state litigants. A federal forum, the Constitution's framers believed, would provide a more neutral space for interpreting disputes between citizens of different states. Their solution was the diversity jurisdiction provision, which would serve as the enforcement mechanism for Article IV.[106] The intention of the diversity clause and the privileges and immunities clause thus overlapped: as the lawyer in *Hope Insurance Co. v. Boardman*, a companion case to *Deveaux*, explained, "The great object of the Constitution was to erect a government for commercial purposes, for mutual intercourse, and mutual dealing," by guaranteeing "the security and protection of the citizens of each state." [107] This relationship between diversity jurisdiction and the privileges and immunities clause would imply that the term "citizen" should have the same meaning in both.[108]

A third compelling reason in support of recognizing corporate citizenship under Article IV was that the privileges and immunities clause was intended to protect interstate market transactions. The Articles of Confederation had specifically included among the privileges and

[105] Jay, "Origins," 18-19.
[106] Jay, 19.
[107] Bank of Augusta v. Earle, 38 U.S. 519, 526 (1839).
[108] Marshall had affirmatively declined to rule on the question of whether the definition of citizen was the same throughout different provisions of the Constitution.

immunities of citizenship the right to "free ingress and egress to and from any other State" and to "enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[109] The Continental Congress streamlined this provision in Article IV, but it was widely understood that the protection of interstate market transactions was a core purpose of the clause.[110] In one very early interpretation of Article IV in a case involving individuals, a federal circuit court included among the privileges and immunities of citizenship, "The right of a citizen of one State to pass through or reside in any other State, for the purposes of trade, agriculture, professional pursuits, or otherwise."[111] Attorney Robert Harper argued in *Deveaux* that incorporation was simply a legal mechanism "to enable *individuals* to transact business more conveniently for their mutual benefit."[112] If, as *Deveaux* indicated, corporations could be viewed as aggregates of individuals in certain cases, it would seem the underlying purpose of Article IV to prevent discrimination against commercial actors from different states would weigh in favor of extending the privileges and immunities clause to corporations in order to protect the constitutional rights of its citizen members. Indeed, lawyers arguing for recognizing corporations as citizens under Article IV made this exact argument.[113]

The Northern Man and His Corporations, the Southern Man and His Slaves: the Law of Interstate Comity

[109] Jay, 8.
[110] Jay, 8, 16-17.
[111] Corfield v. Coryell, 6 Fed. Cas. 546 (E.D. Pa. 1823).
[112] *Deveaux*, 81.
[113] David B. Ogden, on behalf of the bank, made this argument in *Bank of Augusta*, 528-29.

Yet despite the precedent set by *Deveaux* and subsequent cases,[114] as well as caselaw including interstate economic participation and mobility as a privilege and immunity of citizenship, the Court consistently held that corporations were not citizens for purposes of Article IV. In the background of these privileges and immunities cases were three interrelated factors: the nature of the corporation; the political economy of interstate corporate activity; and the connection between interstate corporate mobility and slavery.

In support of their denial of corporate Article IV citizenship, courts invoked the conception of the corporation as owing special duties to the public that natural persons or ordinary market actors did not. As the previous chapter illustrated, this view has a long history in American law in the context of internal improvement companies. This was true with regard to insurance companies as well. In 1804, future president John Quincy Adams, representing the insured mercantile company in *Head & Amory v. Providence Ins. Co.*, argued that whereas an "individual underwriter… must feel himself bound by all the ties of duty" to indemnify a merchant "for the numerous and deplorable calamities to which navigation is liable," this was even more true of a corporation.[115] "A *corporation*," he emphasized, "by their essential character and constitution, are under obligations of a still higher nature… They are responsible… to the public, to the legislature under whose

[114] These cases by and large upheld the basic premise of *Deveaux* that the citizenship of the members determined the ability of the corporation to sue in federal court, although they differed in how to determine the members' citizenship. See, e.g., Bank of Cumberland v. Willis, 2 F.Cas. 648 (C.C.D. Me. 1839) (all members must be diverse from other party); Commercial & Railroad Bank of Vicksburg v. Slocomb, Richards & Co., 39 U.S. 60 (1840) (same); but see But: Louisville RR v. Letson, 43 US 497 (1844) (*Deveaux* was "carried too far"; a corporation "is substantially, within the meaning of the law, a citizen of the state which created it… for all the purposes of suing and being sued."); but see Marshall v. Baltimore & O. R. Co., 57 U.S. 314, 328 (1853)(modifying *Deveaux* and calling *Letson* into question)("The persons who act under these faculties, and use this corporate name, may be justly presumed to be resident in the State which is the necessary *habitat* of the corporation"); Wheeden v. Camden & A.R. Co., 1 Grant 420, 427 (1856) (Penn. 1856) (returning to *Deveaux*) ("1. A corporation is not, *per se,* a citizen, within the meaning of the third article of the Constitution. 2. But when it sues or is sued, the governing officers, by whatever name called, are the substantial party, and if they are citizens of the State which created the corporation, and the other party is a citizen of another State, the federal courts have jurisdiction."); Covington Drawbridge Co. v. Shepherd, 61 U.S. 227, 233 (1857) (misreading *Letson* as endorsing aggregate theory) ("members of the corporate body must be presumed to be citizens of the State in which the corporation was domiciled" for purposes of diversity jurisdiction).

[115] Head & Amory v. Providence Ins. Co., 6 U.S. 127, 143 (1804).

sanction their proceedings are regulated, and to their country which is interested in the accuracy of their transactions."[116] Notably, Adams here referred to the corporation in the plural: "the corporation *are*."[117] The corporation, for Adams as for treatise writers of the period, was an entity composed of individuals, but who bore special duties to the public.[118] Lawyer and politician Charles Ingersoll argued against corporate citizenship in a seminal corporate privileges and immunities case, *Bank of Augusta v. Earle*, that "[n]o corporation is created, in contemplation of law, but for the public good. Charters are intended to benefit the unincorporated more than the incorporated."[119] Ingersoll embraced the view of the corporation as a legal entity with distinct and limited rights: it was "an artificial person created by the law of an independent state… a mere creation of the law, with none but express powers ad hoc, or such implied powers as are strictly indispensable."[120] Unlike natural persons, Ingersoll emphasized, the rights and duties of corporations were significantly circumscribed: "An American person is a sovereign, restrained by no fetters but of his own making. A corporation is his creature, bound by strict obligation… Personal identity, corporeal being, and powers of motion, are the attributes of persons, but not of corporations."[121]

Because corporations had limited rights and special duties, they could not invoke the protection of the privileges and immunities of citizens the way natural persons could. Explained

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[116] *Head & Amory*, 143.
[117] A practice we also saw in the previous chapter regarding discussions of the Charles River and Warren Bridge corporations.
[118] See treatises discussed in Chapter 1. Yet in *Deveaux* a few years later, Adams, on the side of the insurance company this time, argued that a corporation should be treated as a citizen, illustrating how lawyers used the versatile nature of the corporation to argue various sides.
[119] *Bank of Augusta*, 577.
[120] *Deveaux*, 83; *Bank of Augusta*, 574.
[121] *Bank of Augusta*, 578. In a later case, the Supreme Court of Virginia similarly argued that the privileges and immunities of "individual citizens" could not be "confound[ed]" "with the company in which they are corporators." Rather, "privileges and immunities guaranteed to them are annexed to their status of citizenship. They are personal, and may not be assigned or imparted by them, or any of them, to any other person, natural or artificial." Slaughter v. Commonwealth, 54 Va. 767, 770-71 (Va. 1856).

the Supreme Court of Connecticut in 1825, "the civil rights of a corporation (for it has no natural rights) are widely different" than those of individuals; "The law of its nature, or its birth-right, in the most comprehensive sense, is such, and such only, as its charter confers."[122] Courts distinguished corporate charter rights from "the rights which belong to its members as citizens of a state."[123] Rather, it was "an error in confounding things, which are essentially different, in holding these individual citizens, with their privileges and immunities as such, to be identical with the company in which they are corporators."[124] Explained the Supreme Court of Virginia, "The privileges and immunities guaranteed to [the corporation's members] are annexed to their status of citizenship. They are personal, and may not be assigned or imparted by them, or any of them, to any other person, natural or artificial."[125]

The nature of the corporation as an entity distinct from the individuals who composed it was one factor that influenced courts' rejection of corporations' privileges and immunities claims. Another reason courts cited was the threat foreign corporations posed to states' sovereignty over their internal economies. This was a problem not just for individual states but for the entire nation, as state economic sovereignty, in their eyes, was vital to the preservation of the Union.[126] Thomas Alexander Marshall, Kentucky Supreme Court judge and second cousin to Chief Justice John Marshall, catastrophized that if foreign corporations could operate in other states at will, "[t]he competition for extra territorial advantages would but aggrandize the stronger to the disparagement of the weaker States. Resistance and retaliation would lead to conflict and

[122] New York Firemen Ins. Co. v. Ely, 5 Conn. 560, 568 (Conn. 1825).
[123] *Bank of Augusta*, 587.
[124] *Slaughter*, 770-71.
[125] *Slaughter*, 771.
[126] Gerard Henderson, writing in 1918, hypothesized that this was the central reason the Court refused to recognize corporate citizenship under the privileges and immunities clause: "To say that a corporation is a citizen… would have enabled the North to force its corporations on Southern states whose policy was against the existence of any corporations within their boundaries… it must have been apparent that such a doctrine would have seriously imperilled [sic] the union." Henderson, "Position of Foreign Corporations," 56-57

confusion, and the weaker States must either submit to have their policy controlled, their business monopolized, and their domestic institutions reduced to insignificance, or the peace and harmony of the States would be broken up, and, perhaps, the Union itself destroyed."[127] Supreme Court Justice John Archibald Campbell, railing against the "mischief" of recognizing corporate citizenship in any context, contended, "It may be safely assumed that no offering could be made to the wealthy, powerful, and ambitious corporations of the populous and commercial States of the Union so valuable, and none which would so serve to enlarge the influence of those States, as the adoption, to its full import, of the conclusion, 'that to all intents and purposes, for the objects of their incorporation, these artificial persons are capable of being treated as a citizen as much as a natural person.'"[128] This concern carried on after the Civil War ended; wrote a Kentucky judge in 1868, if a courts should "recognize the right of a corporation created by one State to force its presence and business into the territory of another," it would be "easy to imagine what discords, heart- burnings, and disasters might follow; and instead of producing that congruous harmony so desirable in a union of free States…, its opposite might reasonably be anticipated."[129]

A third, largely unspoken concern of courts was the implications of interstate corporation cases for cases involving the interstate mobility of enslaved persons. Although at first foreign corporation cases and slave transit cases may appear to have nothing in common, in fact they raised the same sets of legal questions.[130] Both challenged the courts to define the rights of citizenship. Both implicated the extraterritorial effects of state laws. And both threatened to undermine the fragile balance between free industrial states and slaveholding agricultural states in

[127] Commonwealth v. Milton, 51 Ky. 212, 222-23 (Ct. App. Ky. 1851). William McClung Paxton, *The Marshall Family* (Cincinnati: R. Clarke & Company, 1885), 185.
[128] Marshall v. Baltimore & O. R. Co., 57 U.S. 314, 353 (1853) (Campbell, J., dissenting).
[129] Phoenix Ins. Co. v. Commonwealth, 68 Ky. 68, 78 (Ky.1868).
[130] Insurance and slavery had been connected in other ways for centuries. Jonathan Levy details how the slave trade was a key driver of the growth of marine insurance in the 18th century. *Freaks of Fortune*, 36.

the federal system. Judges rarely made direct references to slavery in cases involving foreign corporations, but as the same judges heard both sets of cases, they were very much aware of the challenges each posed for vital and contentious issues of state sovereignty in the years leading up to the Civil War. Cases involving transitory slaves cited seminal cases involving foreign corporations, and vice versa. Together, these parallel sets of cases prompted the Supreme Court to craft a doctrine of interstate comity, which attempted to balance between interstate relations and state sovereignty.

Interstate economic activity and interstate slavery were interrelated components of Article IV. Article IV had one goal: to give equal protection to the rights of citizens across state lines.[131] To fulfill this goal, Section 2 of Article IV included both the privileges and immunities clause and the fugitive slave clause.[132] As discussed above, the privileges and immunities clause was intended to ensure equal treatment in commerce between domestic and out-of-state citizens. The fugitive slave clause singled out an additional right for protection, the right to recapture slave property, in order to guarantee that slaveholders would not become "members of the Union upon unequal terms" whose property rights in persons could be annulled by free states.[133] The questions raised by foreign corporations and interstate slavery cases both involved the scope of the protection guaranteed to citizens under Article IV. Could the citizen members of a corporation invoke the privileges and immunities of citizenship to compel states to recognize an out-of-state corporation? Did a citizen slaveholder have a constitutional right to transport an enslaved person from a slave

[131] Prigg v. Com. of Pennsylvania, 41 U.S. 539, 646 (1842).
[132] The fugitive slave clause read, "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due." US Constitution Art. IV § 2.
[133] *Prigg*, 612, 645.

to a free state? In other words, were incorporated status and slave ownership among the "privileges and immunities of citizens" protected by the Constitution?

Together, foreign corporation and slavery cases shaped the interpretation of Article IV in the antebellum period. In these cases, courts defined "privileges and immunities of citizens" to include only "fundamental," "natural," or "constitutional" rights, not "peculiar" rights granted by state law. Courts concluded that the rights to incorporate and to own slaves were special statuses granted by state positive law, and so were not included among the privileges and immunities of citizenship. In two seminal cases, *Bank Augusta v. Earle* (1839) and *Prigg v. Pennsylvania* (1842), involving the interstate mobility of corporations and enslaved persons respectively, the Supreme Court definitively narrowed the scope of Article IV. The Court did so by formulating the doctrine of interstate comity.

One of the earliest cases to interpret the privileges and immunities clause was the circuit court case of *Corfield v. Coryell*, in which Supreme Court Justice Bushrod Washington, riding circuit, held that the rights guaranteed by the clause were those "which are, in their nature, fundamental."[134] Fundamental rights were those common "to the citizens of all free governments" under natural law and constitutional law, as well as those vital to a republican form of government.[135] Although declining to set forth an exhaustive list, Washington explained that such fundamental rights included the rights to protection by the government; the enjoyment of life and liberty; to acquire, possess, and dispose of property; to habeas corpus; to sue; to equality of taxation; to suffrage; and "to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise."[136] In contrast, the privileges and immunities of citizenship did

[134] Corfield v. Coryell, 6 F.Cas. 546, 550 (E.D. Pa. 1823).
[135] *Corfield*, 551.
[136] *Corfield*, 552.

not include "advantages" or "rights which belong exclusively to the citizens of any other particular state."[137]

State and federal courts' argument against extending the protection of the privileges and immunities clause to corporations, enslaved persons, and enslavers was based on Justice Washington's distinction between such fundamental, natural, and constitutional rights, and special rights created by state statutory or common law. In their interpretation of foreign corporation and interstate slavery cases, courts narrowed *Corfield's* definition of fundamental rights by focusing on the unique elements of the law of slavery and of incorporation. Both incorporation and enslavement were state-created statuses, not natural, fundamental, or constitutional rights.

The power to incorporate, courts held, was not a fundamental right, but a special privilege granted by the legislature in unique circumstances. As Kentucky Judge Marshall explained, "the corporation itself and its faculties or privileges as such, and the right of individuals to be or compose a corporation and to act in a corporate capacity, are all peculiar privileges, creations of the local law."[138] According to Supreme Court of Virginia, incorporation was not an inherent right of citizenship, as "it must be conceded, that our citizens, in any number, of their own motion, and in virtue of their mere citizenship, could do no corporate act whatever."[139] Even if the court pierced the corporate veil to consider the citizenship of its members, the Kentucky Supreme Court concluded, the privileges and immunities clause "embrace[d] such privileges and immunities only as are fundamental and common to freemen in the several States," of which the right to incorporate

[137] *Corfield*, 552 (in this case, the state-created advantage/right was the right to collect shellfish in the private property held in common by the citizens of New Jersey).
[138] *Milton*, 219.
[139] *Slaughter*, 771. Rather, a corporation was "a being, unknown to the Constitution, and only to be called into being and invested with a legal existence and with legal capacities by the fiat of some legislative body." Phoenix Ins. Co, 75.

was not one.[140] As such, incorporated status was not a privilege or immunity that existed outside the jurisdiction of the chartering state.[141]

In *Prigg v. Pennsylvania*, the Supreme Court held that ownership in enslaved persons was also not a fundamental or constitutional right. Lord Mansfield, in the 1772 British case *Somerset v. Stewart*, had held that slave status was not recognized under natural law, as slavery was "so odious, that nothing can be suffered to support it, but positive law."[142] Mansfield concluded that in the absence of positive law in England recognizing slavery, the master-slave relationship could not be maintained on English shore.[143] Justice Story adopted this rule in *Prigg*: "By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign slaves found within its territorial dominions."[144] This meant, courts in free states concluded, that slave owners could not claim the protection of the privileges and immunities clause when they transported enslaved persons across state lines, as they had no fundamental right to own slaves.[145]

Incorporated status, in this sense, was like the status of master and slave; both were the product of state law, which had no force outside the state's jurisdiction. As Senator Thomas Hart Benton proclaimed to the people of Missouri, "No citizen of any State can carry any property

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[140] *Milton*, 226.
[141] Tatem v. Wright, 23 N.J.L. 429 (NJ 1852).
[142] Somerset v. Stewart, 12 Geo. 3, 19, (K.B. 1772).
[143] *Somerset*, 19.
[144] *Prigg*, 611. Justice Taney reiterated this regarding an enslaved person who had been taken into Ohio and then returned to Kentucky: "Every state has an undoubted right to determine the *status*, or domestic and social condition, of the persons domiciled within its territory… the condition of the negroes, therefore, as to freedom or slavery… depended altogether upon the laws of that state, and could not be influenced by the laws of Ohio." Strader v. Graham, 51 U.S. 82, 93-94 (1850).
[145] Lemmon v. People, 20 N.Y. 562, 609-11 (NY Ct. App. 1860). For the contrary view, *see*: *Lemmon*, 636 (Clerke, J. dissenting) ("Is it consistent with this purpose of perfect union, and perfect and unrestricted intercourse, that property which the citizen of one State brings into another State, for the purpose of passing through it to a State where he intends to take up his residence, shall be confiscated in the State through which he is passing, or shall be declared to be no property, and liberated from his control?"); Johnson v. Tompkins, 13 F.Cas. 840 (ED Pa. 1833) ("As the owner of property, which he had a perfect right to possess, protect, and take away; as a citizen of a sister state, entitled to all the privileges and immunities of citizens of any other states," the slave owner had the right to reclaim his runaway slave.)

derived from a law of that State an inch beyond the boundary line of the State which creates it."[146] He explicitly listed incorporation and enslavement as examples: "This is the case with all – with the Northern man, with his corporations and franchises – with the Southern man and his slaves. This is the law of the land, and let any one try it that disputes it."[147]

Although holding that neither the right to incorporate nor to own property in persons was a privilege and immunity of citizenship, the Supreme Court was leery of putting its thumb on the scale too strongly in favor of state's rights and protectionism. To harmonize federalism with state sovereignty in cases involving foreign corporations and transitory enslaved persons, the Supreme Court developed the doctrine of interstate comity. Under a centuries-long practice in Britain and continental Europe, the principle of "comity" guided the recognition in one nation of the commercial or domestic laws of foreign nations, primarily involving contracts or marriages formed abroad.[148] Comity entailed the presumption that nations would enforce the laws of foreign nations out of "that respect" that emerged "from motives of public policy" to encourage friendly intercourse.[149] Without comity, Justice Story explained in his influential treatise *Conflict of Laws*, under the "natural principle" of "the equality and independence of nations," no nation would be "bound to yield the slightest obedience" to the laws of a foreign jurisdiction.[150]

Two major exceptions to the principal of comity existed in international law, however. The first was when explicit state law or policy indicated that the foreign state's law was "repugnant to its policy, or prejudicial to its interests," as it was "the right and duty of every nation to protect its own subjects against the injuries resulting from the unjust and prejudicial influence of foreign

[146] "Col. Benton's Speech to the People of Missouri," *Louisville Examiner*, June 16, 1849 (emphasis added).
[147] "Col. Benton's Speech."
[148] Joseph Story, *Commentaries on the Conflict of Laws,* 1st ed. (Boston: Hilliard, Gray, and Company, 1834), 7.
[149] Story, *Commentaries*, 7.
[150] Story, 8.

laws."[151] The second was when the foreign state's laws violated "law of nature," as in the case of allowing polygamous or incestuous marriages.[152] These two exceptions to the principle of comity would form the basis of American jurisprudence regarding the interstate mobility of corporations and enslaved persons.

In the mid-nineteenth century, it was unclear how the international principle of comity might apply to the states in a federalist system. "To no part of the world," Justice Story's treatise emphasized, was the principle of comity "of more interest and importance than to the United States, since the union of a national government with that of twenty-four distinct, and in some respects independent states, necessarily creates very complicated relations and rights between the citizens of those states."[153] The interstate mobility of foreign corporations and enslaved persons challenged the Court to craft a doctrine to address interstate conflicts of law.[154] In *Bank Augusta v. Earle* (1839) (involving a foreign corporation) and *Prigg v. Pennsylvania* (1842) (involving a fugitive slave), the Supreme Court developed a doctrine that integrated the international law of comity with American federalism. These cases situated comity as a complement to the federally-mandated privileges and immunities clause and the fugitive slave clause of Article IV. The doctrine of comity, as it was developed in Article IV cases involving the interstate transit of corporations and slaves, acknowledged the supremacy of the federal constitution in protecting specific, limited rights, while leaving ample room for states to refuse to recognize rights that were deemed non-fundamental.

Chief Justice Roger Taney's opinion in *Bank of Augusta v. Earle* became foundational precedent for the mid-century American doctrine of comity in both foreign corporation and slavery

[151] Story, 32.
[152] Story, 107, 104.
[153] Story, 9.
[154] While Story did touch on the problem of slavery in his treatise, Story, 28-29, the first edition made no mention of corporations whatsoever.

cases. *Bank of Augusta* involved the question of whether a contract made by a corporation chartered in Georgia was enforceable in Alabama. Taney held that it was; not because Alabama was compelled to recognize the Georgia corporation, but because of the respect and camaraderie that should exist between states. Among the states of the union, explained Taney, which were "members of the same great political family" bound together by "deep and vital interests," the Court should "presume a greater degree of comity, and friendship, and kindness towards one another, than we should be authorized to presume between foreign nations."[155] Yet Taney took pains to note that comity "is no impeachment of sovereignty," for "when (as without doubt must occasionally happen) the interest or policy of any state requires it to restrict the rule, it has but to declare its will, and the legal presumption is at once at an end."[156] In other words, comity dictated the assumption that foreign corporations could do business in other states, but this assumption could be overridden when "contrary to the known policy of the state, or injurious to its interests."[157] States would be presumed to recognize out-of-state corporations, unless they affirmatively stated otherwise.

Just a few years later, Justice Story elaborated on *Bank of Augusta*'s doctrine of interstate comity in the context of slavery, in what became one of the most important cases to interpret the fugitive slave clause, *Prigg v. Pennsylvania*. *Prigg* involved a Pennsylvania law that criminalized the abduction of any black persons in the Commonwealth, which in effect undermined the ability of slave catchers to capture fugitives from slavery. Relying on the English case *Somerset*, Story stated, "By the general law of nations, no nation is bound to recognise the state of slavery, as to foreign

[155] *Bank of Augusta*, 590. Taney referred to Justice Story's *Conflict of Laws*, in which Story explained, "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, Courts of justice presume the tacit adoption of them by their own government; unless they are repugnant to its policy, or prejudicial to its interests." Story, 37.
[156] *Bank of Augusta*, 589, 590.
[157] *Bank of Augusta*, 589.

slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognised. If it does it, it is as a matter of comity, and not as a matter of international right."[158] Yet Story went on to explain that although slavery was a product of positive law, the fugitive slave clause had transformed the right to recapture a fugitive slave into a constitutional right: "Under the constitution, it is recognised as an absolute, positive right and duty, pervading the whole Union with an equal and supreme force, uncontrolled and uncontrollable by state sovereignty or state legislation. It is, therefore, in a just sense, a new and positive right, independent of comity, confined to no territorial limits, and bounded by no state institutions or policy."[159] In other words, the fugitive slave clause in the Constitution had overridden the presumption of comity that states need not recognize the positive law of other states. By virtue of the fugitive slave clause, the right to recapture a slave was now a constitutional right of citizenship, akin to the fundamental rights protected in the privileges and immunities clause, its sister clause in Article IV. Story made clear, however, that only the slaveowner's right to capture a fugitive slave had been constitutionalized; in all other respects, slavery was a product of state positive law, which under the principle of comity states could choose to recognize or disregard as they pleased.

The principle of comity among the States of the Union, laid out first in *Bank of Augusta* and a few years later in *Prigg*, thus became the guiding standard for cases regarding the interstate mobility of corporations and enslaved persons under Article IV. If neither incorporated status nor slave property (apart from the right to recapture) were protected under Article IV, then the only justification for recognizing these products of state law was comity. Yet as Taney and Story had made clear, the presumption of comity could be overridden when contrary to explicit state policy.

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[158] *Prigg*, 611.
[159] *Prigg*, 542.

Whether and how states should override the presumption of comity became the subject of both slavery and foreign corporation cases going forward.

Discussions about whether states should recognize the incorporation and slavery laws of other states implicated broader fears about sectionalism and the fragility of the Union in the decades before the Civil War. Both proponents and opponents of extending comity in these cases claimed that they acted in the service of national peace and harmony. Proponents of the recognition of the rights of foreign corporations averred that recognizing the incorporation laws of sister states was necessary "to insure domestic tranquillity [sic], to promote the general welfare, and to form and preserve a perfect union of the States."[160] Arguing on behalf of a foreign corporation in *Bank of Augusta*, Daniel Webster warned of "the inconvenience, mischief, and injustice," as well as "the great injury to commerce and trade," that would result if states refused to recognize the rights of foreign corporations to operate within their borders.[161] Northern manufacturing companies, Webster noted, "manufactured and sold to the south, out of cotton bought in the south," extensive quantities of goods; yet if the northern corporation had no power to form contracts in other states, such arrangements would be unenforceable.[162] "What will our fellow-citizens of the south say to this?" queried Webster. "If, after we have got their cotton, they cannot get their money for it, they will be in no great love, I think," with the doctrine of comity.[163]

The spectre of disunion also featured in the promotion of comity in slave cases. Advocates of slavery argued that "international comity" required the recognition of "personal rights," of which property in enslaved persons was one; "the owner's right to his slave" should therefore under

[160] *Milton*, 221. This argument carried over into the postwar period. In 1866, the New York Court of Appeals likewise argued that recognizing foreign corporations was essential to the maintenance of the Union: "In this country our material interests are so interwoven that the union of the States is due, in its continuance, if not in its origin, as much to commercial as to political necessity." Merrick v. Van Santvoord, 34 N.Y. 208, 214, 216 (1866).
[161] *Bank of Augusta*, 545.
[162] *Bank of Augusta*, 561.
[163] *Bank of Augusta*, 561.

comity "be recognized as legal in every State in our Union."[164] The Illinois Supreme Court warned that it "would be productive of great and irremediable evils, of discord, of heart burnings, and alienation of kind and fraternal feeling, which should characterize the American brotherhood, and tend greatly to weaken, if not to destroy the common bond of union amongst us," if masters should not be allowed to travel with their slave property across free states.[165]

In contrast, lawyers and judges who opposed the recognition of other states' slave or corporate law focused on the international principle of national sovereignty. In *Milton v. Kentucky*, involving the Ohio Insurance Company's attempt to do business in Lexington, Judge Marshall explained that because "peculiar privileges" have no extraterritorial force, and "the corporation itself and its faculties or privileges as such, and the right of individuals to be or compose a corporation and to act in a corporate capacity, are all peculiar privileges, creations of the local law," the corporation could not "exist or be exercised beyond its territorial jurisdiction."[1] In *Collins v. America*, regarding whether an enslaved woman who was sent into a free state and then returned to Kentucky was free, the same judge employed nearly identical reasoning: "If the laws and Courts of Ohio may determine the condition of the slave while in that State, they cannot by their own force or power, determine what shall be his condition when he has gone beyond their territorial jurisdiction."[1] Rather, "it pertains to the sovereignty of every independent State, to determine for itself, and according to its own interests and policy, in what cases and to what extent the foreign law shall be adopted as a part of its own, and operate upon persons and things within its territory."[1]

They seized on the exception to comity that Taney and Story had emphasized in *Bank of Augusta* and *Prigg*. Jurists used strikingly similar language in foreign corporation and interstate

[164] "Judge Robertson's Letters in Defense of the Missouri Compromise," *Frankfort Tri Weekly Commonwealth*, November 18, 1857.
[165] Willard v. People, 5 Ill. 461, 472 (1843).

slavery cases to explain why they rejected the principle of comity, focusing on the threat to the state's internal economic and social order if they were to follow out of state corporate or slavery law. Foreign corporation cases focused on the inordinate power of corporations. Judge Marshall of the Kentucky Supreme Court warned that given the power of corporations, recognizing "the absolute right of the corporations of one State to [operate] in every other State" would be "in effect an absolute and almost unlimited power in one or in each State to legislate extra territorially."[166] If legislatures couldn't dictate the terms under which foreign insurance companies could operate, he cautioned, "then the power of our legislature to withhold charters of incorporation is but a shadow… If foreign, and perhaps irresponsible, corporations may force themselves upon us in defiance of our laws, state sovereignty is but a name."[167] If such corporations could claim "the constitutional rights of an American freeman… they would overrun State lines, seize upon political power, and ultimately devour one another."[168]

Jurists similarly argued that recognizing the law of freedom or slavery in different states would be "injurious to their interests."[169] One Kentucky lawyer, arguing that once an enslaved person crossed into free Ohio they became permanently free, even if they subsequently returned to Kentucky, explained, "If the non-slaveholding states, out of comity, would allow citizens of slaveholding states to cultivate their soil with their slaves, they would soon be converted into slaveholding states," which "would violate the settled policy of their state by bringing slave labor in competition with their poor."[170] Judges in slave states likewise refused to apply the doctrine of comity where it would compel them to recognize free status granted by another state. Rebuffing the lawyer's argument, Judge Marshall explained, "Whatever… might be the law of comity, …it

[166] *Milton*, 222.
[167] People v. Thurber, 13 Ill. 554 (1852), 557.
[168] Wheeden v. Camden & A.R. Co., 1 Grant 420, 423 (1856) (Penn. 1856).
[169] *Bank of Augusta*, 589.
[170] *Strader*, 87; Graham v. Strader, 44 Ky. 173, 182 (Ky. 1844).

would be placing our laws and policy in subordination to those of a foreign State, if we were to say that one of our citizen has lost his right of property in a slave, which is valid here, by the mere force of a declaratory law of a foreign State, that there shall be no slavery within its territory." [171]

Taney's exposition of comity in *Bank of Augusta* was commonly invoked by both sides in cases involving slave mobility. As these cases reveal, the doctrine of comity set out in *Bank of Augusta* was not inherently anti-slavery or anti-corporation. Rather, it was an endorsement of state sovereignty over particular status relations within its borders: enslaved or free, incorporated or individual. In *Lemmon v. People of New York*, which considered whether an enslaved person became free simply by transiting through a free state, the state's lawyer cited *Bank of Augusta* in support, contending, "No comity of States requires us to admit slavery into our State in any form…, because the State has made an express statute declaring these persons to be free."[172] In a case involving enforcement of a will that bequeathed slaves for purpose of sending them to Liberia, a practice legal in Virginia where the will was written, but illegal in Mississippi, the Mississippi Supreme Court relied on *Bank of Augusta* for justification about why it would not enforce the Virginia law: "whilst we freely concede that in this confederacy of states, comity is indispensable, and should be extended in the most ample manner, yet it cannot be allowed to defeat the general policy of a state, declared by the legislative authority."[173] Again citing *Bank of Augusta*, the same court a decade later refused to enforce a bequest to a woman who had been born a slave but manumitted in a free state by her owner, who was also her father, as "the *status* of a slave, in Mississippi, is fixed by our laws, and cannot be changed elsewhere, so as to give him a *new status in this State,* without our consent."[174] Flipping the script, the court blamed free states for ignoring the doctrine of comity, saying,

[171] *Graham*, 182. See also Collins v. America, 48 Ky. 565 (1849).
[172] *Lemmon*, 591.
[173] Mahorner v. Hooe, 17 Miss. 247, 275, 278. (1848).
[174] Mitchell v. Wells, 37 Miss. 235, 249 (1859).

"'Comity" forbids that a sister State of this confederacy should seek to introduce into the family of States, as equals or associates, a caste of different color, and of acknowledged inferiority."[175] In response, the dissenting judge quoted *Bank of Augusta* extensively, arguing that "a free person of color… is entitled to the benefit of the rule of comity between States to its fullest extent, except so far as it is denied by our declared policy," and that Mississippi had no such policy prohibiting formerly enslaved persons from claiming inheritances.[176]

The most well-known slave mobility case to invoke *Bank of Augusta*'s definition of comity was *Dred Scott v. Sanford*. In his dissent, Justice Benjamin R. Curtis (who would later become an insurance lawyer and argue *Paul*) cited explicitly to *Bank of Augusta* for his definition of comity.[177] Justice Curtis concluded, based on *Prigg*, that international law dictated that while in free territory Dred Scott and his wife had become "absolutely free persons."[178] As Missouri had no law "refus[ing] to recognize a change, wrought by the law of a foreign State, on the *status* of a person," Curtis explained that under the principle of comity, it "must be presumed… to allow such effect to foreign laws as is in accordance with the settled rules of international law."[179] Dred Scott and his family, Curtis argued, were therefore free. (Notably, Curtis would soon argue for much less deference to state sovereignty as counsel in *Paul*.)

The doctrine of comity, as outlined in *Bank of Augusta*, was a careful balancing act designed to promote unity within a federalist system. Operating both laterally and vertically, the doctrine addressed inter-state as well as federal-state relations. States were presumed to accord deference

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[175] *Mitchell*, 261.
[176] *Mitchell*, 280 (Handy, J. dissenting).
[177] *Dred Scott*, 593 (Curtis, J., dissenting). Citing Commonwealth v. Aves, 35 Mass. 193 (1836), Curtis also concluded that black persons could be citizens and so could invoke the constitutional protections of citizens, including the privileges and immunities clause of Article IV. *Dred Scott*, 575-76.
[178] *Dred Scott*, 599, 624 (Curtis, J., dissenting).
[179] *Dred Scott*, 595, 593 (1857) (Curtis, J., dissenting).

to the laws of their sister states, in the spirit of national friendship. Yet the ability of states to refuse to recognize the laws of other states, provided they do so explicitly, allowed them some measure of sovereignty over their internal domestic and economic relations. The comity doctrine also mediated between the states and the national government. The exemption of certain rights from the principle of comity – namely, fundamental or constitutional rights – allowed the Supreme Court and the federal government to overstep the borders of state jurisdiction to curtail certain types of state legislation. Sometimes this exception promoted slavery, as with the Fugitive Slave Clause. Yet the doctrine that the Court and Congress had the power to protect fundamental and constitutional rights also established an important precursor to the post-war expansion of the Court's power to shield individual rights from unconstitutional state discrimination, namely via the creation and enforcement of the Fourteenth Amendment. The prevalence of citations to *Bank of Augusta* in cases involving slavery, as well as general reliance on the case's exposition of comity doctrine even when not cited directly, highlights the wide-ranging impact of litigation by corporations on the development of diverse areas of constitutional law.

Interstate Comity and Corporate Citizenship after the Civil War

Although emancipation removed the question of interstate slavery from courts' consideration, the power of states to discriminate against corporate persons and racial minorities continued to be interconnected in the aftermath of the Civil War. In his veto of the 1866 Civil Rights Act, President Andrew Johnson lumped together race, alienage, and incorporation as permissible bases for state discrimination, arguing that federal prohibitions on racial discrimination

would impact "the power of any State to discriminate, as do most of them, between aliens and citizens, between artificial persons called corporations and natural persons."[180]

The interstate mobility of insurance companies was a significant component of an ever-increasing anxiety about the power of large corporations.[181] Ohio Representative (and future president) James A. Garfield emphasized to Congress that since 1860 "the life insurance business of the country has grown up from almost nothing to enormous proportions."[182] These concerns now had a new layer: Reconstruction. In the context of military occupation and the political and economic incursions of the North in the former Confederate states, sentiments in Southern and Western states were even more inflamed over "the insufferable nuisance of 'carpet-bag' insurance companies."[183]

At the beginning of the Civil War, Northern companies had tried to maintain business with their Southern agents and customers in spite of secession.[184] But the Federal Non-Intercourse Act, which prohibited trade or communication with the Confederate States, soon squelched this plan.[185]

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[180] Andrew Johnson, "Veto of Civil Rights Act," *Congressional Globe*, 39th Cong., 1st Sess. 1680 (1866).

[181] In 1868, when *Paul* was decided, the interstate mobility of black persons and foreign corporations was still a pressing issue. The question of interstate mobility of enslaved person had been rendered moot by the Thirteenth Amendment, which abolished slavery. The Fourteenth Amendment overruled *Dred Scott* by making all persons born in the United States citizens, and prohibited states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States." Amendment XIII, Amendment XIV § 1. The Civil Rights Act further guaranteed the same rights to contract and own property "enjoyed by white citizens." *Statutes At Large*, Thirty-Ninth Congress, First Session, April 9, 1866, 27. Yet many states continued the pre-Civil War practice of regulating or prohibiting the entry of black persons into their territory. Kate Masur, "State Sovereignty and Migration before Reconstruction," *The Journal of the Civil War Era* 9, no. 4 (December 2019): 588-611, 604. Questions of state economic sovereignty continued to underly these cases; support for these regulations, which were justified under the state police power to protect the public welfare, included fear that African Americans would be willing to work for lower wages and thus displace the white working class. Interestingly, these restrictions seem not to have been challenged as violations of the privileges and immunities clauses of Article IV or the Fourteenth Amendment.

[182] "41st Congress 2nd Session," *Congressional Globe* 182 (1869). For instance, the Massachusetts Insurance Commission calculated in 1868 that whereas in 1859 there had been 16 life insurance companies in the United States that filed reports with the Commission, by 1868 the number had risen to 56. Nehemkis, 520 n.12.

[183] "Report of Special Committee to Kentucky Senate," *Insurance Times*, vol. 2, (1869), 143. For instance, the editor of a Louisiana newspaper, advocating deposit laws for foreign insurance companies, argued that "if a State, as Connecticut, forms a vast number of Insurance companies, with or without capital, a vast stream of wealth will flow into it, the product of swindling other States." W.H. Scanlan, "The Insurance mania has possession of the country." *The Bossier Banner*, March 12, 1870.

[184] Murphy, 204.

[185] Murphy, 204.

Furthermore, some Confederate states seized Northern assets, while others prohibited Northern insurance companies explicitly.[186] After the war, however, the South desperately need to rebuild its financial infrastructure, and insurance was vital.[187]

Both Southern and Northern insurance companies strove to meet the overwhelming need of Southern merchants using the same prewar playbook, with a Confederate twist. They emphasized their Southern connections and association with respectable Confederate military men. For instance, several Virginia insurance companies announced that they were represented by "THOMAS M. ALFRIEND," an insurance agent for various home companies since 1833 who had served in the Virginia Militia and been a prisoner of war.[188] Invoking the destruction of the war, the Virginia Fire and Marine Insurance Company of Richmond boasted that it had "passed through the ordeal of fire, and through financial crises, and is still solvent."[189] Hoping to take advantage of sectionalist sentiment, a New York company's advertisement in a Virginia paper was titled in large capital letters, "OFFICE OF THE SOUTHERN General Agency," followed in very small print by "the Security Insurance Company of New York."[190]

The most notable example of insurance companies' reliance on Confederate military heroes to promote their trustworthiness and Southern identity was the election of Jefferson Davis as the President of the Carolina Life Insurance Company of Memphis in 1869.[191] The entrance of "ex-President Jefferson Davis" into the insurance industry was broadcast in advertisements throughout the South.[192] "The fact that Jefferson Davis, our late honored President, is the president

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[186] Murphy, 204.
[187] Murphy, 204.
[188] Advertisement, *Daily Richmond Enquirer*, June 1, 1867; "Business Notices," *Richmond Whig and Public Advertiser*, October 17, 1865; Virgil A. Lewis, "City of Richmond," *Virginia and Virginians* vol. II (Richmond and Toledo: H.H. Hardesty, 1888); "Thomas L. Alfriend & Sons," *The Insurance Times*, vol. 29 (January 1906).
[189] *The Daily Dispatch*, February 10, 1866.
[190] *Richmond Dispatch*, March 12, 1867.
[191] "Hon. Jefferson Davis", *The South-Western*, December 15, 1869.
[192] "Jefferson Davis," *The Ouachita Telegraph*, January 15, 1870.

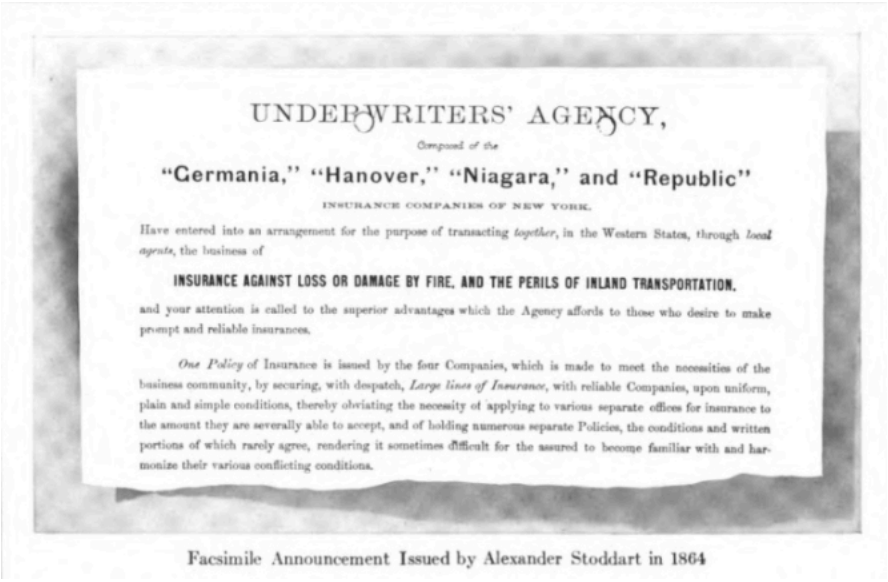
of the Carolina, is alone sufficient to inspire confidence in the integrity of its management," announced one South Carolina paper.[193] A Louisiana paper extolled, "Notwithstanding Jefferson Davis was the leader of a fallen cause, we to-day regard him, and the unprejudiced of America regard him, as the greatest moral hero of the age," and that "Mr. Davis' connection with [the Carolina Life] will serve to strengthen it in the confidence of all honest Southrons."[194] The *Charleston Daily News*, even more devoutly, evinced an almost religious faith in the Confederate leader: "Need any more be said to commend the Carolina Life Insurance Company to the people of the South?... at its head is the patient and indomitable man, upon whom all eyes were fixed during five eventful years of war… we have now before us a plain and simple way of proving that our President is not forgotten, that we still remember with love and respect him who suffered so grievously for our faults."[195]

Paul v. Virginia

The urbane and courteous Samuel B. Paul fit this pattern of employing Confederate war heroes as insurance agents after the Civil War.[196] A former Colonel in the Confederate Army, Paul had been aide to General G. T. Beauregard and was well-respected in the local community.[197] An attorney in Petersburg, Virginia, Paul was hired by the Germania, Hanover, Niagara, and Republic Fire Insurance Companies, "the quadruple alliance… known as the

[193] "Carolina Life Insurance Company," *The Anderson Intelligencer*, July 7, 1870.
[194] "Jefferson Davis," *The Ouachita Telegraph*, January 15, 1870
[195] "The Carolina Life Insurance Company," *The Charleston Daily News*, February 04, 1870.
[196] *Alexandria Gazette*, May 4, 1860 (noting of Paul, in his capacity as flour inspector, that "His uniform urbanity and courtesy have already secured him troops of friends.").
[197] *Battles and Leaders of the Civil War*, edited by Robert Underwood Johnson, vol. IV (New York: The Century Company, 1888), 540; "Business Notices," *Richmond Whig and Public Advertiser*. October 17, 1865; *Alexandria Gazette*, May 4, 1860.

'UNDERWRITERS' AGENCY,'" incorporated in New York.[198] At the direction of his New York employer, Paul refused to pay the deposit required by the 1866 Virginia law regulating foreign insurance companies, instigating a test case in federal court.[199]



UNDERWRITERS' AGENCY,

Composed of the

"Germania," "Hanover," "Niagara," and "Republic"

INSURANCE COMPANIES OF NEW YORK.

Have entered into an arrangement for the purpose of transacting *together*, in the Western States, through *local agents*, the business of

INSURANCE AGAINST LOSS OR DAMAGE BY FIRE, AND THE PERILS OF INLAND TRANSPORTATION.

and your attention is called to the superior advantages which the Agency affords to those who desire to make prompt and reliable insurances.

One Policy of Insurance is issued by the four Companies, which is made to meet the necessities of the business community, by securing, with despatch, *Large lines of Insurance*, with reliable Companies, upon uniform, plain and simple conditions, thereby obviating the necessity of applying to various separate offices for insurance to the amount they are severally able to accept, and of holding numerous separate Policies, the conditions and written portions of which rarely agree, rendering it sometimes difficult for the assured to become familiar with and harmonize their various conflicting conditions.

Facsimile Announcement Issued by Alexander Stoddart in 1864

Image 7: *Advertisement of the Underwriters' Agency, 1864.*

Although scholars have discussed *Paul v. Virginia* in histories of insurance in the United States, none have examined the case in the history of the development of corporate constitutional personhood in any depth. In fact, *Paul* is a turning point in the history of corporation constitutional rights claiming: a failure in an otherwise successful legal strategy to expand corporations' constitutional rights over the course of the nineteenth century.

By the end of the Civil War, the patchwork of state regulations insurance companies had to navigate, as well as the burdensome new deposits required by developing states like California and Nevada, prompted insurance executives to think creatively about other strategies.

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198 "Hanover Fire Insurance Company," *Insurance Gazette* 28: 217.

199 On Feb. 3, 1866 the Virginia Assembly passed "An act to require a deposit of securities to be made by foreign insurance companies doing business in this State," which required a deposit of bonds from foreign insurance companies in the following amounts: if the capital of the company was less than $500,000, $30,000 of bonds; if between $500,000 and $1 million, $35,000 in bonds; and "for every additional million of dollars, or a fraction thereof, it shall deposit an additional" $5,000 in bonds, up to $50,000. Paul transcript, 20.

Emboldened by the integrated national commercial, industrial, and financial network that emerged from the Civil War, executives from the largest insurance companies envisioned "one general law for the government of insurance companies throughout the Union."[200] A national system of insurance was practically necessary because insurance, by its nature, required a large pool of insurers; ideologically, insurance had the potential to bind together the entire Union, creating a new fraternity among states out of the ashes of "the most terrific fratricidal war in the history of civilization."[201] Alexander Stoddart, the founder of the Underwriters Agency, expressed that "insurance-wise, no State can live unto itself alone, and that States, as well as individuals must bear each other's burdens… in the broad survey which insurance makes of a continent, artificial lines known on the map as State boundaries have no place."[202]

The executives of major fire and life insurance companies determined to combine forces in order to standardize both industry practices and the law governing insurance corporations. They formed national boards that attempted to set uniform standards among their member companies, encourage cooperation regarding rate-setting and other practices, and most importantly, to craft a national strategy for combating discriminatory state laws.[203]

Insurance companies also determined to reverse *Bank of Augusta,* resolving to contribute funds to cases currently challenging foreign corporation restrictions in federal court.[204] A Supreme Court opinion finding state regulation of foreign insurance companies unconstitutional, they

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[200] *The Conquest of Fire* (New York: New York Underwriters Agency, A & J.H. Stoddart, 1914), 48. Insurance executives hoped to model national insurance legislation after the National Banking Act.
Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, The "Conspiracy Theory," and American Constitutionalism* (Madison: Wisconsin Historical Society, 1968), 383; Philip L. Merkel, "Going National: The Life Insurance Industry's Campaign for Federal Regulation after the Civil War" *Business History Review* 65 (1991): 528-553, 538.
[201] *Conquest of Fire*, 39.
[202] *Conquest of Fire*, 48.
[203] Merkel, 538.
[204] "Proceedings of the executive committee of the National Board of Fire Underwriters," *Insurance Gazette* 28: 52; "Life Insurance Convention," *Insurance Gazette* 28: 70. See Merkel, 544.

hoped, would compel Congress to create a national system of insurance regulation.[205] In 1868, the National Board of Fire Underwriters determined to back *Paul v. Virginia*, on the grounds that as the cased involved "all of the constitutional points which are common to us all," it was "very important that a vigorous defense of that case should be made," and the costs not "be borne by one Company for the benefit of us all."[206] Contributing $15,000 to the case's prosecution, the Board authorized Col. Paul "to employ such counsel as [he] thought best qualified to present the case to the Supreme Court."[207] Paul engaged James Mandeville Carlisle and ex-Supreme Court Justice Benjamin R. Curtis, who had retired from the Court in 1857 and become counsel for insurance companies.[208] Although Paul's original claim had only involved Article IV, Paul's new lawyers subsequently added a commerce clause claim as well, a novel gambit based on the Supreme Court's newfound willingness after the Civil War to recognize a broader scope of Congress's power to regulate commerce.[209]

Paul's Article IV claim relied on the interpretation of the privileges and immunities of citizenship as including "trade, commerce, buying and selling."[210] The lawsuit, announced Curtis, arguing before the Supreme Court, "concerns nothing less than the equal right of the citizens of all the States to carry on a lawful trade or commerce in each State upon equal terms with the citizens thereof."[211] Virginia's law, Paul's petition proclaimed, violated "this great constitutional right of freedom and equality, in trade, in and among the several States, by and between the

[205] Merkel, "Going National," 544.
[206] *Insurance Gazette* 28: 53.
[207] *Conquest of Fire*, 49.
[208] Nehemkis, 527-28.
[209] Insurance executives hoped a court ruling that state regulation of insurance was an unconstitutional infringement on Congress's commerce power would force the federal government's hand and compel Congress to institute a system of uniform national regulation. Merkel, 544.
[210] Transcript, *Paul v. Virginia*, 7.
[211] *Paul*, 174.

citizens thereof."[212] Because interstate trade was a privilege and immunity of citizenship, states had no power "to impose any hindrance or embarrassment, or lay any excise toll, duty, or exclusion upon citizens of other States" engaged in commercial activities.[213] Paul's lawyers also argued that the privileges and immunities of citizenship included the right to contract: "the citizens of the several States have a clear and absolute constitutional right to hold commerce and commercial intercourse, and make contracts… as their several interests and inclinations may dictate, free and exempt from any interference or control of State legislation."[214] This interpretation of the "privileges and immunities of citizens of different states" did not distinguish between state and national citizenship; rather, quoting Justice Story's *Commentaries on the Constitution*, Paul argued that Article IV "intended to confer on the citizens of the several States 'a general citizenship' throughout the Union."[215] As "general" was often used as a synonym for "federal" or "national", Paul's interpretation of Article IV was that it established a baseline of protections for citizens of the United Stated, including the right to equality in interstate commerce.[216]

The argument Paul's lawyers made in the Virginia Supreme Court presented a different vision of the corporation than the arguments Curtis and Carlisle employed in the Supreme Court of the United States. In the state court petition, Paul's lawyers portrayed the corporation as simply a useful vehicle for collective profit-making, not as a citizen itself, referring to insurance corporations evasively as "citizens doing business here under the form of incorporated

[212] Transcript, 7.
[213] Transcript, 7.
[214] Transcript, 9.
[215] Transcript, 8.
[216] This understanding complicates assertions by several scholars that the "privileges and immunities of citizens in the several states" of Article IV was understood to be different than the "privileges and immunities of citizens of the United States" in the 14th amendment, at the time the 14th amendment was drafted. It also challenges the Court's holding in Slaughterhouse that the privileges and immunities of national citizenship did not include the right to engage in a trade, as Paul's lawyers clearly thought that the claim that the right to "freedom and equality, in trade" was a privilege and immunity of "general" citizenship was a legitimate argument.

companies."[217] As it "cannot be questioned" that a law levying special burdens on merchants or unincorporated partnerships from other states would violate the constitutional right to equality in trade, Paul argued, "it is not perceived why" the same right of citizens of other states should be "thereby destroyed or impaired" simply because they were "authorized to associate themselves" in corporate form by their home state.[218] Dismissing the idea that incorporation was a unique status granted by the state with special duties to the public, Paul argued that as "[c]ontracts with such a corporate body of our fellow citizens of a sister State are made at our own option and for our own benefit…, no reason is perceived why that privilege should not be exercised by a combination of citizens contracting with an individual or by an individual contracting with a combination of citizens."[219] Paul here presented the corporation as simply a collection of private actors performing an arms-length transaction with another private party, for their own profit, no different than any other market actors. This was a strikingly different portrayal of insurance companies than that promoted in public discourse by members of the public, as well as insurance agents and directors – Col. Paul and his company included. Rather than a benevolent, community-minded body personified by its respectable, paternal directors and agents, the insurance company in Paul's state court filings was simply a collection of individuals pursuing their own private interest in the marketplace, with no special relationship or duty to the public.

In the Supreme Court, however, Col. Paul's new layers, ex-Justice Curtis and J.M. Carlisle, made a different claim about the nature of the corporation. They boldly claimed, "A corporation created by the laws of one of the States, and composed of citizens of that State, is a citizen of that State within the meaning of the Constitution."[220] In support of this claim, they cited Supreme

[217] Transcript, 4.
[218] Transcript, 4.
[219] Transcript, 8-9.
[220] *Paul*, 170.

Court precedent on diversity jurisdiction. The case they relied on was *Louisville v. Letson*, which had appeared to overrule *Deveaux's* view of the corporation as an aggregate of citizens, not as a citizen itself. Arguing that the doctrine of *Deveaux* had been "carried too far," the Court in *Louisville* had proclaimed, "A corporation created by a state to perform its functions under the authority of that state… seems to us to be a person, though an artificial one, inhabiting and belonging to that state, and therefore entitled, for the purpose of suing and being sued, to be deemed a citizen of that state."[221]

Yet Curtis and Carlisle ignored the fact that a decade later, the Supreme Court had seemed to revert to the view of the corporation as an aggregate of citizens whose citizenship could be attributed to the corporation, in the case of *Lafayette v. French* and *Marshall v. Baltimore & Ohio Railroad* – even though Curtis himself, at the time a Supreme Court Justice, had written the opinion in that very case.[222] In *Lafayette*, Curtis had conclusively stated that as far as pleading in diversity cases was concerned, "The averment, that the company is a citizen of the State of Indiana, can have no sensible meaning attached to it. This court does not hold, that either a voluntary association of persons, or an association into a body politic, created by law, is a citizen of a State within the meaning of the constitution."[223] In other words, according to Curtis's own opinion, regardless of whether the corporation was seen as an aggregate of citizens or as a "body politic" itself, the corporation itself could not be called a "citizen."

Curtis's argument in *Paul* was also in tension with his view of interstate comity in corporate citizenship cases, as well as in his dissenting opinion in *Dred Scott*.[224] In *Lafayette*, Curtis had strongly

[221] *Letson*, 555.
[222] Lafayette Ins. Co. v. French, 59 U.S. 404 (1855); *Marshall*, 328.
[223] *Lafayette*, 405.
[224] Curtis's conflicting views of interstate comity were also in tension with his advocacy in cases involving the interstate mobility of enslaved persons. As a young lawyer representing the slave owner in the famous case *Commonwealth v. Aves*, in which a slave owner travelled from Louisiana to Massachusetts with an enslaved girl who then claimed her freedom under Massachusetts law, Curtis argued that Massachusetts should recognize Louisiana law on the basis of comity.

emphasized the view of comity set out in *Bank of Augusta*, explaining that a corporation created in one state "can transact business in [another] only with the consent, express or implied, of the latter State," subject to "such conditions as [the latter state] may think fit to impose."[225] In his dissenting opinion in *Dred Scott*, Curtis endorsed a similar vision of interstate comity that gave more power to state sovereignty and international law. He cited explicitly to *Bank of Augusta* for his definition of comity.[226] "Undoubtedly," wrote Curtis, "every sovereign State may refuse to recognize a change, wrought by the law of a foreign State, on the *status* of a person, while within such foreign State."[227] This was true "even in cases where the rules of international law require that recognition."[228] Yet, he cautioned, the principle of comity held that unless it clearly appeared "from the statute or customary law of the State, to be the will of the State to refuse to recognize such changes of *status* by force of foreign law," the State would be presumed to recognize "the rules of the law of nations require to be recognized."[229] According to the law of nations, "wherever any question may arise concerning the *status* of a person, it must be determined according to that law which has next previously rightfully operated on and fixed that *status*."[230] Curtis concluded, based on *Prigg*, that international law dictated that while in free territory Dred Scott and his wife had become "absolutely free persons."[231] As free persons, they had been married.[232] Missouri had no explicit law refusing to recognize the marriage of persons who were free when they married, and so the

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Aves, 195. Countering the argument that the exception to comity applied when the law was contrary to express state policy or "immoral," Curtis weakly argued that state policy favored promoting peace among the union, and that while slavery was "not consistent with natural right," it was not immoral in a legal sense. In contrast, Curtis voiced strong support for state sovereignty to refuse to recognize foreign law in his dissenting opinion in Dred Scott.

[225] *Lafayette*, 407.

[226] *Dred Scott*, 593 (Curtis, J., dissenting). Citing *Aves*, Curtis also concluded that black persons could be citizens and so could invoke the constitutional protections of citizens, including the privileges and immunities clause of Article IV. *Dred Scott*, 575-76.

[227] *Dred Scott*, 595 (Curtis, J., dissenting).

[228] *Dred Scott*, 595 (Curtis, J., dissenting).

[229] *Dred Scott*, 595 (Curtis, J., dissenting).

[230] *Dred Scott*, 595 (Curtis, J., dissenting).

[231] *Dred Scott*, 599, 624 (Curtis, J., dissenting).

[232] Marriage was one of the domestic status relations that the international principle of comity was designed to protect.

presumption of comity dictated that the state recognize the free and married status of Dred Scott and his wife, and the freedom and legitimacy of their children.[233]

In contrast, as counsel for Paul, Curtis ignored the claim that incorporation was a state-created status, claiming instead that the corporation itself was a constitutional rights-bearing citizen. Article IV, he argued, adopted the Articles of Confederation's definition of privileges and immunities, which included the right to "free ingress and egress to and from any other State" and to "enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively."[234] As corporations were citizens, therefore, "[l]egislation imposing special and discriminating restrictions upon the carrying on of lawful business in one State by citizens of other States" was clearly unconstitutional. [235]

Regardless of whether Curtis's views had undergone a transformation or whether he was simply being a good lawyer, Justice Field chose to follow Supreme Court precedent rather than heed the assertions of the former justice. Field's opinion in *Paul v. Virginia* relied on the interpretation of privileges and immunities and of comity established by the two lines of slavery and corporate cases. First, citing *Letson* and *Bank of Augusta*, Field concluded that corporations were not citizens and so could not claim the privileges and immunities of citizenship.[236] "The term citizens" in Article IV, he explained, "applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."[237] Quoting *Bank of Augusta*, Field stated, "The only rights [the corporation] can claim are the rights which are given to it" in its charter, "and not

[233] *Dred Scott*, 601 (Curtis, J., dissenting).
[234] *Paul*, 170-171, quoting the Articles of Confederation.
[235] *Paul*, 171.
[236] *Paul*, 177-79. Field's opinion in *Paul* reinterpreted *Letson* to accord with *Deveaux*, *Lafayette*, and *Marshall*, as holding that a corporation was an aggregate of citizens whose citizenship could be attributed to the corporation for purposes of federal jurisdiction, but which was not a citizen itself. *Paul* at 178.
[237] *Paul*, 177.

the rights which belong to its members as citizens of a State."[238] Yet even if the Court were to view corporations as simply collections of individual citizens, Field held, the privileges and immunities of citizenship did not include any "[s]pecial privileges enjoyed by citizens in their own States."[239] Referencing the comity principle, Field explained, the privileges and immunities clause "was not intended… to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States."[240] As "a grant of corporate existence is a grant of special privileges to the corporators," a status that was "the mere creation of local law," it could have "no legal existence beyond the limits of the sovereignty where created."[241] Citing the slave transit case *Lemmon v. New York*, Field announced that "no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people" as the privileges and immunities clause.[242]

Field also voiced concerns about the impact on state economic sovereignty of allowing foreign corporations to operate interstate. The "wealth and business of the country are to a great extent controlled" by large corporations, he warned; if "their corporate powers and franchises could be exercised in other States without restriction,… the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."[243] Noting the particular dangers posed by foreign insurance companies that had long been the subject of public debate, Field specified, "No foreign insurance company has a right to come into Virginia by her agents, to do the business of insurance, without the consent of Virginia, and, in giving her consent, she has the perfect right to impose such

[238] *Paul*, 180 (quoting *Bank of Augusta*, 586).
[239] *Paul*, 180. Field did, however, include among the privileges and immunities of citizenship "the right of free ingress into other States." Paul, 180.
[240] *Paul*, 180.
[241] *Paul*, 181.
[242] *Paul*, 180.
[243] Paul, 181-82.

reasonable conditions as she may deem necessary and proper to secure the payment of her revenue."[244]

Paul, called "one of the greatest suits in American corporation law," became a "cause célèbre" among "Insurance men."[245] In spite of his loss, Samuel Paul catapulted to national fame, eventually establishing his own insurance company in New York City.[246] Although the outcome in *Paul v. Virginia* had not been what the insurance company had hoped for, Paul and other insurance lawyers acknowledged the precedential power of the case. Upon Paul's death in 1908, an insurance industry periodical opined that "it is probable that the case, already cited thousands of times, will continue to be cited while insurance is insurance and the United States stand."[247]

Conclusion: Paul's Legacy and Bingham's Bill

Paul v. Virginia gave the green light to discriminatory state regulation of foreign insurance companies. Faced with the failure of their attempts to overturn these laws using Article IV, insurance companies adopted a new strategy: using the privileges and immunities clause of the

[244] Paul, 176-77. Field's commitment to denying corporations citizenship might be considered surprising, given his later jurisprudence that purposively pierced the corporate veil in order to expand corporations' constitutional rights in other contexts, as the next two chapters will discuss. One reason why Field may have been disinclined to open the door to foreign corporations was because his home state of California had recently passed a draconian law requiring all foreign insurance companies to deposit $75,000, and Field perhaps did not want to offend his friends among the San Francisco business elite. "Prospect That New York Insurance Companies in This State Will Have to Close up Business," *Evening Bulletin*, April 22, 1864. As with other states in the West and South in this period, Californians in favor of the law argued that "foreign companies have obtained so complete a monopoly of the insurance business in California, that it is almost impossible for domestic companies to get a foothold." CTH, "Facts on the Home Insurance Question," *Evening Bulletin*, March 24, 1862. Invoking *Bank of Augusta*, one commentator explained that "no other State acknowledges any *inherent right* in foreign insurance corporations to extend their business beyond the limits of their own respective States. Such extension is allowed solely *by comity*." *Ibid*. Regardless of Field's personal stake in the outcome of the cases, a major difference between *Paul* and the cases in which Field did recognize corporate constitutional rights, discussed in the following chapters, is that *Paul* involved interstate relations in a federal system.

[245] *The Conquest of Fire*, 48, 47; *Weekly Underwriter*, 71(New York: 1904): 453.

[246] *The Chronicle*, 38 (New York: 1886): 290.

[247] *The Adjuster: An Insurance Journal* 37 (San Francisco: 1908), 171.

nascent Fourteenth Amendment of the United States Constitution, which was ratified in 1868, the year *Paul* was decided. In the 1870 Fifth Circuit case *Insurance Co. v. New Orleans*, future Supreme Court Justice William Burnham Woods dismissed a New York insurance company's claim that New Orleans's tax on foreign insurance corporations violated the clause of the Fourteenth Amendment that prohibited states from making or enforcing "any law which shall abridge the privileges or immunities of citizens of the United States."[248] Noting that the precedent of *Paul* and *Bank of Augusta* had conclusively determined that corporations were not "citizens of the several states," Woods concluded that corporations could not claim national citizenship either. The amendment clearly defined United States citizens as "persons born or naturalized in the United States," and a corporation, Wood explained, "cannot be said to be born, nor can it be naturalized."[249] Conclusively, then, "artificial persons" could not be citizens under the Fourteenth Amendment.[250]

In addition to its conclusive denial of corporate citizenship, *Paul* also had an impact on the Supreme Court's interpretation of the meaning of privileges and immunities in the Fourteenth Amendment. In the *Slaughter-House Cases*, in one of the first Fourteenth Amendment cases to reach the high court, the Court cited *Paul* to support a narrow interpretation of the amendment's privileges and immunities clause.[251] The *Slaughter-House Cases* involved a claim by white butchers

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[248] Insurance Co. v. City of New Orleans, 13 F.Cas. 67, 67 (C.C.D. La. 1870).
[249] Insurance Co., 67-68.
[250] Ins. Co., 68. Although insurance corporations continued to try to overturn *Paul*, they did not succeed. *See Liverpool Insurance Company v. Massachusetts,* 77 U.S. 566 (1871); *Ducat v. Chicago,* 48 Ill. 172 (1868); *Ducat v. Chicago,* 77 U.S. 410 (1871); *Philadelphia Fire Association v. New York,* 119 U.S. 110 (1886); *Hooper v. California,* 155 U.S. 648 (1895); *Cravens v. New York Life Insurance Company,* 148 Mo. 583 (1899); *New York Life Insurance Company v. Cravens,* 178 U.S. 389 (1900); *Nutting v. Massachusetts,* 183 U.S. 553 (1902); *New York Life Insurance Company v. Deer Lodge County,* 43 Mont. 243 (1911); and *New York Life Insurance Company v. Deer Lodge County,* 231 U.S. 495 (1913). Only in 1944 did the Supreme Court overturn part of *Paul*, holding that insurance was in fact commerce. However, in response to this decision, Congress passed the McCarren-Ferguson Act of 1945, which placed control of insurance regulation under the power of the States. Murphy, *Investing in Life*, 290.
[251] Slaughter-House Cases, 83 U.S. 36, 76 (1873).

in New Orleans that the city's grant of a slaughterhouse monopoly to one company violated the Fourteenth Amendment's privileges and immunities clause, which they argued included the right to pursue their chosen calling. In its opinion, the Court held that the privileges and immunities of national citizenship did not include the right to labor in a chosen trade – in spite of the substantial precedent, detailed above, that equal participation in the market was included among the "privileges and immunities of citizens of different states" originally protected in the Constitution.[252]

Faced with the failure of *Paul*, insurance companies lobbied for legislative protection.[253] A year after the Supreme Court rejected the insurance company's claims in *Paul*, Congress considered House Bill 349, "Extending to corporations the privileges and immunities guarantied [sic] by the Constitution to the citizens of the respective States."[254] The bill was introduced by John A. Bingham, the lead drafter of the Fourteenth Amendment.

As a representative from Ohio, Bingham's support of corporate privileges and immunities is at first glance surprising, as Ohio was notorious for heavily regulating foreign insurance corporations.[255] Yet Bingham in fact had extensive ties to a powerful foreign insurance company; as a lawyer, his main client had been the Ohio Life Insurance and Trust Company.[256] Although

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[252] Field, who believed the privileges and immunities of citizenship included equal access to the market, dissented in *Slaughter-House.*

[253] One strategy insurance companies pursued was to lobby for a National Insurance Act that would set uniform standards for the industry. The expansion of Congress's power over the financial industries of the country, notably the passage of the National Bank Act in 1863, gave insurance executives hope that Congress would be willing to take similar steps with regard to insurance. However, leery of any further expansion of federal power after the Civil War, these proposals went nowhere. Murphy, *Investing in Life*, 287-88.

[254] House Bill 349, 41st Congress First Session Cong. Globe XV (1869).

[255] See "Money and Banking," *The Connecticut Courant* (Hartford, Connecticut), July 7, 1855 (joking that in Ohio the penalty for violating the foreign insurance corporation law was "imprisonment in the county jail not more than 30 days and fed on bread and water only"); letter to the editor, *Ohio State Journal*, July 5, 1854; "The New Insurance Law," *The Connecticut Courant*, April 15, 1854; "Report of the Auditor of State," *Ohio State Journal*, January 11, 1859.

[256] As far I have been able to ascertain, no scholars have uncovered Bingham's connection to insurance. Gerard Magliocca refers to the Ohio Life and Trust as a "small bank," but did not link the Ohio's background to a major East Coast life insurance company. Gerard Magliocca, *American Founding Son: John Bingham and the Invention of the Fourteenth Amendment* (New York: New York University Press, 2013), 24. The Ohio Life and Trust fought restrictive state laws in other ways, most notably in bringing a precedential state court suit in the Supreme Court of Kentucky, Commonwealth v. Milton, 51 Ky. 212 (Ct. app. Ky. 1851), which was cited in a major Supreme Court case involving

chartered in Ohio, the corporation was in fact covertly run by major Eastern financiers, who had strategized to skirt Ohio's restrictive foreign corporation laws by incorporating locally while ensuring that almost all major stockholders were wealthy East Coasters.[257] Formed in 1834, the incorporators of the Ohio Life Insurance and Trust were investors in the powerful New York Life and Trust Company.[258] Wishing to expand westward while avoiding Ohio's tax on foreign insurance corporations, they concocted a scheme to secretly recruit two prominent Ohioans – Elisha Whittlesey (a lawyer and Whig Congressional representative) and Micajah T. Williams (a Democrat politician, businessman, and developer) to their cause to push the charter through the Ohio legislature.[259] The charter they received explicitly provided that "no higher taxes" be levied against the corporation than those levied on other state banking institutions.[260] In return for their complicity, Whittlesey and Williams, along with several other Ohio political and financial elite, were given the option to purchase stock in advance of the formal opening, as were the major New York backers of the project.[261] As a result, although the Ohio Life Insurance and Trust Company was nominally a local company, on the official day that stock was opened for subscriptions, it was discovered that no stock was left for ordinary Ohio investors to purchase.[262]

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corporate citizenship for purposes of diversity jurisdiction, Marshall v. Baltimore & O. R. Co., 57 U.S. 314, 353 (1853) (Campbell, J., dissenting).

[257] John Denis Haeger, *The Investment Frontier: New York Businessmen and the Economic Development of the Old Northwest* (Albany: State University of New York Press, 1981), 39-40.

[258] Haeger, *The Investment Frontier*, 40.

[259] Haeger, 44-45.

[260] William Herbert Page and John J. Adams, *The Annotated General Code of the State of Ohio of 1910*, vol. 4 (Cincinnati: W.H. Anderson Company, 1912).

[261] Haeger, 51, 54.

[262] Haeger, 54. Although successful for many decades, in 1857 the company unexpectedly failed, the result of speculative investments by its New York office, particularly in railroads. Charles Clifford Huntington, *A History of Banking and Currency in Ohio Before the Civil War* (Columbus, OH: Heer, 1915), 242. Its failure "precipitated a panic," causing banks throughout the country to suspend specie payments. As a result of the panic "150 banks were said to have failed" on the East Coast and a number in Ohio; several railroads went bankrupt; the stock market crashed; and "20,000 persons were thrown out of work in New York City." Huntington, 242-43. Fortunately, the company had ceased to offer life insurance at that time and focused solely on banking services, "so that, happily, the accumulations for the support of families, contemplated by Life Insurance, are not interfered with by the failure of that Company." "Bank Failures," *The Bankers Magazine* 12, no. 4 (October 1857): 322.

However, Bingham's bill failed to gain the support of the Committee on the Judiciary, on which he served. The bill as originally crafted "was, after due consideration, deemed by us too broad," and the Committee feared that in light of Supreme Court precedent, it was "clearly unconstitutional."[263] On behalf of the Committee, Bingham presented a revised version, which read:

> That no penalty shall be imposed on any life insurance company incorporated by any State, on account of any action by such company which is authorized by the laws of the United States; nor shall any tax or other condition of doing business be imposed upon any such company which is not, by the same authority, imposed upon all life insurance companies.[264]

The first clause of the bill, Bingham explained, was to overturn state laws that prohibited foreign insurance companies from suing in federal court – i.e., from exercising their right as citizens to diversity jurisdiction.[265] Regarding the second provision, Bingham was much more evasive. He stated that as corporations had been "ruled to be citizens of the United States within the meaning of the Constitution… " for purposes of diversity jurisdiction, "they are therefore, of necessity, within the ruling of the court, 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 or commerce than the citizens of the State in which they may live."[266] In other words, in support of his bill, Bingham relied on two arguments that the Supreme Court had explicitly rejected: that corporations were citizens under the privileges and immunities clause, and that the right to equal treatment in interstate commerce was a privilege and immunity of citizenship.

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[263] House Bill 349 (revised), 41st Congress 3rd Session, *Congressional Globe* 1288 (1871).
[264] House Bill 349 (revised).
[265] Ibid.
[266] Ibid.

Bingham's revised bill was introduced on February 15, 1871. *Paul* had been decided in 1868; yet Bingham failed to mention *Paul*, instead listing the diversity jurisdiction cases in which the Court had attributed citizenship to corporations, including *Letson* and several others. As an insurance lawyer, there is no doubt that Bingham knew about *Paul* – after all, opined one study of the fire insurance industry, there "is not a lawyer in this country who does not know the famous case of Paul vs. Virginia."[267] There can be no doubt that Bingham intentionally misrepresented Supreme Court jurisprudence on the question of corporate citizenship.

In this, Bingham was supported by his fellow member of the Judiciary Committee Major General Benjamin Butler, a widely controversial figure in the Civil War and now a Representative from Massachusetts. It has been a fact little noted that Butler served on retainer for the Massachusetts Globe Life Insurance company in the 1870s.[268] His dealings as counsel for the Globe were not always aboveboard; he was accused of pressuring the New York insurance commissioner to turn a blind eye on the failure of the Globe to accord with New York's foreign corporation law.[269]

In his argument, Butler voiced strong support for protections for foreign insurance companies. "It is a very simple and plain proposition," he asserted, "that in the matter of life insurance companies there shall be no other and different penalties imposed by a State on foreign companies than it imposes on its own companies."[270] In response to a query about Congressional authority to pass such a bill, Butler dissembled, "I will answer the question… in this way: Congress has, under the Constitution, the power to regulate commerce between the States; one species of commerce is the business of insurance; and corporations are, by the decisions of the courts, citizens

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[267] *Conquest of Fire*, 47.
[268] "The insurance commissioner of Massachusetts…," *The Weekly Underwriter* 29 (July-Dec. 1883): 158.
[269] "The insurance commissioner of Massachusetts…," 158.
[270] 41st Congress 3rd Session, *Congressional Globe* 1289 (1871).

of the States creating them."[271] This statement was outright falsehood as regarded the first claim, and careful mischaracterization as to the second. In *Paul*, the Supreme Court had explicitly held that insurance was *not* commerce. Following Bingham's lead, Butler also elided the difference between corporate citizenship in diversity jurisdiction doctrine and the corporate citizenship cases involving Article IV. With this subterfuge, Bingham and Butler clearly intended House Bill 349 to overturn the Court's decision in *Paul*. The bill, however, was tabled and never revived.

Bingham first introduced this bill the year the Fourteenth Amendment was ratified. Scholars have debated for more than a century over whether the drafters intended to include corporations in the definition of "persons" in the Fourteenth Amendment, with the most recent consensus concluding that there is no evidence of direct intent.[272] Yet putting House Bill 349 in the context of Bingham's simultaneous drafting of the Fourteenth Amendment reinvigorates this debate. Bingham's first draft of the bill, overtly ascribing citizenship to corporations for purposes of extending to them the privileges and immunities of citizenship, indicates that he was thinking about the rights of corporations at the same time that he was drafting the Fourteenth Amendment.[273] After *Paul*, it was clear that the Court was not willing to include corporations

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[271] 41st Congress 3rd Session).

[272] The originators of this "conspiracy" theory were Charles A. Beard And Mary Beard, *The Rise Of American Civilization, 1874-1948* (New York: Macmillan, 1930), 112. The Beards argued that the Fourteenth Amendment's drafters had a twofold purpose: to protect the rights of formerly enslaved people and their descendants, and to reassert federal control over the economy and protect private property rights. *Id.* at 111-12. *See also* Carl Brent Swisher, *Stephen J. Field, Craftsman Of The Law* (Washington : The Brookings Institution, 1930), 416 (accepting this claim). They based this argument on the argument of Roscoe Conkling, an original drafter of the Fourteenth Amendment and a corporate lawyer who represented the Southern Pacific Railroad in the *San Mateo* case a few years before the Court issued its opinion in *Santa Clara*. Beard and Beard, *The Rise Of American Civilization*, 113; Winkler, *We the Corporations*, 133. Conkling's claim that the Fourteenth Amendment was intended to apply to corporations relied on scanty evidence, and though resurrected by the Beards, has since been scaled back significantly. Graham, *Everyman's Constitution*, 32-37 (discussing the "conspiracy theory" presented by Charles and Mary Beard), 94 (concluding that the Fourteenth Amendment was not "designed" to aid corporations but that the drafters may have been aware of the possibility it could be used that way); Hurst, *Legitimacy of the Business Corporation*, 67 ("No direct evidence supports this conspiracy theory…").

[273] Howard Graham similarly concludes that the existence of these bills concurrently with the drafting of the Fourteenth Amendment indicates corporate Fourteenth Amendment rights may have been in the consciousness of the drafters. *Everyman's Constitution*, 88-89.

within the protection of Article IV; hence the need for Congressional legislation to protect insurance companies by explicitly granting them citizenship. Bingham was undoubtedly aware that the privileges and immunities clause of the Fourteenth Amendment, which was limited to citizens, would likely also be found to exclude corporations. Yet Bingham was also likely aware that, as corporations were widely assumed to be "persons" within the meaning of applicable laws, they had a fair shot at claiming personhood under the due process and equal protection clauses.[274] Even if he may not have explicitly crafted the clauses to include corporations, there can be no doubt that he considered the possibility that corporations would subsequently invoke Fourteenth Amendment personhood rights – as, indeed, they did.[275]

Furthermore, although Bingham's bill itself failed, corporations were not unsuccessful in their lobbying efforts. Ten days after Bingham's bill was introduced, on February 25, 1871, Congress enacted a bill providing that "in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate," unless the context indicated the word was intended to be limited to natural persons.[276] Two months later, Congress passed the Ku Klux Klan Act, giving "any person" a right of action against "any person who, "under color of any law, statute, ordinance, regulation, custom or usage of any state," deprived them of "any rights, privileges, or immunities, secured by the constitution of the United States."[277] In 1873, in *Northwestern Fertilizing Co. v. Hyde Park*, an Illinois federal court held that a manufacturing corporation, as a "person" with constitutional rights within the meaning of the statute, was

[274] Robert Strassfield posits that in arguing for their bill, Bingham and Butler "said nothing of due process and equal protection, perhaps because its proponents assumed that the Civil Rights Act of 1866 had already made the rights encompassed by those phrases enforceable." Strassfield, "Corporate Standing to Allege Race Discrimination in Civil Rights Actions," 1165 n.70.
[275] Strassfield, 1165 n.70 ("Although there is no convincing evidence that the framers of the Reconstruction amendments and the Civil Rights Acts deliberately worded them in such a way as to include corporate rights in the Constitution and statutes, they doubtless did understand the word 'person' to include corporations.").
[276] Act of Feb. 25, 1871, § 2, 16 Stat. 431.
[277] Act of April 20, 1871, 17 St. 13.

entitled to claim the protection of the Ku Klux Klan Act against a municipal corporation.[278] The Supreme Court did not overturn this holding.[279] A decade later, a California federal court cited *Northwestern Fertilizing* to support their holding that corporations could claim the protection of the Fourteenth Amendment.[280]

[278] Northwestern Fertilizing Co. v. Hyde Park, F.Cas. 393, 394 (N.D. Ill., 1873).
[279] Northwestern Fertilizing Co. v. Village of Hyde Park, 97 U.S. 659 (1878). Rather, the Court considered only the question of whether the regulation at issue violated the charter of the fertilizing company under the Contract clause. Invoking the rule of Charles River Bridge that charter terms must be construed narrowly in the public interest, the Court held it did not.
[280] Railroad Tax Cases, 13 F. 722, 759 (C.C.D. Cal. 1882). The Railroad Tax Cases will be discussed in great detail in Chapter 5.

CHAPTER THREE

"Spoiled Children" of the State: The Granger Cases and the Rebellious Railroad

On August 11, 1870, shortly before 10:30 in the morning, the town of Eau Claire was abuzz with excitement. Wagons thronged the streets, a brass band tuned its instruments, and ladies put the finishing touches on ten long tables draped in white linen and loaded with all the delicacies the matrons of this isolated northwest Wisconsin town could produce.[1]

Eau Claire was to be isolated no more. As the first train of the West Wisconsin Railroad rumbled into the brand new depot, canons thundered, church bells clanged, the crowd cheered, and the band burst into a celebratory welcome. On the train were the Governor of Wisconsin and his wife; the railroad's president, D.A. Baldwin; as well as generals, colonels, senators, Milwaukee businessmen, and numerous other dignitaries. It was the finest spectacle Eau Claire had ever seen. Eau Claire was the terminus of the West Wisconsin Railroad; when the train pulled into the depot, it meant the railway was complete. Now Eau Claire was connected to the burgeoning metropolises of Milwaukee and Chicago. Its lumber, grain, and ore had a pathway to the major markets of the nation, and onward to the world.

[1] "Great Celebration at Eau Claire," *Milwaukee Daily Sentinel*, August 13, 1870.

Image 8: *Railroad Roundhouse at Eau Claire, 1872.*

The story of the West Wisconsin's welcome in Eau Claire is representative of the attitude of Wisconsinites during this period of "railroad mania."[2] Yet within just a few years, the relationship between the people of Wisconsin and the railroads had soured. Unable to meet the costs of construction and maintenance, and crippled by corruption and mismanagement, railroads began to rapidly increase fares for the transportation of goods and passengers. They also engaged in discriminatory pricing, privileging "long-haul" shipments over shorter regional ones, and granting special fares to large shippers while charging smaller shippers more.[3] The effect on local

[2] Balthasar Henry Meyer, *A History of Early Railroad Legislation in Wisconsin* (Madison: State Historical Society of Wisconsin, 1898), 259. Enthusiasm for railroads was national, as it was widely believed that rail connection guaranteed economic prosperity. H. Roger Grant, *Railroads and the American People* (Bloomington: University of Indiana Press, 2012), 175.

[3] "Jottings from the Northwest," *Galveston Daily News,* August 19, 1874: See Gerald Berk, Alternative tracks : the constitution of American industrial order, 1865-1917 (Baltimore: Johns Hopkins University Press, 1994), 75-76.

communities was severe. Railroads were accused of "cozening and honey-fugling the people and representatives on the line of these roads" in order to extract land and stock subscriptions, without providing the prosperity they had promised.[4] Disillusionment in the railroads became especially strong in the aftermath of the Panic of 1873.[5] In response to these abuses, "anger blazed up" across the state, and in 1874 the Wisconsin legislature passed what is considered one of the first significant state attempts to regulate railroad corporations in the late nineteenth century, a "magna charta" in the "struggle against monopolies": the Potter law.[6]

The period of railroad regulation in the Midwest reflects the continued transformation of the relationship of corporations to the public and the state. Local communities who depended on the railroad for their livelihood viewed the railroad corporation as inherently the "servant" or even "child" of the public. In this reciprocal relationship, railroads owed the public a duty of service, and the public, via their representatives, owed the railroads a duty of benevolence and care. The Potter law attempted to reinforce this hierarchical but symbiotic relationship. In challenging regulations like the Potter law, railroad corporations advocated for a competing vision of the corporation as the equivalent of the individual rights-bearing businessman, whose responsibilities to the public were determined not by their inherent nature, but solely by the terms of their contract. The relationship of railroads to the people they serviced was not part of the hierarchical status of the household, but one founded on a market transaction between two equal contracting parties. By combating attempts to enforce their perceived public duties, recalcitrant railroads furthered corporations' move from the household to the market.

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[4] "Disposal of Land Grant," *Milwaukee Daily Sentinel*, March 14, 1873.
[5] Benson, *Merchants, Farmers & Railroads*, 27.
[6] Charles Francis Adams, "The Granger Movement," *The North American Review* (Boston: James R. Osgood & Co., April 1875), 405; "The New Conditions," *Milwaukee Daily Sentinel*, February 22, 1875; Paul Kens, "Property, Liberty, and the Rights of the Community: Lessons from Munn v. Illinois," *Buffalo Public Interest Law Journal* 30, no. 1 (2012): 157-196, 162.

The nascent Fourteenth Amendment provided a new avenue for railroad lawyers to promote this transformation. As we saw in the previous chapter, the privileges and immunities clause of Article IV had definitively foreclosed the ability of corporations to combat state regulation by claiming citizenship. The Fourteenth Amendment's due process and equal protection clauses, however, applied not to "citizens" but "persons." In 1874, counsel for the Chicago, Burlington, & Quincy Railroad discussed using the due process clause to challenge railroad regulations, and railroad lawyers were quick to employ this novel strategy. [7] In litigation challenging laws like the Potter law, railroad lawyers argued that such regulations violated the constitutional rights of corporate "persons" by depriving them of their property without due process of law.

The Granger Cases were the culmination of this argument and a major turning point in corporations' transformation from servant of the public to private market actor. In 1876, the United States Supreme Court heard three Wisconsin cases challenging the Potter law, deciding them concurrently with three other cases from Iowa, Minnesota, and Illinois, collectively referred to as the "Granger Cases." [8] Scholarly work on the Granger Cases has primarily focused on *Munn v. Illinois*, in which the Supreme Court wrote the guiding opinion.[9] *Munn* upheld the right of states

[7] Kens, *Property, Liberty, and the Rights of the Community,* 176.

[8] *Peik v. Chicago & N. W. R. Co.,* 94 U.S. 164 (1876); *Chicago, B. & Q.R. Co. v. State of Iowa*, 94 U.S. 155 (1876); *Stone v. State of Wisconsin*, 94 U.S. 181 (1876); *Chicago, Milwaukee & St. Paul Railroad Co. v. Ackley,* 94 U.S. 179 (1876); *Winona and St. Peter Railroad Co. v. Blake,* 94 U.S. 180 (1876); *Munn v. People of State of Illinois*, 94 U.S. 113 (1876).

[9] See Harry Scheiber, "The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts," in *Perspectives in American History*, edited by Bernard Bailyn and Donald Fleming (Cambridge: Harvard University Press, 1971): 329-402; William J. Novak, "The Public Utility Idea and the Origins of Modern Business Regulation," in *Corporations and American Democracy*, edited by Naomi R. Lamoreaux and William J. Novak (Cambridge: Harvard University Press, 2017): Charles Fairman, "The So-called Granger Cases, Lord Hale, and Justice Bradley,"*Stanford Law Review* 5 (1953): 585-679; Kens, "Property, Liberty, and the Rights of the Community." Although noting *Munn*'s importance in upholding economic regulations under the state police power, recent scholarship on corporate personhood does not discuss the other Granger Cases. See Adam Winkler, We the Corporations, 148; Margaret M. Blair and Elizabeth Pollman, "The Derivative Nature of Corporate Constitutional Rights," 1689. One exception is Paul Kens, who views the Granger Cases as fundamentally about the question of popular sovereignty over corporations, a conflict between the public good and private rights. Kens, "Property, Liberty, and the Rights of the Community," 166.

to regulate any businesses that were "affected with a public interest."[10] Focusing on *Munn*, which involved a warehouse business run as a partnership, obscures the fact that five of the six Granger Cases involved railroad corporations.[11] Examining the Granger Cases in light of the movement for railroad regulation that resulted in the five other lawsuits illuminates an underappreciated aspect of *Munn*: its implications for corporate constitutional personhood. By writing their guiding opinion in the one case that did not involve a corporation, the Court side-stepped the driving question behind the five railroad cases: the relationship of corporations to the public and the state. By subjecting the partnership and the railroad corporations to the same rule of decision, the Court obfuscated the very real differences between a partnership and a corporation. Ignoring the arguments made in the public debates over regulation and set forth explicitly in the briefs of the lawyers, the Court treated all business entities the same regardless of their incorporated status. All had the constitutional right not to be deprived of property without due process, and laws regarding corporate regulation were subject to the same constitutional limitations as laws regarding unincorporated businesses.

This chapter traces the prehistory of the Granger Cases by setting *Munn* aside and focusing on the background to the three Wisconsin railroad cases. As these cases made their way through the state and federal courts, judges, lawyers, legislators, and the public debated the nature of the railroad corporation, presenting competing ideas about corporations' relationship to the state and duties to the public. However, although ultimately upholding the Potter law and other state regulations, the Supreme Court ignored the public's demand for special accountability from the

[10] *Munn v. People of State of Illinois*, 94 U.S. 113 (1876).
[11] Howard Graham has discussed the implications for corporate Fourteenth Amendment due process rights of the Granger Cases, but cautions that although the Court seemed to presume corporations could claim due process rights, "the significance of its tacit us and non-rejection is a very dubious and problematic matter." Graham, *Everyman's Constitution*, 394 n. 91.

railroad corporations, instead equating the railroads with any other market actor. The Court did not contest the railroads' claim to the Fourteenth Amendment's guarantee of due process in the protection of property; rather, by issuing the decision in the case involving a partnership, the Court appeared to assume that corporations had due process rights under the Fourteenth Amendment the same as individuals acting in a partnership. The Granger Cases thus established vital precedent for corporations to claim status as persons under the due process clause of the Fourteenth Amendment. The cases also opened the door to the possibility that the constitutional rights of business entities could be weighed against, and potentially trump, the police power of the state – a possibility that would prove vital for the future development of Fourteenth Amendment jurisprudence.

"The Humble Servants of the People": Railroad Development in the Midwest

The example of Wisconsin is representative of the movement for railroad regulation in the Midwest in the 1870s.[12] During the Civil War, the Union government's need for efficient rail transport prompted large-scale investment in railways.[13] This trend continued after the war as investment bankers channeled the flush of cash resulting from the government's buyback of federal bonds into railroad stocks and bonds.[14]

Yet it soon became apparent that mismanagement and corruption threatened to undermine the railroads' promise of economic prosperity. In the years leading up to the passage

[12] Similar movements occurred in Illinois, Minnesota, and Iowa, and resulted in the passing of laws similar to the Potter law. See generally Miller, *Railroads and the Granger Laws*.
[13] White, *Railroaded*, 17-23.
[14] White, *Railroaded*, 56.

of the Potter law, growing discontent with the conduct of railroad corporations led to the formation of a diverse coalition of interests united behind railroad regulation in the Midwest.[15] The national movement of farmers and merchants known as the Patrons of Husbandry, also called the Grange, took hold in Wisconsin in the 1870s.[16] Discontented Republicans and Democrats broke ranks to form the Reform Party, uniting with the Grangers with the goal of passing railroad regulation.[17] Even the Democratic and Republican Parties of Wisconsin agreed that some reform was necessary.[18] In 1874, Reform candidate William R. Taylor won the gubernatorial election and Democratic and Reform party candidates took over the state assembly, while the Republican party maintained a majority of only one in the state senate.[19] With the support of the Grange and other farmer's associations, the new legislature succeeded in passing regulation that significantly curtailed the power of railroads.[20] The Potter Law divided railroads into three categories based on size, set maximum rates and fares for each, created a three-member railroad commission to investigate and report on railroads' finances and compliance with the law, and authorized both private individuals and the state Attorney General to bring suit to enforce the Potter Law's provisions.[21] Similar laws were passed in the neighboring states of Iowa, Illinois, and Minnesota as well.[22]

As the anecdote of the railroad's welcome in Eau Claire reveals, rural communities had high expectations for the services provided by the railroad. The passage of the Potter law was their

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[15] Berk, 78; George H. Miller, *Railroads and the Granger Laws* (Madison, University of Wisconsin Press, 1971), 151-60; Buck, 89-91, 161-70, Lee Benson, *Merchants, Farmers, and Railroads: Railroad Regulation and New York Politics, 1850*-1887 (Cambridge: Harvard University Press, 1955).

[16] The Grangers were notably egalitarian in terms of gender, although many were Democrats who fought against rights for African Americans. *See* Solon Buck, *The Granger Movement: A Study of Agricultural Organization and Its Political, Economic and Social Manifestations, 1870-1880* (Cambridge: Harvard University Press, 1913), 89.

[17] Buck, *The Granger Movement*, 89-90.

[18] Buck, 89-90.

[19] Buck, 92; Charles Richard Tuttle, *An Illustrated History of the State of Wisconsin* (Madison, WI: B.B. Russell & Co., 1875), 641.

[20] Buck, 181-82.

[21] For a discussion of the Potter Law's provisions, see Buck, *The Granger Movement*, 184.

[22] Berk, *Alternative Tracks*, 80-81.

attempt, via their representatives, to compel railroads to fulfill the promises of prosperity they had made. Newspaper articles, town hall speeches, and the records of the newly-created Wisconsin Railroad Commission reveal the way the public conceived of railroad corporations, which influenced how politicians, lawyers, and judges framed their arguments about the state's power over corporations and the railroad's duties to the public.

Public debates over the Potter law reveal a conception of the corporation similar to those discussed in previous chapters. Popular and legal rhetoric around the movement for railroad regulation portray corporations and the public as existing in a hierarchical, affective relationship, in which railroad corporations were the servants or even the children of the public. Local communities considered the railroad as their progeny because they had literally helped create the road. The primary means by which localities encouraged railroad construction was financial, and rural inhabitants often spared no expense. For instance, the denizens of the remote villages of Berlin, Waupun, and Ripon, who "did not propose to be cut off from the rest of the world merely because they did not happen to be located on one of the world's highways," sent a committee to the "railroad magnates" of Milwaukee to solicit the construction of a line through their communities.[23] They agreed to "do the handsome thing by a company that would undertake to build a railroad to them," offering the railroad about $390,000.[24] Such arrangements were not unusual. Rural communities funded these inducements with town or county bonds, supported by taxes on the local residents, and with mortgages on individual property that were used to purchase railroad stock. [25] Ripon alone contributed $130,000, "an immense subscription," composed of

[23] *History of Northern Wisconsin* (Chicago: The Western Historical Company, 1881), 914.
[24] *History of Northern Wisconsin*, 914.
[25] George Miller estimates that between 1850 and 1857, six thousand Wisconsin farmers mortgaged $4.5-5 million worth of homestead property in order to buy stock in local railroads. Although the value of the stock was wiped out by the Panic of 1857, the mortgages remained. Miller, 143.

$80,000 worth of cash and mortgage subscriptions and $50,000 in town bonds.[26] It took Ripon 25 years to clear this debt.[27] Sometimes town leaders drew on their own funds; the founder of Merrill, Wisconsin himself paid the West Wisconsin Railroad $75,000 – an ungodly sum – to change its route to include the town. [28]

Rural inhabitants also physically aided the construction of the railroad.[29] The townspeople of Merrill, for instance, converted a "crude shack" into a depot.[30] E.W. Brewster of Fox River Valley, Illinois, just over the Wisconsin border, reportedly made a present of his land to the railroad, and when the railroad ran out of ties, Brewster "immediately set his hands at work, and in a short time furnished the company with ties enough to keep them busy until the supply arrived."[31]

[26] *History of Northern Wisconsin*, 914.
[27] *Ibid*.
[28] Jean Anderson, "History of Merrillan Wisconsin," Merillan.net, last modified August 28, 2019, http://merrillan.net/village-history/.
[29] *Ibid*.
[30] Anderson, "History of Merrillan."
[31] In response, the railroad provided him with a "life pass," which he was still using at 81 years old. "Patriarchs in Council," *Inter Ocean*, June 5, 1874.

Image 9: *Welcoming the Railroad.*

Like the citizens of Eau Claire above, rural communities invested such extravagant sums and physical labor into the construction of railroads because they sought connection to the rest of the state and the country. In the minds of the railroad's customers, in return for the labor and resources they had contributed to the road's creation, as well as special privileges granted to the railroad like exemption from taxation, the power to exercise eminent domain, and land grants, the railroad was obligated to fulfill its promise to bring economic prosperity. Indeed, in their promotional materials railroad corporations themselves promised to promote the welfare of the people and communities who lived along their lines. Merchants were assured "railway connections furnishing the best markets in every direction"; farmers were told that the land along the road was "rich and contiguous to a good market and constantly increasing in value" and that they would

receive "the highest market price for [their] grain"; and emigrants and settlers were promised employment with "good wages" in the region's many lumber mills.[32]

Image 10: *Map of the Chicago and Northwestern Railway, 1875.*

As such, when the railroad corporations began to hike fare prices, change their routes, and otherwise fail to meet the expectations of local communities, rural Wisconsinites who had "paid very dearly already for the privileges afforded by the railroads" felt betrayed.[33] The *Milwaukee Sentinel* condemned the railroad's infidelity: "The people of the state have bled at every pore for twenty years in consequence of the frauds, the rascalities, the deceptions, the abuses and the extortions that have been practiced upon them by the men connected with these soulless corporations."[34] The treachery of the railroad – its failure to live up to its promises of economic

[32] *One Million Acres of Farming & Timber Land of the West Wisconsin Railway Company* (New York: Henry Seibert & Bros., 187[4?]).
[33] "The Cost of Railroads." *Milwaukee Daily Sentinel*, June 20, 1874.
[34] "The Cost of Railroads"; "The Sentinel," *Milwaukee Weekly Sentinel*, January 30, 1872. The paper described itself as a "Radical Republican newspaper devoted to the dissemination of correct political principles, and is a firm supporter of the reformatory movements of the times." At ten columns, it claimed to be "the largest and most complete newspaper in the Northwest."

prosperity and global connection – was considered a personal betrayal. The Potter law was an attempt to compel railroads to fulfill their obligations to the public.

Because of their initial and ongoing aid to the railroad, rural people saw themselves as embedded in a relationship with the railroad akin to parent-child, master-servant, or even God-man. They viewed the railroad as part of their family and community, embedded in a hierarchical structure of mutually beneficial and affective relationships. Their elected officials reflected this belief in their public statements.[35] U.S. Senator Matt Carpenter, addressing a crowd of 10,000 at a county fair, described the contest over the Potter law thusly: "It is all-important to the peace of a family and the orderly management of a household, that the children should understand where authority rests, and whether the parent has power to chastise the child, or the child the parent."[36] In Carpenter's analogy, the railroads were wayward children who had defied parental authority. Carpenter even took this one step farther, claiming that the people were not only the railroad's parent, but also its God. He proclaimed, "Corporations, as they are recognized by our laws, are creations of man, only of man."[37] As such, the corporation "is as absolutely subject to the law as man to his Creator," for "it is as futile for a corporation to defy the law and say it will exist..., as it is for a man to say he will not die, or that while he lives he will not submit to the providence of God."[38] Carpenter expressed dismay at the betrayal of the railroad. "[R]eflecting upon the good offices performed by these corporations," such as "their necessity to the development of our natural resources, their ministrations to the sorrows and agonies of human life, the relief they have afforded to the dying patriot on the field of national glory, and the comforts they daily bring to our households," he related how the people have been "shocked… by the wayward and unreasonable

[35] "The Railroads." *Milwaukee Daily Sentinel*, September 17, 1874; "Railroads." *Milwaukee Daily Sentinel*, July 2, 1874.
[36] "Railway Control," *Boston Daily Advertiser*, September 17, 1874.
[37] "Railway Control."
[38] Ibid.

disposition manifested by them," and "bemoan their conduct as David did the rebellion of Absalom."[39] Like Absalom, the railroad had rebelled against its parent, the state, and like King David, the people of Wisconsin sought to bring it back under parental control.

Like parents and children, this familial hierarchy benefitted both parties. Carpenter guaranteed that "the people would hail with joy the first evidence of a disposition on their part to return to the parental protection and control of the State," as they "know and fully appreciate" their symbiotic relationship with the railroads.[40] Explained one congressman, the state could not simply dissolve a railroad corporation that refused to follow the law, because "the state has nurtured her foster-child for twenty years or more"; if the legislature repealed the railroad's charter, the state would "lose all herself or citizens have invested."[41] For this congressman, the state was feminized; not just a parent, but a mother. The question, the *Oshkosh Northwestern* articulated, was "one simply of obedience or disobedience… The railroads may be powerful friends and powerful enemies to the people. But their interests… [were] mutual."[42] By refusing to follow the Potter law, railroads were inverting this hierarchy, and "trying to make the people believe the railroads are their masters."[43]

Yet as long as railroads accepted their role as servants of the people, railroad customers emphasized that they wished to act benevolently. They were beneficent masters, they claimed, who did not wish to "do deliberate injustice" to the roads.[44] "They do not desire any unwilling or uncompensated service from the railways," explained Attorney General Andrew Scott Sloan, yet

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[39] "The Railroads."
[40] "Railway Control."
[41] "The Grangers." *Milwaukee Daily Sentinel*, June 29, 1874
[42] "Pith of the Press," *Milwaukee Daily Sentinel*, July 8, 1874 (quoting *Oshkosh Northwestern*). Col. John Hicks, publisher of the Oshkosh Northwestern, considered his paper "the mouthpiece and refuge of the public" and was committed to "the presentation of… both sides of the news." "Colonel John Hicks Is Dead," *Oshkosh Northwestern*, Dec. 21, 1917.
[43] "Hail to the Chief." *Milwaukee Daily Sentinel*, June 12, 1874.
[44] "The Potter Railroad Law." *Milwaukee Daily Sentinel*, Apr. 7, 1874.

"nor will they consent that the State should be placed in a condition of servitude to the corporations." Even the Radical Republican *Milwaukee Daily Sentinel* assured railroads that if data revealed the Potter law to be "inequitable or oppressive to the companies," the public would happily "unite with [the railroads] in an appeal to the next Legislature for the amendment of the law, so that justice might be done to all."[45] "Let them yield promptly and gracefully," promised the *Oshkosh Northwestern*, "and they will not trust to the justice and magnanimity of the people in vain."[46] Yet, the *Sentinel* warned, "the railroads will not help their case any if they assume a defiant attitude toward the people."[47] The Potter law, in other words, was a rebuke; like King David, the people did not want to kill their child, only chastise it. The railroad need merely submit, and if the law proved too harsh, then the people would benevolently repeal or amend it.

The familial relationship between railroads and the public was based in law. The *Appleton Post* announced, "corporations created by and for the benefit of the state, i.e. for the people at large, are… like other creatures, subject to their creator, and his will, which is law."[48] The railroad corporation's very existence – its charter – was the result of legislative act. As the Janesville Grangers resolved, "these railroad corporations are the offspring of legislation, and derive their vitality and all their rights, legal or equitable, from the people of this state through their representatives," and as such "they have no rights superior to the laws and the constitution."[49] Yet the railroads challenged the state's authority, and "assumed that the creature of State legislation is above its creator."[50] The local paper for the railroad-dependent town of Tomah bemoaned, "In the name of God and humanity we ask, are the rights of the people of this great commonwealth to

[45] "Let Us Be Conservative." *Milwaukee Daily Sentinel*, June 1, 1874.
[46] "Pith of the Press," *Milwaukee Daily Sentinel*, July 8, 1874 (quoting *Oshkosh Northwestern*).
[47] "The Potter Railroad Law." *Milwaukee Daily Sentinel*, Apr. 7, 1874.
[48] "Pith of the Press." *Milwaukee Daily Sentinel*, May 23, 1874 (quoting the *Appleton Post*).
[49] "The Grangers." *Milwaukee Daily Sentinel*, June 29, 1874.
[50] "Railway Control." *Inter Ocean*, June 2, 1874.

be trampled beneath the iron heel of a corporation which they have themselves made?"[51] The gravity of the railroad's challenge to state power was well understood; wrote the business-oriented *Chicago Inter-Ocean*, "now is when the question must be decided whether sovereign States are to be insolently ruled by corporations of their creation."[52] "[P]owerful corporations," asserted the *Adams County Press*, must "be taught the useful and now most necessary lesson that the will of the people framed into law is sovereign, and to that, even railroad corporations must submit."[53]

In exchange for the special privileges granted in its charter, the railroad owed the public certain duties. Explained the *Sentinel*, "These roads have been permitted to exercise the right of eminent domain, in consideration of the obligations they assumed to the public, but after accepting and receiving this consideration for their assumed duties, they now strive to shirk their responsibilities."[54] The railroad, in this view, owed its entire existence to the people, and therefore was subject to the legislature's authority.[55] Although the *Sentinel* used the language of "consideration," reflecting that under the *Dartmouth* precedent the corporate charter was technically a contract, the relationship between the people and the roads was more than merely contractual. The "duties" of the railroad were amorphous, and not those that could be easily enforced – they were to serve the public, to put the public's welfare first, and to ensure that local communities had the market access that would make them prosperous. Unlike freely-contracting parties, who in law were deemed to be equal, independent, rights-bearing individuals, the charter between the people and the railroad was one aspect of a complex social relationship, similar to the way that marriage was considered a status based on contract, not simply an economic transaction.[56]

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[51] *Tomah Journal (*1875).
[52] "Railway Control." *Inter Ocean*, June 2, 1874
[53] "Pith of the Press." *Milwaukee Daily Sentinel*, Apr. 15, 1874 (quoting *Adams County Press*).
[54] "The Rebellious Roads." *Milwaukee Daily Sentinel*, July 2, 1874.
[55] Kens, "Property, Liberty, and the Rights of the Community," 165.
[56] Schouler, *A Treatise of the Law of the Domestic Relations*, 26; Bishop, *Commentaries*, 2.

Yet even as incensed rural inhabitants and their representatives attempted to bring the wayward railroad back into the parental fold, the conception of the corporation as embedded in the local community was challenged by changes in the way railroad corporations were governed. As railroad investment skyrocketed, attracting increasing numbers of wealthy stock and bondholders from the East Coast and Europe, railroad executives became more concerned with the demands of shareholders and creditors than rural communities. Absentee presidents and directors, based in metropolises like Chicago and New York, had little knowledge of or interest in the needs of local shippers and passengers. In spite of the promises railroad corporations had made to promote the welfare of rural inhabitants, the need of railroads to produce profit incentivized railroad executives to prioritize economic gain over public service.

In terms of corporate personality, the changing circumstances of corporate ownership and investment also challenged the aggregate theory of the corporation so prevalent in the Charles River Bridge debates. Instead of aggregations of known individuals, proponents of regulation portrayed railroad corporations as distinct entities, associated with their president or directors but not their stockholders. The railroads were even unaccountable to local shareholders. The *Milwaukee Sentinel* mourned the losses of rural Wisconsinites who had purchased railroad stock: "The pioneer farmer mortgaged and lost his homestead; the pioneer trader subscribed and lost his money; the pioneer city subscribed and lost its bonds – sunk forever into the hungry maelstrom of railroad swindling and mismanagement."[57] J.M. Burgess, from Janesville, explained to a crowd of farmers that "he was one of the original stockholders of the St. Paul Railroad," yet he "had never received one cent for the hard earned $3000 he had invested," and had even been foreclosed on.[58] He bemoaned his "melancholy experience": "He had been full of belief in the milk of human

[57] "The Cost of Railroads." *Milwaukee Daily Sentinel*, June 20, 1874.
[58] "The Grangers." *Milwaukee Daily Sentinel*, June 29, 1874.

kindness and the good faith of fellow men, up to that time," but the railroad's president Alexander Mitchell had "scooped" him, and was now "rolling in riches" from the earnings of himself and other investors "of a similarly confiding nature."[59] For Burgess, the transformation of the railroad from a collective of persons to a separate entity, in the form of its president, was visceral; he had considered himself as part of the corporation's community of shareholders, his "fellow men", only to find that the railroad had in fact exploited his trust.

Unlike in the conflict over the Charles River Bridge several decades earlier, discussed in Chapter 1, the threat of railroad corporations was not that they would create an aristocratic class by enriching a certain group of shareholders, but that the entity of the corporation itself was a centralized power that threatened to overcome popular government. Maintaining the hierarchical relationship of state control over subservient corporations was critical to the preservation of democracy.[60] To draw on Carpenter's analogy above, by rebelling against King David, his parent, Absalom had challenged his sovereign authority and begun a war. By refusing to accept popular control, the railroad corporations had begun "a struggle with the powers of sovereignty," a "rebellion against the people."[61] Colonel George W. Bird warned at a Fourth of July celebration of the St. John Society[affiliation?], "If corporation[s] shall be successful in establishing the baleful doctrine for which they now condend [sic], that they are greater than the state, then will a fatal blow have been struck at our freedom. That the created is greater than the creator, is a monstrous heresy, that should receive countenance nowhere, and least of all in this boasted land of the free."[62]

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[59] "The Grangers."
[60] Kens, "Property, Liberty, and the Rights of the Community," 165 (discussing how during the Gilded Age conflict over regulations was framed as between private property and popular sovereignty).
[61] "The Railroads." *Milwaukee Daily Sentinel*, Sept. 17, 1874; "Of the railroads and the Potter law The Janesville Gazette says." *Milwaukee Daily Sentinel*, Sept. 19, 1874.
[62]. "The Fourth." *Milwaukee Daily Sentinel* , July 8, 1874

If the railroads were to break free of popular control, the sovereignty of the people would be undermined.

Railroads that defied this political-parental relationship were accused of attempting to overthrow the state, and comparisons to political rebellions were rife. In the shadow of the Civil War, these comparisons carried weight. The *Milwaukee Daily Sentinel* criticized the "sovereign pretensions of these roads," asserting that their refusal to follow the Potter law was "treason against the state."[63] The Janesville Grangers likewise concluded that resistance of the roads to the Potter law constituted "treason to the state, in contempt of the people and in rebellion against the fiat of almighty justice – the rules of the universe."[64] In the Grangers' framing, the state's control of the railroad was a product of both state sovereignty and of natural law – "the rules of the universe." Railroad presidents were referred to as "treasonable generals-in-chief" who had seized the state as a prisoner of war; they had "usurped the sovereignty of the state, and carried it away captive to the dark cellars of Wall street."[65] This "Wisconsin rebellion" threatened the very existence of popular government by attempting to "usurp and exercise certain powers in defiance of the sovereign will of the people."[66] It was an "insurrection raised by railroad companies against the authority of the state."[67] "It is a mere question of power, explained one commentator, "whether the state shall be governed by these law-defying monopolies or whether the people shall rule."[68] One congressman exhorted that "this local rebellion will not go out in blood, nor fire, nor in the shock of battle, nor amid the roar of cannon, but it will subside and vanish in the presence of an aroused public

[63] "Railroad Rebel Tactics." *Milwaukee Daily Sentinel*, May 25, 1874.
[64] "The Grangers." (internal quotes omitted).
[65] "Pith of the Press." *Milwaukee Daily Sentinel*, June 1, 1874 (quoting the *Wood County Reporter*); "Gen. Mitchell's Newspaper," *Milwaukee Daily Sentinel*, May 27, 1874; F. H. West. "Mr. Potter's Little Bill." *Milwaukee Daily Sentinel* , June 16, 1874
[66]"The Chicago Times," *Milwaukee Daily Sentinel*, May 25 1874; "The Grangers."
[67] "The Peaceful Victory of the People." *Milwaukee Daily Sentinel*, July 6, 1874.
[68] F. H. West. "Mr. Potter's Little Bill." *Milwaukee Daily Sentinel* , June 16, 1874

sentiment, and the silent majesty of vindicated law."[69] As a Granger meeting in Rock County resolved, "there shall be no compromise with rebels in arms."[70]

The Railroad, the Logger, and the Railroad Commission

When the railroads failed to follow the Potter law, local communities and individuals appealed to the newly-formed Railroad Commission to hold the railroads accountable. Under the Potter law, the Railroad Commission was charged with mediating between the public and the roads. Wrote Commissioner Joseph Osborn in his first Annual Report, the purpose of the Commission was to "devise a system of control in the interest of the public that will, at the same time, be entirely just to the railway corporations."[71] Communication between the Commission, the public, and railroad agents reveals the extent of popular expectations of the railroad's subservience, as well as the growing resistance of the railroads to public demands for accountability.

At first, the newly-formed Railroad Commission attempted to cajole railroads into following the Potter law by using moral suasion, pleading that "the interests of the railroad corporations and the public are in harmony."[72] When faced with complaints of Potter law violations, he Commission's first step was to mediate between the railroad and the complainants to reach "an agreement upon the means best calculated to secure the manifest rights of the public

[69] "The Grangers."
[70] "The Grangers"; "Pith of the Press." *Milwaukee Daily Sentinel*, July 4, 1874
[71] *First Annual Report of the Railroad Commissioners of the State of Wisconsin* (Madison, WI: Atwood & Culver, 1874), 66.
[72] *First Annual Report*, 48.

without unnecessary interference with the freedom of corporations."[73] One of the most illustrative examples of the personalized demands made on the railroads and the role of the Commissioners in mediating the relationship between individuals and the roads is the case of Marcellus Pedrick, a lumberman from the small town of Fairchild.

Pedrick first wrote to the Commissioners in October of 1874 to complain that the West Wisconsin Railroad was not following the Potter law, but was charging him $15 per carload of lumber, "an overcharge of $9."[74] As the Commission began to pursue his claim, the West Wisconsin Railroad refused to furnish cars for Pedrick to ship his timber. Pedrick wrote again to the Commission, alleging, "I do not wish to complain unjustly, but it looks to me as if there might be a little spite mixed in this refusal to furnish the cars called for."[75]

Although the Commission explained that there was no legal remedy "for the non-supply of the platform cars you demand," the Commissioner that same day wrote to the West Wisconsin's Superintendent W.G. Swan to inquire about the situation.[76] Softening Pedrick's language, he explained that Pedrick "does not wish to put himself in opposition to the management of the railroads, nor to complain unjustly," yet he was "suffering embarrassments on account of the non-supply of platform-cars" and the high rates, to the extent that his business was threatened.[77] He noted that Pedrick "seems to fear that he is being punished for asserting his legal rights," while assuring Swan that he informed Pedrick that "if he were to appeal to the general officers of the company he would find them not only superior to the motives he inclines to attribute to their agent,

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[73] *Second Annual Report of the Railroad Commissioners of the State of Wisconsin* (Madison, WI: Atwood & Culver, 1875), 37.
[74] Letter from Pedrick to Commission, Oct. 16, 1874, Oct. 20, 1874, Railroad Commissioner's Letterbooks, Wisconsin Historical Society Archives.
[75] Pedrick to Commission, April 1, 1875, Railroad Commissioner's Letterbooks, WHSA.
[76] Letter to Pedrick from Commission, April 6, 1875, Railroad Commissioner's Letterbooks, WHSA; Letter to W.G. Swan from Commission, April 6, 1875, Railroad Commissioner's Letterbooks, WHSA.
[77] Letter from Commission to Swan, April 6, 1875, Railroad Commissioner's Letterbooks, WHSA.

but willing to afford him any accommodations in their power."[78] The Commission indicated that he assumed the railroad agents would perform their role as public servant, using moral suasion to appeal to the railroad's goodwill. In response, Swan claimed that he had "made immediate and kindly reply" to Pedrick's request for cars, explaining that the company had few cars on the road and that "they were all being used for our own or other purposes."[79] Nevertheless, he asserted, he had already "at a *sacrifice of our own interests*, given him several flats."[80] Swan, at least as far as his interaction with the Commission, presented himself as a willing servant who was simply limited by circumstances.

After hearing the Superintendent's side of the story, the Commission wrote to Pedrick, "We are pleased to learn… that the officers of the W.W.R.R. Company are disposed to grant you all the facilities in their power, for the transportation of your lumber and timber, and that the differences between yourself and them are in the way of amicable adjustment."[81] Yet although Pedrick may have been granted cars for his timber, the West Wisconsin continued to defy the Potter law and charge higher rates. A few months later, Pedrick wrote again to the Commission, declaring, "I have waited very quietly for something to be done. My business has been entirely ruined by the excessive charges demanded, and I have been repeatedly told that something would be done for my relief, but as far as I am able to ascertain there is nothing being done or likely to be done."[82] He further accused the Commission of being "afraid of offending" the railroad.[83] In response, the Commissioner explained, "Hitherto, we have cherished the hope that the several

[78] Letter from Commission to Swan, April 6, 1875, Railroad Commissioner's Letterbooks, WHSA.
[79] Letter from Swan to Commission, April 8, 1875, Railroad Commissioner's Letterbooks, WHSA.
[80] Letter from Swan to Commission, April 8, 1875, Railroad Commissioner's Letterbooks, WHSA.
[81] Letter from Commission to Pedrick April 24, 1875, Railroad Commissioner's Letterbooks, Wisconsin Historical Society Archives.
[82] *First Annual Report of the Railroad Commissioners of the State of Wisconsin*, 255-56.
[83] *First Annual Report*, 256.

railway corporations would fulfill their oft repeated pledges to obey the law," and that their intention was that "the sincerity of pledges made by railroad managers should be fairly and fully tested before involving the State in troublesome and expensive litigation."[84] He informed Pedrick that state officials were "firmly fixed in their purpose that the will of the people shall be obeyed," yet "the Railroad Commissioners are themselves without power to enforce the law," and that he would forward Pedrick's complaint the Attorney General.[85]

The President of the West Wisconsin, H.H. Porter, bristled at the Commissioner's intervention in Pedrick's case. The railroad was bankrupt, he alleged, and "we must have all the latitude that the shippers over our road are themselves willing to give us, or stop running."[86] The other lumbermen had agreed to pay a higher rate in order to keep the road functioning.[87] Pedrick, President Porter complained, was "the only lumberman on our line" to refuse, and although the railroad had "at different times sacrificed our own interests in my efforts to conciliate him," this had had no effect: "Mr. Pedrick appears to be one of those men who are bound to rule or ruin."[88] Pedrick expected the railroad to serve his needs and follow the law, regardless of the impact on the railroad's bottom line. The other lumbermen, apparently, had been willing to sacrifice this control for fear of losing the railroad's service altogether. Although the West Wisconsin's officers paid lip service to the Commission about their duty to provide service to Pedrick, the railroad's actions defied the authority of both Pedrick and the state. All the Railroad Commission could do was refer

[84] Letter from Commission to Pedrick, July 6, 1875, Railroad Commissioner's Letterbooks, WHSA.
[85] Letter from Commission to Pedrick, July 6, 1875; Letter from Commission to Pedrick, August 17, 1875; Railroad Commissioner's Letterbooks, WHSA.
[86] Letter from H.H. Porter to Commission, July 12, 1875, Railroad Commissioner's Letterbooks, WHSA.
[87] *First Annual Report*, 258, 259.
[88] *First Annual Report*, 259.

the case to the Attorney General or suggest the Pedrick pursue a private civil lawsuit, which it acknowledged most farmers or merchants could not afford to do.[89]

"The Spoiled Children of the State": Railroad Corporations in State Court

As Pedrick's experience reveals, Wisconsin railroads largely ignored the new regulations. While the West Wisconsin was a local road that expressed commitment to its customers even as it evaded the law in practice, the large interstate "trunk" lines shocked the public by their "extraordinary and flagrant violation and contempt" of the law.[90] Challenging the Potter Law in three separate cases, the powerful Chicago & Northwestern Railroad argued that rate regulation infringed on the property rights of its shareholders under the Wisconsin Constitution's takings clause and the nascent Fourteenth Amendment, as well as the contract clause, by preventing them from using their property to charge the rates required to earn sufficient profit. The primary purpose of the railroad corporation, its wealthy East Coast and European shareholders contended, was to make money, no different than any private business. Railroads bore no special responsibility to serve the public interest to the detriment of the corporations' financial gain.

The debate over whether railroad corporations were public servants or private, profit-making entities had a long history in the Midwest. Prior to the Potter law, the most significant litigation over this issue had involved municipal bonds pledged to railroad corporations as payment for shares in the road. These cases highlight how the dual nature of the corporation as an entity created by the state to fulfill a public purpose, and an organization of private individuals to earn

[89] *Second Annual Report of the Railroad Commissioners of the State of Wisconsin*, 33-34, 269.
[90] *First Annual Report*, 9.

some amount of profit, could be mobilized by both corporations and the public to achieve different ends. In the municipal bond cases, the views of the corporation presented by the local communities and the railroads were the opposite of those they took in the Potter law cases. Whereas in the Potter law cases, state attorneys contended that the railroads were public servants, in the municipal bond cases they argued that railroads were essentially private companies. Railroads took the opposite position, arguing that they were public entities rather than private businesses. The background of the municipal bond litigation reveals that both conceptions of the railroad as a public servant or as a market actor were equally viable during this period. When confronted with these dueling visions of the railroad corporation in the Granger Cases, the Supreme Court were compelled to make a decision that would dictate the direction of corporate personhood for decades to come.

Beginning in the 1840s, counties and municipalities tried to lure railroad corporations to construct lines through their communities by subscribing to shares that would be funded by bonds, which in turn would be funded by taxes on local residents. In the interim period, as discussed above, relations between local communities and railroads soured, and when the subscriptions finally came due, townspeople sometimes refused to pay these taxes. Local residents challenged the constitutionality of the bonds, claiming that the railroad was a private corporation, and so could not constitutionally receive public funds. In the resulting lawsuits, the townspeople and the state argued that taxing residents to fund private companies violated the clauses of state constitutions that prohibited the state from taking private property except for a public use.[91] In response, the

[91] See Swan v. Williams, 2 Mich. 427 (1852); Sharpless v. Mayor of Philadelphia, 21 Pa. 147, (Pa. 1853); Rogers v. City of Burlington, 70 U.S. 654 (1865); Curtis' Adm'r v. Whipple, 24 Wis. 350 (1869); Detroit & H.R. Co. v. Salem Township Bd., 20 Mich. 452 (1870); Bay City v. State Treasurer, 23 Mich. 499 (Mich. 1871); Commercial National Bank of Cleveland v. City of Iola, 9 Kan. 689 (Kan. 1873).

railroad's bondholders argued that the railroad was essentially public, and so issuing bonds to them was a legitimate expenditure on the part of the state.

The citizens of Wisconsin, where the practice of luring railroads with municipal bonds had been extensive, became key litigators in several notable cases involving the constitutionality of taxing residents to fund such bonds. One case was *Whiting v. Sheboygan and Fond du Lac Railroad* (1870).[92] The residents of Fond du Lac County in 1867 had voted to provide the railroad corporation with town bonds to incentivize it to build through their locality.[93] The railroad demanded payment of the bonds one year later, when it had graded the road but not yet completed construction; the taxpayers refused, arguing that it now appeared that the road would not provide a public benefit but in fact be detrimental to their interests.[94] The case turned on whether the railroad was a public corporation – in which case the donation of bonds would be legal – or a private enterprise, in which case the donation would be unconstitutional.

The railroad's lawyer (Matt Carpenter, who would later become U.S. Senator and an advocate for railroad regulation) argued that the railroad corporation, "from first to last, is a creature of the law, an agent of the state, exercising sovereign franchises, subject to the public will; and in this state its charter may be repealed at the pleasure of the legislature."[95] As such, the railroad was essentially a public entity, and so taxing the populace to support the railroad was constitutional, the same as it would be for any government-run project. However, Judge L.S. Dixon, who would soon retire from the bench and become special counsel for the State in the Potter law cases, disagreed, holding that the railroad was "essentially a private corporation," and

[92] Whiting v. Sheboygan & F. du L.R. Co., 25 Wis. 167 (1870).
[93] *Whiting*, 168.
[94] *Whiting*, 169-70.
[95] *Whiting*, 177.

so the taxation was unconstitutional.[96] For Dixon, it was the nature of the railroad corporation as a privately-owned entity that determined whether the state could properly give it funds, regardless of the railroad's benefit to the public. "It is plain to the mind of every intelligent person," Dixon explained, that railroad property "is private property, owned, operated and used by the company for the *exclusive benefit and advantage of the stockholders*."[97] Laws promoting the construction of railroads did not change the private function of the road, he emphasized; such a law merely "invites capitalists into this field of enterprise, *not as public servants, charged with a public duty, but as private corporations*."[98] In holding that railroads were private, Dixon denied any duty of service the railroad might have to the public; rather, the exclusive purpose of the railroad was to enrich shareholders. The public use function of the road was irrelevant, in spite of the fact that the railroad corporation was only chartered to fulfill a public need: "All private corporations are more or less for public use. If they were considered of no public utility or advantage, it is presumed they would never be chartered."[99]

Dixon doubted the power of the state to tax citizens to fund any business enterprise and expressed concern about embarking on a slippery slope. If railroads were deemed to be public because they had a "public use," "then all distinction between public and private business, and public and private purposes, is obliterated, and the door to taxation is opened wide for every conceivable object by which the public interest and welfare may be directly or in any wise promoted."[100] In Dixon's view, taxing citizens to fund any business that impacted the public would be an unconstitutional taking of property.[101] This limit on state taxation, Dixon noted, did not

[96] *Whiting*, 181-82.
[97] *Whiting*, 182 (emphasis added)
[98] *Whiting*, 208 (quoting Redfield on Railways, § 192 n.5) (emphasis in original).
[99] *Whiting*, 183.
[100] *Whiting*, 194.
[101] *Whiting*, 199.

affect the state's power to regulate in the public welfare: in spite of their "essentially private" nature, railroad corporations could be subject to regulation intended "to prevent oppression, and avoid the imposition of unreasonable and unjust burdens upon the people who are obliged to avail themselves of these great channels of trade and communication." One such legitimate regulation, he pointed out, would be setting maximum rates. In his argument for the state in the Potter law cases later in his career, Dixon emphasized the legitimacy of public welfare regulation, and minimized his previous contention that corporations were essentially private profit-making entities.

The Supreme Court, however, disagreed with the reasoning in *Whiting* a few years later, when the issue of the Fond du Lac bonds was litigated anew in federal court.[102] The Court concluded that railroads "[i]n their very nature… are public highways," yet determined that it was not the nature of the corporation per se that legitimated state regulation, but rather the use to which the corporation was put.[103] Justice Strong explained that it was not "a matter of any importance that the road was built by the agency of a private corporation," because "[t]hough the ownership is private the use is public."[104] The state therefore had the power to tax residents to fund the railroad.[105] Notably, this reasoning was diametrically opposed to that of Justice Story in *Dartmouth*, in which the private or public nature of the corporation was determined not by its purpose but by the character of its shareholders. Yet, concerned with the widespread practice of states reneging on their corporate subscriptions, Strong ignored the *Dartmouth* ruling. Unlike Judge Dixon, Justice Strong was unconcerned about the possibility that allowing taxation to fund railroads would open the door to taxing citizens to fund any business. For the Court, the organizational form of the business was irrelevant; the state could dispense funds to any business

[102] Olcott v. The Supervisors of Fond du Lac County, 83 U.S. 678 (1872).
[103] *Olcott*, 696.
[104] *Olcott*, 695.
[105] *Olcott*, 696.

that had a public use. Strong's focus on the purpose of the business rather than the character of the ownership foreshadowed the Court's decision a few years later in the Granger Cases.

The railroad corporation's mixed status as privately owned but chartered for a public purpose allowed both sides to make compelling arguments, as the Fond du Lac bond cases show. Cases challenging the Potter law, however, presented a new complication regarding the relationship of the state to the railroad corporations. Whereas the bond cases involved the state's power to provide aid to the railroad, the Potter law cases involved the state's power to regulate the railroads. Denying the state's ability to regulate, railroad lawyers flipped sides; they now argued that railroad corporations were purely private, and so state regulation was unconstitutional. In other words, railroads sought the benefits of being a public entity for purposes of state funding, without the accompanying regulatory burden. In contrast, lawyers for the state, who in the bond cases had argued that the railroad was purely private and so not a legitimate expenditure of tax dollars, in the Potter law cases reversed their position and now argued that railroads were public or quasi-public entities, and so subject to state regulation and oversight.

The Wisconsin Supreme Court case that determined the constitutionality of the Potter law was *Attorney General v. Chicago & Northwestern Railway* (1874). Both the public/private nature of the corporation and its status as a child of the public were central to the state's arguments. The state's counsel claimed that railroads were "quasi public companies, in the sense that they are created to promote great public interests, and are hence under the control and supervision of the state."[106] Another state attorney explained, "The business in which such corporations are engaged is not a private business or enterprise, but public, and for the public use."[107] Although private persons may

[106] Attorney General v. Chicago & N.W. Ry. Co., 35 Wis. 425, 508 (1874).
[107] *Chicago & N.W. Ry. Co.*, 470.

invest in railroads "for the purpose of private gain," the lawyers admitted, and so railroads "may for this reason alone be called private corporations," they contended that "they are never considered such as to their objects or purposes, and private gain does not form even a part of the consideration that moves the government in creating them."[108]

The hierarchical relationship of people and the railroad was central to the arguments of Wisconsin Attorney General A. Scott Sloan. Sloan focused on the laws that he claimed established the power of the people, via their representatives, over corporations: "As these corporations have no natural existence, but are created wholly by legislative enactments, their power to act in every particular is derived from the State." [109] According to L.S. Dixon – the judge in the *Whiting* case, who had recently retired from the bench and become counsel to the state – it was "a question of whether the Legislature has power of life or death." [110] He believed it had; echoing Senator Matt Carpenter above, Dixon claimed the corporation was to the state as man to God. He believed that "the body politic had the same power over the body corporate as the Creator over the natural body," including the power "to dictate the conditions in which life may continue."[111]

The state's lawyers argued that state's power over corporations was solidified in Wisconsin's constitution, which reserved to the legislature "the sovereign power to alter or repeal acts of incorporation."[112] Reservation clauses like this became common in the decades after the *Dartmouth* ruling, in which Story had indicated that legislatures might retain their power over corporations

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[108] *Chicago & N.W. Ry. Co.*, 471.
[109] A. Scott Sloan, Attorney General. "Railway Control." *Inter Ocean*, May 27, 1874.
[110] "Railroads." *Milwaukee Daily Sentinel*, July 2, 1874
[111] "Railroads." Dixon's argument as counsel conflicted with his holding as judge in *Whiting* that railroads were purely private entities.
[112] *Chicago & N.W. Ry. Co.*, 470. The full text of the reservation clause was as follows: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage." Wisconsin Constitution (1848), Art. XII § 1.

via such a clause.[113] Indeed, Dixon's opinion in *Whiting* had applauded the reservation clause as "a most wise and beneficent provision" that acted as "a check upon the rapacity which these corporations sometimes exhibit."[114] This reserved power, the state's lawyers argued, allowed Wisconsin to make any changes to the charter of a corporation that it wished to, "to any extent, regardless of any vested rights of property, or the rights of creditors."[115] In exchange for the grant of corporate privileges, Sloan contended, the railroad owed the public certain duties: "The rights and privileges conferred cannot be separated from the restrictions and duties imposed." For instance, in the case of the Potter law, railroads had no power to determine their own rates: "the power to take toll cannot be distinguished from the duty to take only such as the Legislature shall establish."[116]

The Chicago & Northwestern's lawyers disputed this conception of the corporation as a creature of the state as well as the scope of the reservation clause. The "massive and powerful" railroad lawyer John Watson Cary, considered "one of the first corporation lawyers of the country," emphasized that the corporation was "simply a grant of authority from the state" to individuals who "desire to associate together in a work requiring a large amount of capital," and to conduct their business under "an artificial or corporate name."[117] Echoing Daniel Webster, he argued that the corporation had no public function, as "[t]he sole object of those who invest their capital in such business is private gain or emolument."[118] In other words, the corporation was simply an organizational form adopted by a group of private market actors.

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[113] Seymour D. Thompson, *The Dartmouth College Case: A Study of its Authority and Influence* (Albany, N.Y. : Print of H.B. Parsons, 1898), 13.
[114] *Whiting*, 198.
[115] *Chicago & N.W. Ry. Co.,* 474.
[116] Sloan, "Railway Control."
[117] John R. Berryman, *History of the Bench and Bar of Wisconsin,* vol. 1 (Chicago: H.C. Cooper, Jr., & Co., 1898), 480, 478; *Chicago & N.W. Ry. Co.*, 499 (internal quotes omitted).
[118] *Chicago & N.W. Ry. Co.*, 499.

The question of whether the corporation was an aggregate of individuals or a separate entity with special rights and duties was, as in the cases discussed in the previous chapters, central to the railroad's argument. Although the railroad corporation was an "artificial person," Cary argued, it was essentially coextensive with its shareholders, who were "the *absolute owners* of the railroad and of all the property of the company."[119] The corporation simply held the property "in trust for the bondholders and stockholders."[120] The rights of the individuals who composed the corporation and the corporation itself were therefore the same; the shareholders "hold their equities, and the corporation its legal title, by as sacred a right as any individual holds his own."[121] Railroad lawyers argued that the Potter law deprived the railroad and their shareholders and creditors of property without just compensation under the Wisconsin constitution's takings clause; by setting caps on fares, the law took away their income, and "to take away the *income* of property is, in principle and in fact, to take the property itself."[122] Railroad lawyer John C. Spooner argued that if the state could so regulate, the corporation "must therefore be held to stand beyond the pale of the constitution."[123]

The reservation clause was no justification for state regulation, asserted Cary, for it had been included simply to permit legislative oversight of corporations to ensure that they did not abuse their special privileges, not to create additional regulatory burdens for corporations separate from those applicable to the general public: "Under this reservation the legislature has the same power over corporations and their business that it has over individuals, and nothing more."[124] C.B.

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[119] *Chicago & N.W. Ry. Co.*, 496. See Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate,* 1st ed., (Boston: Hilliard, Gray, Little & Wilkins, 1832), 1.
[120] *Chicago & N.W. Ry. Co.*, 479
[121] *Chicago & N.W. Ry. Co.*, 479
[122] *Chicago & N.W. Ry. Co.,* 480.
[123] *Chicago & N.W. Ry. Co.*, 491.
[124] *Chicago & N.W. Ry. Co.*, 500, 482.

Cook, the lawyer for the Chicago and Northwestern Railroad, implored, "The railroad asks only to be allowed to live, not to be compelled to do business on such terms that ruin must be inevitable."[125]

Chief Justice Edward G. Ryan of the Wisconsin Supreme Court heard the case. He agreed with the state's lawyers that the railroad corporation was essentially public, positing that "private corporations" were primarily "trading corporations," while the term "*quasi* public corporations" included all those "whose relations with the public involve public interests and public questions."[126] To hold otherwise would be to "emasculate[] state authority over state corporations."[127] Ryan portrayed the corporation as a single entity rather than focusing on the private shareholders who invested in it. While Ryan acknowledged that "[t]he railroads have their rights," he emphasized the hierarchical relationship between the state and the corporation, echoing the popular and legal view of railroads as the state's creation.[128] "The material property and rights of corporations should be inviolate," he explained, but "it comports with the dignity and safety of the state… that corporations should exist as the subordinates of the state, which is their creator."[129] He dismissed the railroad's claim that the charter was simply a contract, pointing to the reservation clause as ensuring that Wisconsin had "emancipated itself from the thraldom [sic]" of the Dartmouth College decision, which "never was the law here."[130]

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[125] "The Railroads." *Milwaukee Daily Sentinel*, July 3, 1874.
[126] *Chicago & N.W. Ry. Co.*, 544 (internal quotes omitted).
[127] *Chicago & N.W. Ry. Co.*, 590. Ryan attacked the holding of *Dartmouth College*, that all corporations except those owned by the state were private. This definition, he argued, was out of date: "The difficulty arises probably from applying old names to new things; applying the ancient definition of private corporations to corporations of a character unknown when the definition arose, corporations of such great and various public relation and public significance," which exercised "almost a control of all commerce within its reach, and a power almost of life and death" over the public. *Chicago & N.W. Ry. Co.,* 568.
[128] *Chicago & N.W. Ry. Co.*, 580.
[129] *Chicago & N.W. Ry. Co.*, 574.
[130] *Chicago & N.W. Ry. Co.*, 547.

Like the Potter law supporters, Ryan emphasized that this hierarchical relationship was benevolent. He opined, "there is certainly an implied, obligation and promise, on the part of the state, never to reduce the tolls and charges below a standard which will be reasonable, or which will afford a fair and adequate remuneration and return upon the amount of capital actually invested."[131] The legislature would not "unnecessarily interfere with… the business of the corporations," he was convinced, "except where the company, by gross and wanton abuse of its privileges, had forfeited its rights." [132] Echoing the town hall and legislative debates, Ryan explained that the Potter law was "not vindictive; but is rather of the nature of parental anger against those spoiled children of legislation… who, after some quarter of a century of legislative favors lavishly showered upon them, unwisely mutiny against the first serious legislative restraint they have met."[133] He concluded, "If it be true that the people are too angry, it is very sure that the companies have been too defiant."[134] After all, the relationship of the people and corporations was mutually beneficial: there was "a point where the public interest in railroads and the private interest of the corporators meet," and "calm, just, appropriate legislation" was the solution to their conflict. [135]

Supporters of the Potter law applauded the Wisconsin Supreme Court's opinion. Senator Carpenter disparaged the railroad's claim, announcing that it was "absurd to say that corporations have any natural rights; that is, rights not derived from the law, rights the law cannot take away."[136] For supporters of regulation, the railroad's claim that a corporation had constitutional rights to property on par with those of natural persons was absurd.

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[131] *Chicago & N.W. Ry. Co.*, 581.
[132] *Chicago & N.W. Ry. Co.*, 581.
[133] Chicago & N.W. Ry. Co., 582.
[134] Chicago & N.W. Ry. Co., 582.
[135] Chicago & N.W. Ry. Co., 583, 580.
[136] "Railway Control," *Boston Daily Advertiser* , September 17, 1874.

In contrast, the decision upholding the Potter law caused a predictable outcry among railroads and their supporters throughout the country. Notably, supporters of the railroad also embraced the analogy of railroads as subordinate to the public – but, invoking the Reconstruction-era language of emancipation and equal rights, flipped it on its head. Comparing corporations to African Americans, the pro-railroad *Chicago Tribune* hyperbolized that the state court's decision "means that no corporation in Wisconsin, railroad, life or fire insurance company, manufacturing, educational or other, *has any rights which the state is necessarily bound to respect*."[137] Agreed a Philadelphia paper, "the decision suggests that previous one – that the colored race had no rights the whites were bound to respect."[138] These papers were invoking the infamous antebellum Supreme Court decision of *Dred Scott v. Stanford* (1857), in which Chief Justice Taney had stated that "the class of persons who had been imported as slaves" and their descendants "had no rights which the white man was bound to respect."[139] In echoing Taney's language, railroad supporters remarkably compared railroad corporations to former slaves, obscuring the striking power difference between monopolistic companies and people who had been held in bondage. In this framing, the railroad was not a child of the state; it was an oppressed minority subjected to unjust servitude. Yet the comparison between corporations and African Americans was not entirely inaccurate, at least in one particular way. Like freedpeople, corporations were attempting to escape a hierarchical status relationship and recreate themselves as independent, rights-bearing legal persons.[140] This analogy between a corporation and a persecuted minority would prove very useful to corporations in future Fourteenth Amendment claims, as the following chapter will show.

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[137] "The Railroads." *Milwaukee Daily Sentinel*. July 7, 1874 (Quoting the *Chicago Tribune*) (emphasis added).
[138] "The Wisconsin Railway Decision." *North American and United States Gazette,* July 14, 1874. This may have been tongue in cheek; the paper noted: "consequently every such corporation must in some way be able to control the Legislatures."
[139] *Dred Scott*, 407.
[140] *See* Stanley, *From Bondage to Contract*, 20.

As discussed in the introduction, corporations have thus far not been included in scholarship mapping the transition from status to contract, yet as challenges to railroad regulation reveal, contract ideology was central to the transformation of the corporation from a public servant to a private, rights-bearing person. The contractual relationship between corporations and the state had been clearly established in *Dartmouth College* and *Charles River Bridge*; yet this "contract" had continued to exist in tandem with a popular expectation that corporations were first and foremost servants of the public, a view that *Charles River Bridge* had endorsed by holding that charters must be read narrowly in the public interest.

Railroad supporters challenged this imposition of additional status duties on corporations, arguing that like a private contract, the corporate charter alone established the relative duties and obligations of the parties. For instance, one letter to the editor argued, "In granting a railroad charter, the State deals with the incorporators precisely as any other party might, by stipulating equivalent consideration. Thus all the requirements of a 'contract' are entered into."[141] In the Potter Law cases, railroad lawyers argued that the state and the incorporators "are but parties to a contract. Each has equal rights and privileges under it… By becoming a party to a contract with its citizens, the government divests itself of its sover[e]ignty, … and stands in the same position as a private individual." [142] By invoking the *Dred Scott* case and adopting the Reconstruction-era emphasis on the independent, self-owning, freely-contracting person, the railroads and their supporters refuted the state's claims that corporations were subordinate to the people and instead framed their relationship as purely contractual. In this formulation, the corporation's members carried their common law and constitutional contract rights with them when they incorporated;

[141] "The Railroad Granger Contest," *Boston Daily Advertiser*, Sept. 17, 1874.
[142] "Brief of Argument of C.B. Lawrence," *Second Annual Report of the Railroad Commissioners of the State of Wisconsin* (Madison, WI: Atwood & Culver, 1875), 285 (quoting Commonwealth v. Proprietors of New Bedford Bridge).

they were presumed to stand on an equal footing with the state in terms of setting their contract terms, the same as any private parties.[143] Yet this argument ignored the social and economic context behind the grant of railroad charters, including the massive power disparities between wealthy corporations like the Chicago & Northwestern and isolated rural states like Wisconsin, as well as the railroads' own promises of prosperity and public service.

This is the dilemma the Supreme Court encountered in the Granger Cases. Although the nature of corporate personality – public or private, aggregate or entity – was central to the parties' briefs, the Court chose to evade the issue. Instead of ruling on the nature of the corporation, the Court held that regardless of the form of the business enterprise, if the business *itself* affected the public interest, the state could regulate – echoing its reasoning in the Fond du Lac bond case. Yet in so doing, the Court conflated corporate enterprises with business partnerships, implying that these two types of business organizations were equivalent and enjoyed the same set of constitutional rights. This erosion of the difference between corporations and other businesses would have lasting effects in constitutional cases to come.

The Granger Cases: Railroads in the Supreme Court

[143] Wisconsin Supreme Court Chief Justice Ryan refuted this argument, explaining that the relationship of corporations had elements of both contract and status: "charters of private corporations are contracts, but contracts which the state may alter or determine at pleasure." Chicago & N.W. Ry. Co., 574. Ryan's comment echoes the legal concept of marriage during the nineteenth century as a status arising from contract. See Story, *Commentaries on the Conflict of Laws*, 101-103.

Three Wisconsin Potter Law cases were appealed to the Supreme Court, where they were combined with three others: two challenges to similar railroad regulations in Iowa and Minnesota, and one challenge to the regulation of grain warehouses in Illinois.[144] Collectively, they were referred to as the "Granger Cases," a nod to the role the Granger movement, a national coalition primarily of farmers that took shape in the early 1870s, had played in electing the legislators who passed the regulations.[145] The legal briefs submitted for the railroads and those of the states centered on the dueling visions of the corporation as public servant or private market actor. Although the Supreme Court ultimately upheld the regulations and declined to confront the question of the nature of the corporation, the Granger Cases established vital precedent for corporations to claim status as persons under the Fourteenth Amendment.

Although five of the six Granger Cases involved state regulation of railroad corporations, the Supreme Court chose to write its central opinion for the Granger Cases in *Munn v. Illinois* (1876), involving a partnership, and consequently that case is the most well-known.[146] Yet *Munn*, as the only case that did not involve a corporation, was not representative of the other five cases. Very little notice has been given to the Granger Cases involving railroad corporations, and few scholars have recognized the importance of the Granger Cases in the development of corporate constitutional personhood. Examining the railroad Granger Cases, however, reveals that the question of the nature of the corporation and its relationship to the public was central to the legal arguments. By declining to address these arguments and writing their opinion in the sole case involving a legal partnership, the Supreme Court avoided determining the essential nature of the

[144] The Granger Cases were Peik v. Chicago & N. W. R. Co., 94 U.S. 164 (1876); Stone v. State of Wisconsin, 94 U.S. 181 (1876); Chicago, M. & St. P.R. Co. v. Ackley, 94 U.S. 179 (1876); Chicago, B. & Q.R. Co. v. State of Iowa, 94 U.S. 155 (1876); Winona & St. P.R. Co. v. Blake, 94 U.S. 180 (1876); and Munn v. People of State of Illinois, 94 U.S. 113, 126 (1876).
[145] Kens, 163; Buck, 89-92, 181-82; Fairman, "The So-called Granger Cases," 606-07.
[146] *See* Miller, 189.

corporation; in so doing, the Court left open an ambiguity that corporations would exploit in later cases in order to solidify their claims to corporate constitutional personhood.

Before it reached the U.S. Supreme Court, *Munn v. Illinois* was heard by the Supreme Court of Illinois. Ira Munn and his partner, who ran a grain warehouse in Chicago, argued that an Illinois law imposing maximum rates on the storage of grain violated their right to protection against the taking of property without due process under both the Illinois State Constitution and the Fourteenth Amendment. The Supreme Court of Illinois summarily dismissed the Fourteenth Amendment claim, stating that it was "well known" that the purpose of the Fourteenth Amendment was "to shield a certain class, who had been born and reared in slavery, from pernicious legislation," and that the U.S. Supreme Court had never intimated that "a regulation of the use of property, abridged in any manner the liberty of the citizen, white or black."[147]

As for the state constitution's due process clause, the Supreme Court of Illinois explained that while the state could not "destroy" property or "deprive its owner of the use of it" completely, the due process clause "nowhere declares that, in the exercise of the admitted functions of government, private property may not receive remote and consequent injury."[148] From the early nineteenth century, regulation of private businesses to promote the public welfare had been a widely-recognized function of state and local government.[149] According to the Court, the rate cap was surely a legitimate exercise of government to protect producers and shippers from "oppression and extortion" by grain warehouse managers: "Can there be a more legitimate subject for the action of a legislative body? We think not."[150] The Court dwelt on the connection between the

[147] Munn et al. v. People of the State of Illinois, 69 Ill. 80, 85 (1873).
[148] *Munn v. People*, 88.
[149] Novak, *People's Welfare*.
[150] *Munn v. People*, 89.

grain warehouses and the railroad; both functioned as a monopoly that oppressed local farmers and merchants. The legislature had determined that "the owners and managers of these warehouses are an organized body of monopolists," who possessed "sufficient strength in their combination, and by their connection with the railroads of the State" to impose extortionate terms on grain producers and shippers, who in turn "had no alternative but submission."[151] Notably, the Court did not see Munn and his partner as simply two property-owning individuals, but rather as part of a monstrous entity; their partnership was part of "an organized combination of monopolists… with but one heart, and that palpitating for excessive gains."[152] The grain warehouses, they concluded, like the railroad, had the power to affect "the most valuable portion of our staple productions" and undermine the livelihoods of their customers, and thus the state had the power to regulate in the public welfare.[153]

In contrast, the dissenting Illinois Supreme Court judge ignored the monopolistic power of the grain warehouses and their embeddedness with the railroad. Denying that grain warehouses had any impact on the public that might subject them to regulation, the dissent portrayed the partnership as "a mere private enterprise."[154] He pointed out that Munn and his partner did not possess a franchise – a grant of special privilege from the state, such as the right to incorporate – and as such "may be regarded precisely the same as in the case of any individual insisting upon constitutional protection for rights of private property."[155] By expressly distinguishing a private partnership from a business that had been granted a special franchise like incorporation, the dissent indicated that the constitutional restrictions on state regulation of individuals were greater than

[151] *Munn v. People*, 89, 90.
[152] *Munn v. People*, 93.
[153] *Munn v. People*, 93.
[154] *Munn v. People*, 94 (McAllister, J., dissenting).
[155] *Munn v. People*, 94 (McAllister, J., dissenting).

those of corporations. For the dissenting judge, the public impact of the warehouse business made no difference – under the state constitution's due process clause, the state had no power to interfere with Munn's use of private property.[156]

Munn's lawyers focused on the Fourteenth Amendment's due process clause in their appeal to the Supreme Court. In contrast to the lower court's opinion, they claimed that although "the protection of the colored race" may have been its immediate object, the Fourteenth Amendment had "no words of limitation," but was "as broad as humanity," applying to all persons "without distinction of race or color."[157] Nonetheless, they were careful to frame Ira Munn and his partner as oppressed persons, like African Americans. The warehouse regulation deprived Munn of his essential property right, they argued, making "the citizen a slave…, for that is one of the essential conditions of slavery."[158] If the state could regulate an individual's use of his property, his lawyers argued, "citizens have no rights the legislative power would be bound to respect."[159] By invoking the infamous line from *Dred Scott*, just as the railroad's supporters had done above, the lawyers attempted to draw a parallel between white businessmen and slaves and their descendants. This analogy bolstered their claim that just like former slaves, warehouse owners were singled out for oppression by the state, and so the Fourteenth Amendment applied to them.

Importantly, neither side debated whether Munn *had* a constitutional right to protection against deprivation of property without due process – after all, due process clauses were prevalent in state constitutions as well as the Fifth Amendment, the Illinois Attorney General noted, and had been extensively interpreted.[160] Rather, the issue was whether that right could be interpreted so

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[156] *Munn v. People*, 100 (McAllister, J., dissenting).
[157] W.C. Goudy, "Brief and Argument for Plaintiff in Error," *Munn v. Illinois* (Oct 1874), 28-29; Jonathan N. Jewett, "Further Argument for Plaintiff in Error," *Munn v. Illinois* (Oct 1875), 17.
[158] Jewett, "Further Argument for Plaintiff in Error," 19.
[159] Jonathan N. Jewett "Argument for Plaintiffs in Error," *Munn v. Illinois (*1874), 20.
[160] James K. Edsall, "Argument for Defendants in Error," *Munn v. Illinois* (Oct 1874), 35.

broadly that it would shield Munn from rate regulation. Like the dissenting state court justice, Munn's counsel presented property as an "inherent and inalienable right" which included the right to use one's property as one saw fit. Lawyers for the state, in contrast, argued that under no construction of the meaning of the clause could the regulation be considered a deprivation of property without due process.[161] The regulation "neither takes from, nor deprives any warehouseman of his property," but "simply provides that if he uses his property for a specific purpose… he shall conform to certain regulations deemed essential to the protection of public interests."[162]

The two sides also engaged in a debate about the extent of a state's power to regulate a "public" versus a "private" business. Distinguishing a private partnership from a state-chartered corporation, Munn's lawyers emphasized at the outset that Munn and his partner "are two private individuals, partners in the business, and exercise no franchise or privilege, granted by the legislature."[163] The implication of this distinction was that as private individuals, Munn and his partner possessed a constitutional shield against state regulation of their property that corporations did not. The Attorney General of Illinois, however, insisted that a grant of privileges from the state, such as incorporation, was not necessary for a business to be considered public. Like the Supreme Court in the municipal bond case discussed above, Illinois' Attorney General explained, "Although the ownership of the property is private, the use may be *public* in a strict legal sense."[164] Like railroads and other "common carriers" who were considered public, the Attorney General argued, grain warehouses "*sustain[] such relations to the public that the people must of necessity deal*" with them in order to get their goods to market; and the public had "no option but to submit to… [their]

[161] Edsall, "Argument for Defendants in Error," 35.
[162] Edsall, "Argument for Defendants in Error," 35.
[163] W.C. Goudy, "Brief and Argument for Plaintiff in Error," *Munn v. Illinois* (Oct 1874), 1.
[164] Edsall, "Argument for Defendants in Error," 46.

terms."[165] Grain warehouse operators like Munn were therefore "engaged in a public employment as distinguished from ordinary business pursuits," and consequently had "public duties to perform."[166] In the state's argument, grain warehouses, like railroads, were by their function public enterprises, and the due process clause of the Fourteenth Amendment could not shield them from regulation by the state.

The Granger Cases that accompanied *Munn*, involving railroad corporations, made a different set of arguments. Instead of focusing on the nature of the state's police power to regulate any business that was essentially a "public employment," lawyers for the states emphasized the nature of the corporation itself as justifying state regulation, just as they had done in state court. The Potter law case *Peik v. Chicago & Northwestern Railway*, which was extensively briefed, provides an example of these arguments. [167]

Echoing the popular perception of the corporation as a servant or child of the state, the states' counsel emphasized the nature of the railroad corporation itself as justifying state regulation. Asserted L.S. Dixon, the former Wisconsin state judge in the municipal bond case and counsel for Wisconsin, "The creation of corporations is a prerogative of sovereignty – an absolute, unqualified power of the state, to be exercised or not as the legislature shall see fit."[168] The state's power over corporations was solidified in Wisconsin's constitution, which reserved to the legislature "the sovereign power to alter or repeal acts of incorporation."[169] Just as they had in state court, the

[165] Edsall, "Argument for Defendants in Error," 45, 47, 50 (emphasis in original).
[166] Edsall, "Argument for Defendants in Error," 45.
[167] Peik v. Chicago & N. W. R. Co., 94 U.S. 164 (1876).
[168] L.S. Dixon, "Brief for Appellees," *Peik v. Chicago & Northwestern Railway* (Oct. 1875), 32.
[169] *Chicago & N.W. Ry. Co.*, 470. The full text of the reservation clause was as follows: "Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act except for municipal purposes and in cases where, in the judgment of the legislature, the objects of the corporation cannot be attained under general laws. All general laws or special acts enacted under the provisions of this section, may be altered or repealed by the legislature at any time after their passage." Wisconsin Constitution (1848), Art. XII § 1. Many states included such "reservation clauses" in corporate charters and state constitutions after the *Dartmouth College* decision, in response to Story's statement that states could retain their power to change corporate charters if expressly provided for in the

state's lawyers argued that the reservation clause allowed the state to make any changes to the charter of a corporation that it wished to, "to any extent, regardless of any vested rights of property, or the rights of creditors."[170] The clause "affects the entire relation between the state and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter directly from the state."[171] In contrast to his view as a state judge that corporations were purely private, Dixon here argued that the railroad corporation was a public entity, drawing a distinction between "mere private corporations" such as "ordinary commercial or manufacturing corporation[s]," and corporations "endowed with and exercising certain public or *quasi* public functions."[172] The railroad, having been chartered to fulfill a public need and granted special powers like eminent domain to effect this purpose, was a *quasi* public corporation subject to special legislative oversight. "The rights and privileges conferred" on railroad corporations, Attorney General A. Scott Sloan argued, "cannot be separated from the restrictions and duties imposed."[173] Because the railroads had been granted special privileges, they were bound to act in the public interest.

In contrast, lawyers for the railroads argued that the railroad corporation was no different than any other business, repeating the claims they had made in state court. Railroad lawyer John Watson Cary represented the railroads in four of the five Granger Cases. [174] Cary and his co-counsel contested the claim that the states' grant of incorporation and the reservation clause gave the legislature more control over the corporation than it would over individual persons, decrying

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contract. Stanley I. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Philadelphia: J.B. Lippincott Co., 1971), 63.

[170] *Chicago & N.W. Ry. Co.*, 474.

[171] Dixon, "Brief for Appellees," 14 (internal quotes omitted).

[172] Dixon, "Brief for Appellees," 26-27.

[173] A. Scott Sloan and I.C. Sloan, "Brief and Points for Appellees," *Peik v. Chicago & Northwestern R*y. (Oct. 1875), 26.

[174] Berryman, *History of the Bench and Bar of Wisconsin*, 480, 478.

the claim that railroads were creatures of the state as "wretched sophistry."[175] Rather, incorporation was "simply a grant of authority from the State to its citizens, to conduct certain specified business, by an artificial or corporate name," while the reserve clause was merely the power to withdraw that privilege.[176] Aside from this, the corporation was no different than an individual, and could only be "subject to such police and other regulations as the state may lawfully make in respect to any other property owned by any citizen of the state." [177] By arguing that railroad corporations were no different than private, rights-bearing market actors, Cary lumped together the railroads and the grain warehouse partnership in *Munn*. [178] Although the Fourteenth Amendment's protection against deprivation of property without due process was admittedly "designed to apply only to natural persons," the railroads' counsel contended that "artificial persons must be permitted to invoke the spirit of justice which prompted them, so far as may be necessary to protect their property and franchises."[179] After all, Cary contended, "Property owned by an incorporated company is just as sacred as if owned by a natural person."[180] For the railroads' lawyers, the artificial corporate "person" had all the constitutional property rights of an individual rights-bearing person, including Fourteenth Amendment due process rights.

Arguing that the corporate form was largely irrelevant and that the railroad possessed the same right to protection against deprivation of property as individuals, Cary contested the claim

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[175] C.B. Lawrence, "Brief and Arguments for Appellants," *Peik v. Chicago & Northwestern R*y. (Oct 1875) by 94.
[176] Lawrence, "Brief and Arguments for Appellants," 17.
[177] John W. Cary, "Brief and Arguments for Appellants," *Peik v. Chicago & Northwestern R*y. (Oct 1875), 32.
[178] Neither side debated whether or not Munn had a constitutional right to protection against deprivation of property without due process. Rather, the issue was whether that right could be interpreted so broadly that it would shield Munn from rate regulation. Munn's counsel presented property as an "inherent and inalienable right" which included the right to use one's property as one saw fit. Lawyers for the state, in contrast, argued that under no construction of the meaning of the clause could the regulation be considered a deprivation of property without due process. Edsall, "Argument for Defendants in Error," *Munn*, 35.
[179] Lawrence, "Brief and Arguments for Appellants," 58.
[180] Cary, "Brief and Arguments for Appellants," 53. Piek's lawyers also argued that the regulation violated the Contract clause and the Commerce Clause.

that state regulation was merited by the particularly public function that the railroad exercised. Although the railroad may have been "built for public use," he admitted, the ownership of the road itself was in "the Company," *i.e.* the shareholders, who had the "right to operate and control it in their own way."[181] Furthermore, he claimed, the "sole object" of corporate shareholders was "private gain and emolument," not public service.[182] Cary warned that if the state could fix the rates of a railroad corporation, it could do so for other corporations as well: the principle "would apply with equal force to a gas company, or a company to supply cities or towns with pure and wholesome water," or any other company which served a "public purpose[]."[183] Surely, "[n]othing of the kind would be claimed."[184]

In contrast, the states' lawyers drew on the conception of the corporation as a creature birthed by the state, arguing that corporations possessed no rights other than those granted to them in their charter by the state. Attorney General Sloan asserted, "As these corporations have no natural existence, but are created wholly by legislative enactments, their power to act, in every particular, is derived from the State."[185] In the view of the states' lawyers, the corporation had no constitutional rights to invoke. Denying the claim that the Fourteenth Amendment limited the state's power over its corporations, Dixon argued that the state could "reserve whatsoever control and authority over these beings of their creation they will, and there is no power lodged elsewhere under our system of government to deny this sovereign right, or to interfere or prevent its exercise."[186] Dixon also drew a distinction between the rights of a corporation's shareholders and the rights of the corporation itself. Although the former were protected by the constitution, he

[181] Cary, "Brief and Arguments for Appellants," 32.
[182] Cary, "Brief and Arguments for Appellants," 50.
[183] Cary, "Brief and Arguments for Appellants," 26.
[184] Cary, "Brief and Arguments for Appellants," 27.
[185] Sloan, "Brief and Points for Appellees," 26.
[186] Dixon, "Brief for Appellees," 32.

acknowledged, they had no rights "beyond and superior to those possessed by the corporation itself" that would allow them to "intervene between the state and the corporation." [187] To hold otherwise, he claimed, "would be to carry the doctrine of the protection afforded by the constitution of the United States… to a most unprecedented and alarming length."[188]

Even though the briefs in five of the six Granger Cases had focused on the nature of the corporation, and that the brief in Munn had centered on the distinction between a corporation and a private partnership, the Supreme Court ignored this question. The Court chose to write one opinion, in *Munn v. Illinois*, that would ostensibly cover the issues raised in all six cases. Yet as a partnership, the constitutional question in *Munn*, the state's ability to impose rate caps on a grain warehouse, did not represent the core question raised by the other cases, the constitutional rights of railroad corporations. By focusing on the case involving a simple partnership rather than a corporation, the Court avoided the particular questions counsel raised about the nature of the corporation and the extent of the states' control over corporations.

In *Munn*, the Supreme Court held that any business "clothed with a public interest" could be subject to state regulation such as rate setting, and that this was not an unconstitutional taking of property without due process.[189] The Court focused on the question of whether Munn's grain warehouse was "used in a manner to make it of public consequence, and affect the community at large," determining that it was.[190] Then, in the five railroad cases, the Court simply referred to *Munn* as controlling without addressing the differences between a partnership and a corporation, or the nature of a railroad corporation *qua* corporation. In the Granger case involving railroad

[187] Dixon, "Brief for Appellees," 36.
[188] Dixon, "Brief for Appellees," 37.
[189] *Munn*, 126.
[190] *Munn*, 126.

regulations in Iowa, the Supreme Court even stated that as far as the common law of common carriers was concerned, the railroad, "in the transactions of its business, has the same rights, and is subject to the same control, as private individuals under the same circumstances."[191] The Court, however, avoided the question of whether corporations were entitled to the same *constitutional* rights as natural persons. Rather, by avoiding the states' claims about the special nature of corporations as public servants, the Court implied that as far as the property rights protected by the due process clause were concerned, railroad corporations were to be treated the same as any private market actor. The organizational form was irrelevant; the only question was whether the business itself implicated the public welfare.

It was widely apparent that the Court had sidestepped the question. Justice Stephen Field wrote a scathing dissent calling out the Court for evading two questions "of the gravest importance": "the limits of the power of the State over its corporations" and "the rights of the corporations."[192] Field believed that corporations did possess Fourteenth Amendment rights the same as private individuals, and that those rights trumped the state's police power to regulate to promote an ambiguous "public interest." He wanted the Court to make that clear. Yet he did not explain his reasoning about why corporations possessed due process rights, simply claiming that the decision in the Granger Cases "practically destroys all the guaranties of the Constitution… for the protection of the rights of the railroad companies."[193]

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[191] For instance, "It must carry when called upon to do so, and can charge only a reasonable sum for the carriage." Chicago, B. & Q.R. Co., 161. "Common carriers" was the term used to refer to those who offered transportation service to the public; under the common law, common carriers were obliged to service any customer who asked and to offer reasonable fares. The legislature could also regulate common carriers in the public interest. Novak, *The People's Welfare*. The Court made no mention, however, of whether the railroad corporation possessed the same *constitutional* rights as private individuals.

[192] Stone v. State of Wisconsin, 94 U.S. 181, 184 (1876).

[193] *Stone,* 186

Field's conviction that corporations could claim constitutional rights as persons seems at odds with his opinion in *Paul v. Virginia*, discussed in the previous chapter, that corporations had no constitutional rights as citizens. Some scholars have posited that Field was primarily motivated by concerns about protecting private property from working-class and populist redistributive legislation.[194] More cynically, one might be tempted to attribute this difference between *Paul* and the Granger Cases to Field's political and social ambitions. Field planned to run for president, and California had recently passed a virulent anti-foreign corporation law, so perhaps his ruling against corporate citizenship was the product of his desire not to alienate supporters. In contrast, he had longstanding ties to California railroad magnates (discussed in the next chapter), and so perhaps did not want to do railroad corporations a disservice in the Granger Cases. Or perhaps Field genuinely believed that the rights of citizenship and the rights of personhood were different, and that the due process clause of the Fourteenth Amendment had a broader reach than the privileges and immunities clause of Article IV.[195]

The Supreme Court's failure to address the question of the nature of the corporation was intentional. Ten years later, Justice Samuel Miller explained that the Court chose to write the opinion in *Munn* instead of the other Granger Cases because "that case presented the question of a private citizen, or unincorporated partnership,… free from any claim of right or contract under an act of incorporation of any state whatever."[196] Justice Joseph Bradley added, "All the justices who concurred in the opinion were entirely satisfied with it."[197] The Court, then, intended that its ruling apply to all businesses, regardless of the organizational form, ignoring the arguments by the

[194] Berk, 83.
[195] He did, however, believe that the privileges and immunities clause of the Fourteenth Amendment had a broader reach than Article IV. Slaughterhouse Cases (Field, J., dissenting).
[196] Wabash, St. L. & P. Ry. Co. v. State of Illinois, 118 U.S. 557, 569 (1886)
[197] *Wabash,* 592 (Bradley, J., dissenting). Likely, the Court wished to avoid intervening in the heated political environment of the populist movement to control railroad corporations.

states' lawyers that railroad corporations, by their very nature and by state law, had a different set of rights and responsibilities than purely private businesses.

Conclusion

Despite the Supreme Court's refusal to address the question of the relationship between corporations and the public, proponents of railroad regulation in Wisconsin continued to think of themselves as the benevolent parents of a wayward child. Even before the Supreme Court's opinion in the Granger Cases came down, Wisconsinites had begun to discuss the repeal of the Potter Law. Until the Potter Law created the Railroad Commission, the finances of railroad corporations had been a mystery. The "broad daylight" that the Commission's investigation shed on railroad operations revealed the Potter Law's detrimental impact on the railroads' bottom line, which even supporters of regulation found "startling."[198] Public sentiment increasingly supported amending the law's strictest provisions.[199] A caucus of Democrats "resolved unanimously that the spirit of the Potter Law shall be maintained, but necessary amendments shall be made."[200] The *Watertown Democrat* and other pro-regulation papers accepted the necessity for this balance: "It must be plain to every fair and intelligent man that if we are to have the benefits and advantages of

[198] "The Commissioners' Bill." *Milwaukee Daily Sentinel*, Feb. 18, 1875; "Legislatures." *Milwaukee Daily Sentinel* Feb. 19, 1875. Some scholars have concluded that the Granger laws had little effect if any on railroad profits during the period, and that a general decline in profit and investment between 1865 and 1885 was attributable to other factors, including the Panic of 1873 and ensuing depression. Berk, *Alternative Tracks*, 86-87.
[199] "The Railroad Companies Ask the Repeal of the Potter Law." *Wisconsin State Register*, Feb. 13, 1875; "Legislatures." *Milwaukee Daily Sentinel*, Feb. 18, 1875; "Madison." *Milwaukee Daily Sentinel*, Feb. 9, 1876; "The Railroads." *Inter Ocean*, Feb. 2, 1876; "Legislative." *Wisconsin State Register*, Jan. 29, 1876; "Madison." *Milwaukee Daily Sentinel*, Feb. 9, 1876.
[200] "State Legislation." *Inter Ocean*, Feb. 1, 1875.

railroads, these corporations must be permitted to make reasonable and moderate profits on the vast capital invested in their construction and operation."[201] The Commissioners proposed a replacement bill that the *Milwaukee Sentinel* endorsed, determining that "it affords ample protection to the people" by "securing the objects of state control," while also being "entirely just toward the stockholders of railroads."[202] The paper concluded that the Commissioners' bill was "a compromise and adjustment of the views entertained respectively by the Commissioners, the railroads and the Grangers."[203]

Ultimately, the Wisconsin legislature repealed the Potter Law, replacing it with a law that granted railroads more flexibility, while still keeping the power of the railroad commission to oversee the railroads' operations and set maximum rates, among other forms of control.[204] Some historians have seen this as a capitulation to the railways, driven by the recognition that widespread railroad bankruptcy would have destroyed the state's economy.[205] Contemporary observers outside of Wisconsin voiced the same concern.[206] Wisconsinites, however, widely endorsed the repeal of the Potter Law, as the people's fulfillment of their promise of parental benevolence. The local paper of the small town of Portage refuted the accusation "that the legislature has surrendered the principle of railroad control in this state, and that henceforth the people are subject to the tender mercies of railroad corporations," contending, "Nothing could be farther from the facts."[207] The Potter Law had achieved its purpose as a chastisement; the "relative obligations of the railroad

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[201] "The Potter Law." *Milwaukee Daily Sentinel*, Jan. 28, 1876. The *Sentinel* wrote, quoting the *Oconomowoc Times*: "Nearly all [newspapers] favor its repeal, while there are none who fail to commit themselves to the most stringent and decided amendments."
[202] "The Commissioners' Bill." *Milwaukee Daily Sentinel*, Feb. 18, 1875.
[203] "Legislatures." *Milwaukee Daily Sentinel*, Feb. 19, 1875.
[204] "Legislative." *Wisconsin State Register*, Jan. 29, 1876; "The Railroads." *Milwaukee Daily Sentinel*, Feb. 3, 1876; "The New Railroad Bill." *Wisconsin State Registe,* Feb. 19, 1876; "R. R. Legislation." *Wisconsin State Register*, Feb. 26, 1876.
[205] Fairman, "The So-called Granger Cases," 610; Berk, *Alternative Tracks*, 85.
[206] "The New Law for the Control of Railroads." *Wisconsin State Register*, Feb. 25, 1876.
[207] "The New Law for the Control of Railroads." *Wisconsin State Register*, Feb. 26, 1876

companies" and "rights of the people" had "resulted in a better understanding, and in sentiments of concession and conciliation in both parties."[208] While the railroad corporations had at first "assumed with the imperiousness of a petty sovereign" that they could ignore the law, the Supreme Court's decision had shown the roads "that they were but the servants and not the masters of the situation."[209] The *Chicago Inter-Ocean* reported that "[t]he railroad folks certainly evince a spirit of concession, and are determined that nothing in their power shall be left undone to prove to the people that they are not soulless corporations."[210] In other words, the Granger Cases had re-established the relationship of benevolent control of the people over the road, and the railroad officials had acceded to this relationship, at least for the time being. Now that the hierarchical structure of control had been vindicated, or so it seemed, the people, via the legislature, could once again assert their role of benevolent protector over their obedient corporate servant.

The restoration of the familial relationship was short-lived, however. The Supreme Court's recognition of a seemingly broad regulatory power in the Granger Cases at first glance might be considered a populist victory, a legitimation of state control over corporations, as supporters of the repeal and replacement of the Potter Law believed.[211] However, the Granger Cases actually proved to be a vital step in the transformation of corporations from creatures of the state to private, constitutional rights-bearing persons. By presuming that corporations were no different than private businesses in terms of their constitutional right to protection of property, but that both could be regulated when their activities impacted the public, the Supreme Court elided any difference between railroad corporations and private partnerships, thus leaving open the question

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[208] "Experience of Minnesota" *Milwaukee Daily Sentinel*, Feb. 05, 1876.
[209] A Farmer, "Railroad Legislation." *Milwaukee Daily Sentinel*, Feb. 10, 1876.
[210] "Wisconsin." *Inter Ocean*, Mar. 31, 1876.
[211] The Granger movement's promotion of regulated capitalism did lay the groundwork for the Interstate Commerce Act in 1887. Berk, *Alternative Tracks*, 77.

of whether and why corporations could claim Fourteenth Amendment rights. Like in *Charles River Bridge*, the Court held that the "public interest" could justify regulation of corporations, but again the question of what was in the public interest was to be determined by the courts, not the legislature. Later, when the Court narrowed the definition of "public interest" in the early twentieth century, the scope of states' regulatory power over both individual market actors and corporations was likewise diminished.[212] More immediately, the Court's endorsement of the view of the corporation as akin to any private market actor opened the door to other corporate Fourteenth Amendment claims, as the next chapter will show.

[212] See, for instance, Lochner v. New York, 198 U.S. 45 (1905) (interpreting the "public interest" narrowly).

CHAPTER FOUR

Slaves, Coolies, and Shareholders: Corporations Claim the Fourteenth Amendment

On a drizzly day in February 1880, in an empty sand lot next to the San Francisco City Hall, Denis Kearney called for the erection of a gallows.[1] An Irish immigrant who helped found the Workingmen's Party of California, Kearney declared that "incorporated men" who "refused to discharge their Chinese help" should be "hung 'higher than a kite.'"[2] These "thieves" needed to comply with the provision of the newly-enacted California constitution that prohibited any corporation from employing Chinese labor. Kearney specifically targeted Tiburcio Parrott, the wealthy president of a mining company, who had recently allowed himself to be arrested to test the constitutionality of the provision.[3] He advised Parrott to "take warning" from the fate of a group of "Chinamen" who had tried to contest an anti-Chinese law, and were "found hanging to the trees the next morning." Amid the cheers of the crowd, Kearney warned, "If Parrott should happen to be found to-morrow morning hanged on a lamppost, it might save the city from a bloody revolution."[4]

As Kearney's invective reveals, corporations and Chinese immigrants were inextricably linked in the politics of late nineteenth century California. By employing large numbers of Chinese laborers, proponents of Chinese exclusion argued, corporations undercut the wages of white

[1] "The Gallows," *Daily Alta California*, February 23, 1880.
[2] "Sand-Lot Threats," *San Francisco Chronicle*, February 23, 1880.
[3] "Sand-Lot Threats"; "Kearney's Victim," *Daily Alta California*, February 25, 1880.
[4] "Sand-Lot Threats."

workers and forced them into a condition of poverty and dependence akin to slavery. According to this argument, in undermining free white labor, the basis for an independent citizenry, corporations and Chinese workers endangered popular sovereignty itself.

In 1879, Californians adopted a new constitution that addressed this intertwined threat by prohibiting corporations from employing Chinese laborers. The mining magnate Tiburcio Parrott challenged this prohibition under the Fourteenth Amendment's due process and equal protection clauses. In the landmark legal case, *In re Tiburcio Parrott* (1880), the Ninth Circuit held that the prohibition violated not just the Fourteenth Amendment rights of Chinese workers, but of their corporate employers as well. The court drew analogized Chinese laborers to corporate shareholders, a paring that reiterated the popular perception of corporations and Chinese immigrants as deeply interconnected.[5] Corporate lawyers and sympathetic federal judges used this comparison between corporate shareholders and persecuted minorities to justify the extension of the Fourteenth Amendment to corporations and to craft a broad interpretation of the meanings of "person" and "equal protection."[6] This analogy, of course, disregarded the power imbalance between corporate shareholders and persecuted racial groups. By holding that the equal protection clause applied to "the despised laborer from China" as much as the "envied master of

[5] *In re Tiburcio Parrott*, 1 F. 481, 492 (C.C.D. Cal. 1880).

[6] Despite the decision's significance, historians have not scrutinized *Parrott* in depth, or examined its place in the social and political history of the post-Civil War United States. While Charles McClain, Jr. has described the case in his history of Chinese equal protection litigation, he does not analyze its implications for the doctrinal importance of free labor or discuss the important comparison between Chinese laborers and shareholders. Charles J. McClain, Jr., *In Search of Equality : The Chinese Struggle Against Discrimination in Nineteenth-Century America* (Berkeley: University of California Press, 1994), 83-92. Legal scholars have recognized the importance of Fourteenth Amendment cases involving Chinese immigrants in laying the groundwork for corporations' constitutional claims, and some have mentioned *Parrott* in passing. *See* Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism* (Madison: State Historical Society of Wisconsin, 1968), 146-47; Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University Press of Kansas, 1997), 209-10; Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights* (New York: Liveright Publishing Corp, 2018), 153. However, scholars have not delved into the social and political context that made the comparison between Chinese coolies and shareholders in *Parrott* possible, nor have they the examined how the framing of the corporations' claims in *Parrott* influenced the federal courts' interpretation of the Fourteenth Amendment more broadly.

millions," the Ninth Circuit endorsed an interpretation of the amendment as treating all persons alike, regardless of their social and economic power.[7]

In re Parrott provided the reasoning for the seminal corporate personhood case *Santa Clara v. Southern Pacific Railroad* (1886), credited with establishing corporate Fourteenth Amendment rights.[8] A fact little discussed is that the Supreme Court decided *Santa Clara* on the same day as the foundational civil rights case *Yick Wo v. Hopkins*, which involved discrimination against Chinese immigrants.[9] By examining popular and political rhetoric around Chinese exclusion and corporate regulation in the decade preceding *Santa Clara* and *Yick Wo*, this chapter uncovers the conjoined history of these two Fourteenth Amendment cases and their antecedents.[10] Drawing on little-known archival sources, it traces how the same coterie of corporate lawyers simultaneously brought Fourteenth Amendment cases involving Chinese and corporate litigants

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[7] Railroad Tax Cases, County of San Mateo v. Southern Pacific, 13 F. 722, 741 (9th Cir. 1882). This reasoning bolstered a "formal equality" interpretation of the Fourteenth Amendment, in contrast to claims that the amendment embodied a commitment to substantive equality – part of a trend towards limiting the amendment's ability to address longstanding inequalities that continues today. "Substantive equality", or "anti-subordination", consists not only in eliminating discrimination, but in "alter[ing] the circumstances that are identified as giving rise to equality questions in the first place." Catharine A. MacKinnon, "Substantive Equality: A Perspective," *Minnesota Law Review* 96, no. 1 (2011):1-27, 11. *See also* Ruth Colker, "Reflections on Race: The Limits of Formal Equality," Ohio State Law Journal 69, no. 6 (2008): 1089-1114, 1090 (contrasting a "formal equality" with an "anti-subordination" perspective); and "equality as a result", *see* Kimberle Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101, no. 7 (May 1988): 1331-1387 (contrasting "equality as a process" with "equality as a result"). *See generally* Catharine A. MacKinnon, *Sex Equality*, 2nd ed. (New York : Foundation Press; 2007), for an extensive analysis of "formal" versus "substantive" concepts of equality.

[8] Santa Clara County v. Southern Pac. R. Co., 118 U.S. 394 (1886). *See* Horwitz, "*Santa Clara* Revisited," 173; Blair and Pollman, "Derivative Nature of Corporate Constitutional Rights," 1694-95; S. Avi-Yonah, "Citizens United and the Corporate Form," 1033-34.

[9] Yick Wo v. Hopkins, 118 U.S. 356 (1886). *See* 2 Encyclopedia of American Civil Rights and Liberties: Revised and Expanded Edition (United States: ABC-CLIO, 2017), 482; Peter Irons, *Jim Crow's Children: The Broken Promise of the Brown Decision* (United States: Penguin Publishing Group, 2004).

[10] Scholars have studied the connection between Fourteenth Amendment claims of Chinese immigrants and the Supreme Court's desire to protect economic rights. Thomas Wuil Joo, "New Conspiracy Theory of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence," *University of San Francisco Law Review* 29, no. 2 (Winter 1995): 353-388, 354-55; Thomas W. Joo, "Yick Wo Re-Revisited: Nonblack Nonwhites and Fourteenth Amendment History," *University of Illinois Law Review* 2008, no. 5 (2008): 1427-1440, 1248; McClain, *In Search of Equality,* 83; Graham, *Everyman's Constitution*, 15; Daniel W. Levy, "Classical Lawyers and the Southern Pacific Railroad," Western Legal History: The Journal of the Ninth Judicial Circuit Historical Society 9, no. 2 (Summer/Fall 1996): 177-226, 211, 216; Paul Kens, *Justice Stephen Field*, 209; Winkler, *We the Corporations*, 153. However, none have put the decades-long precedent of Chinese cases and corporate cases in conversation or revealed the role of corporate lawyers.

before the sympathetic Ninth Circuit, in order to strategically craft a broad interpretation of the equal protection clause that applied to all "persons", natural and artificial alike.[11] Although in the *Slaughter-House Cases* the Supreme Court had suggested that it would read the Fourteenth Amendment narrowly, in *Yick Wo* and *Santa Clara* the Court changed course and adopted the Ninth Circuit's expansive interpretation of equal protection.[12]

This is not a story of unintended consequences. By expanding the scope of the equal protection clause to include Chinese immigrants, corporate lawyers were able to use the Chinese cases to draw a through-line from African Americans – the original beneficiaries of the Fourteenth Amendment – to Chinese immigrants, to corporate shareholders. This comparison was made possible because corporate lawyers and federal judges intentionally portrayed the corporation as simply an aggregate of rights-bearing shareholders, who did not forsake their constitutional rights when they joined the corporation.[13] In this framing, shareholders were members of a persecuted group, the same as racial minorities. The Chinese mercantile and political elite, who employed the same prominent San Francisco lawyers as corporations and had longstanding connections with California politicians and industrial magnates, were willing participants in this strategy.[14]

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[11] *See* In re Ah Fong, 1 F.Cas. 213 (C.C.D. Cal. 1874); Ho Ah Kow v. Nunan, 20 ALB. L.J. 250 (D. Cal. 1879); In re Ah Chong, 6 Sawy. 451 (D. Cal. 1880); In re Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880); Railroad Tax Cases, County of San Mateo v. Southern Pacific, 13 F. 722 (9th Cir. 1882); In re Quong Woo, 7 Sawy. 526 (D.Cal. 1882); County of Santa Clara v. Southern Pac. R. Co., 18 F. 385, 397 (9th Cir. 1883); In re Yick Wo, 68 Cal. 294 (Cal. 1885); In re Wo Lee, 26 F. 471 (D.Cal. 1886).

[12] Slaughter-House Cases, 83 U.S. 36 (1873).

[13] Gregory Mark and Morton Horwitz have analyzed how Field's basis for extending constitutional rights to corporations was based on the aggregate theory of corporate personhood, but have not explained why they focused on this theory at the expense of other coexisting understandings of the corporation. This Article builds off their work by revealing that doing so allowed corporate lawyers to analogize groups of shareholders to persecuted minorities. Mark, "Personification of the Business Corporation," 1464-65; Horwitz, "*Santa Clara* Revisited," 178, 181.

[14] This partnership exemplifies Derrick Bell's theory of interest convergence. Bell, "Brown v. Board of Education and the Interest-Convergence Dilemma," *Harvard Law Review* 93, no. 3 (1980): 518-33. Although allying with corporations aided Chinese litigants in achieving Fourteenth Amendment protection, however, the rights of Chinese inhabitants were ultimately restricted through another avenue, federal power over immigration, in which corporations had no interest. As Marc Galanter explains, the financial resources to litigate are a vital factor in bringing rights claims before a judicial tribunal. Marc Galanter, "Why the Haves Come out Ahead: Speculations on the Limits of Legal Change,"

The Fourteenth Amendment provided a valuable tool for corporate lawyers to advocate on behalf of both their Chinese and corporate clients.

Corporations for the most part have fallen outside accounts of the political and legal history of the "Greater Reconstruction."[15] Recent scholarship has contended that studies of Reconstruction-era history must incorporate the West, to illuminate the multiplicity of regional debates over the meaning of freedom and equality after emancipation and the influence of complex racial ideologies on those concepts.[16] Scholars have also argued for expanding the periodization of Reconstruction studies to stretch from the postbellum era through the Gilded Age.[17] Yet studies of the Greater Reconstruction must include corporations as well. Corporations were central players in Reconstruction-era arguments about free labor and equal treatment, and corporate litigation played a vital role in shaping the courts' early interpretation of the Fourteenth

Law & Society Review 9 (1974): 95-160. When the interests between the powerful ally and minority group diverge, the minority's resources disappear, making continued success difficult.

[15] For one exception see Richard White, *Railroaded: The T"ranscontinentals and the Making of Modern America* (New York : W.W.Norton, 2011); Richard White, *The Republic for Which It Stands: The United States during Reconstruction and the Gilded Age, 1865-1896* (New York: Oxford University Press, 2017).

[16] See, e.g., Heather Cox Richardson, *West from Appomattox: The Reconstruction of America after the Civil War* (New Haven, CT: Yale University Press, 2007); Joshua Paddison, *American Heathens : Religion, Race, and Reconstruction in California* (University of California Press, 2012); Stacey L. Smith, *Freedom's Frontier : California and the Struggle Over Unfree Labor, Emancipation, and Reconstruction* (Chapel Hill: University of North Carolina Press, 2013); D. Michael Bottoms, *An Aristocracy of Color: Race and Reconstruction in California and the West, 1850–1890* (Norman: University of Oklahoma Press, 2013); Edlie L. Wong, *Racial Reconstruction: Black Inclusion, Chinese Exclusion, and the Fictions of Citizenship* (New York and London: New York University Press, 2015); Beth Lew-Williams, *The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America* (Cambridge, MA: Harvard University Press, 2018).

[17] Elliott West dated "Greater Reconstruction" as spanning from 1846-1877, while recent scholarship has extended the period into the 1890s. Elliott West, "Reconstructing Race," *Western Historical Quarterly* 34 (Spring 2003): 7-26, 20; Eric Foner, "Afterword," in *After Slavery: Race, Labor, and Citizenship in the Reconstruction South*, eds. Bruce E. Baker and Brian Kelly (Gainesville: University of Florida Press, 2014): 221-230, 224. Richard White notes that although Reconstruction and the Gilded Age are often discussed separately, in fact "the two gestated together" and significantly overlapped. White, *The Republic for which It Stands*, 2. Other scholars have traced through-lines from the immediate postbellum era into the late nineteenth century and beyond. *See, e.g.*, Steven Hahn, *A Nation under Our Feet: Black Political Struggles in the Rural South from Slavery to the Great Migration* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2003); Heather Cox Richardson, *The Death of Reconstruction: Race, Labor, and Politics in the Post-Civil War North, 1865-1901* (Cambridge, MA: Harvard University Press, 2004); Kendra T. Field, *Growing Up with the Country: Family, Race, and Nation after the Civil War* (New Haven, CT: Yale University Press, 2018). This seemingly ever-broadening scope has led Gregory P. Downs and Kate Masur to question whether the framework of Reconstruction is still useful for understanding the postwar period. Downs and Masur, "Echoes of War: Rethinking Post–Civil War Governance and Politics," in *The World the Civil War Made,* ed. Gregory P. Downs and Kate Masur (Chapel Hill: University of North Carolina Press, 2015): 1-21, 4.

Amendment, as a longer chronological view makes clear.[18] While constitutional law doctrine involving the rights of racial minorities took varying complicated turns, corporations throughout the period successfully invoked the Fourteenth Amendment as a shield against state regulation.[19]

This inquiry builds on current scholarship on the Greater Reconstruction era to reveal the development of ideas about equal protection and free labor as they applied to a new set of "persons," corporations. As politicians and citizens rebuilt the postwar legal order, they debated what it meant to be a free, rights-bearing legal person.[20] It is well established that in the aftermath of slavery the ideology of free labor was central to this new understanding of personhood; the right to freely labor was seen as the fulcrum of freedom for those formerly enslaved.[21] Additionally, although the Fourteenth Amendment promised "equal protection under law" to all "persons," what constituted "equal," and who could claim status as a "person" was debated. The West, particularly California, was a crucial site where questions of the meaning of free labor and equal treatment played out.[22]

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[18] Labor historians have discussed the importance of corporations to the development of the concept of free labor with regard to white and black laborers and the wage labor system, but not the connection between Chinese claims to free labor and corporations' Fourteenth Amendment rights. *See, e.g., David Montgomery, Beyond Equality: Labor and the Radical Republicans, 1862-1872* (New York: Knopf, 1967); David Montgomery, *The Fall of the House of Labor: the Workplace, the State, and American Labor Activism, 1865-1925* (Cambridge and New York: Cambridge University Press, 1987); Stacey L. Smith, "Emancipating Peons, Excluding Coolies: Reconstructing Coercion in the American West," in *The World the Civil War Made*, ed. Gregory P. Downs and Kate Masur (Chapel Hill: University of North Carolina Press, 2015): 46-74.

[19] Even when corporations were not successful in their Fourteenth Amendment suits, the Supreme Court did not question corporations' ability to claim constitutional rights under the amendment.

[20] See, e.g., Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge and New York: Cambridge University Press, 1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* (New York: Cambridge University Press, 2010); Laura Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* (New York: Cambridge University Press, 2015).

[21] Stanley, *From Bondage to Contract*; Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988) (2002); Smith, *Freedom's Frontier*; Erik Mathisen, "The Second Slavery, Capitalism, and Emancipation in Civil War America," *Journal of the Civil War Era* 8, No, 4 (December 2018): 677-699.

[22] See Smith, *Freedom's Frontier*; Paddison, *American Heathens*; Wong, *Racial Reconstruction*; Lew-Williams, *The Chinese Must Go*; Najia Aarim-Heriot, *Chinese Immigrants, African Americans, and Racial Anxiety in the United States* (Urbana: University of Illinois Press, 2003).

This chapter reveals that the principles of "free labor" and "equal protection" were central not only to Chinese immigrants' claims, but to claims of corporations' constitutional rights as well. Both opponents and proponents of Chinese immigration drew on concepts of equal treatment and free labor, but defined these terms in contrasting ways. For advocates of the white working class like Kearney's Workingmen's Party, "equal treatment" meant promoting equal opportunity for white men and prohibiting special legislation that favored powerful groups like corporations. Relatedly, "free labor" meant the right of white men to earn enough to support their families and participate in the polity. In contrast, corporate lawyers contended that equal treatment was a principle embodied in the Fourteenth Amendment's equal protection clause, which applied to all "persons," natural and artificial alike. Corporations had long been considered "persons" in some areas of law, such as contract and property ownership, but courts had significantly restricted their ability to claim constitutional rights.[23] While proponents of immigration restrictions emphasized the threat to free white labor that Chinese workers allegedly posed, corporate lawyers argued that Chinese immigrants themselves possessed the right of free labor, and by extension, that corporate employers possessed the right to freely contract for their labor.[24] The federal Ninth Circuit court

[23] *See* Stewart Kyd, *A Treatise on the Law of Corporations*, vol. 1 (London: J. Butterworte, 1793), 13; Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* (Boston: Little & Brown, 1843) (2nd ed). The Supreme Court had held that corporations were protected by the Contract clause, *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819), but refused corporations constitutional protection under the privileges and immunities clause. *See Paul v. Virginia*, 75 U.S. 168 (1869).

[24] In examining the relationship between Chinese immigrants and corporations, this article is informed by scholarship showing the essential contribution of Chinese labor to entrenching capitalist labor relations in the United States. *See, e.g.,* McClain, *In Search of Equality*; Smith, *Freedom's Frontier*; Smith, "Emancipating Peons, Excluding Coolies"; Jung, *Coolies and Cane*; Lon Kurashige, *Two Faces of Exclusion : the Untold History of Anti-Asian Racism in the United States* (Chapel Hill: University of North Carolina Press, 2016). It takes this insight one step farther to argue that lawsuits by Chinese laborers were essential to establishing *corporate* capitalism – a system of market relations in which industries were controlled by corporations employing masses of wage laborers and exercising significant economic power. For scholarship on the rise of corporate capitalism, *see, e.g.*, Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916: The Market, The Law, and Politics* (New York: Cambridge University Press, 1988); Naomi Lamoreaux, *The Great Merger Movement in American Business, 1895-1904* (Cambridge: Cambridge University Press, 1985); Charles Perrow, *Organizing America: Wealth, Power, and the Origins of Corporate Capitalism* (Princeton: Princeton University Press, 2002); William G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton: Princeton University Press, 1997); Gerald Berk, *Alternative Tracks: The Constitution of American Industrial Order, 1865-1917* (Baltimore: Johns Hopkins University Press 1994). The link between Chinese immigrants and the flourishing of corporate capitalism in

endorsed the latter interpretation. The crux of the court's reasoning that corporations were "persons" under the Fourteenth Amendment was the comparison it drew between corporate shareholders and Chinese immigrants.

"Workingmen Have No Rights Which They Are Bound to Respect": Free White Labor under Threat

In 1878, delegates from across California met to draft a new state Constitution. The convention was the product of an alliance between the Workingmen's Party, formed in 1877, and the California Farmer's Alliance.[25] Convention delegates were a motley assortment of Workingmen, Grangers, alleged nonpartisans, and lawyers.[26] The goal of the new constitution was to combat three evils: "corporations, taxation, and Chinese."[27]

The Workingmen's Party and their allies saw Chinese immigrants and corporations as conjoined evils.[28] They believed that by restricting the ability of corporations to employ Chinese labor, they would rid themselves of Chinese competition, and compel corporations to pay them a

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the postbellum era is the doctrine that emerged from intertwined cases brought by Chinese litigants and corporations. Carl Brent Swisher, *Motivation and Political Technique in the California Constitutional Convention, 1878-79* (Claremont, CA: Pomona College, 1930).

[25] Swisher, *Motivation and Political Technique*, 9-10, 17.

[26] Swisher, *Motivation and Political Technique*, 25.

[27] *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento,* vol. 2, September 28, 1878 (State Office, Sacramento, 1880) (henceforward, Debates), 661. See "Hugh J. Glenn," *San Francisco Chronicle*, Aug. 11, 1879 ("With the railroads controlled and Chinese emigration stopped, and with radical reductions in State and county taxes, new courage will be infused into all the industries of the State and corresponding prosperity promoted among the people."), *See also* Swisher, *Motivation and Political Technique,* 24, 42.

[28] *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878* (State Office, Sacramento, 1880) (henceforward, *Debates*), vol. 2, 661; Swisher, *Motivation and Political Technique*, 24, 42.

[28] Kens, *Justice Stephen Field*, 198-99.

living wage.[29] The dichotomy between free and slave labor was central to this view. As scholars of the Reconstruction Era have shown, the meaning of "free labor" depended on its contrast with "slave labor."[30] Yet determining when labor was free rather than coerced proved an ongoing battle, which was exacerbated by the rise of wage labor.[31] It was particularly difficult to distinguish the two in the West, where various forms of unfree labor – including the Mexican-inherited padrone system, American Indian domestic servitude, prostitution, and Chinese contract labor – abounded.[32]

Opponents of Chinese immigration pointed to Chinese "cooliesm" to show that Chinese labor was unfree and thus should be excluded.[33] They argued that this system, in which Chinese laborers contracted to pay off their passage to the United States over a period of time by deducting a set amount from their wages, was "a system of peonage" that kept them perpetually bound to their employers.[34] Chinese laborers also lived like slaves, opponents claimed, eating meager meals and sleeping in squalid shanties, and were inherently servile.[35] Since Chinese coolies were essentially slaves, they reasoned, then the corporations that employed them, particularly railroad corporations, were slave masters.[36] The *San Francisco Chronicle* accused the "great corporations" of building up "another form of slavery in the disguise of coolieism," controlled by "another

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[29] Kens, *Justice Stephen Field*, 8; Smith, *Freedom's Frontier*, 81, 93; Moon-Ho Jung, *Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation* (Baltimore: Johns Hopkins University Press, 2006), 9, 224; Lew-Williams, *The Chinese Must Go*, 32.

[30] *See, e.g.*, Stanley, *Bondage to Contract*, 2; Foner, *Reconstruction*, 296, 299; Smith, "Emancipating Peons, Excluding Coolies," 47, Smith, *Freedom's Frontier*, 4; Lew-Williams, *The Chinese Must Go*, 31; Jung, *Coolies and Cane*, 6.

[31] Stanley, *Bondage to Contract*, 84; Montgomery, *Beyond Equality*, 89.

[32] Smith, *Freedom's Frontier*, 4; Jung, *Coolies and Cane*, 6, Lew-Williams, *The Chinese Must Go*, 30.

[33] For histories of the term "coolie", *see* Jung, *Coolies and Cane*, 5; Wong, *Racial Reconstruction*, 17-18, 69-70; Smith, "Emancipating Peons, Excluding Coolies," 61; Smith, *Freedom's Frontier*, 3, 95-97; Lew-Williams, *The Chinese Must Go*, 31-34.

[34] *Debates,* vol. 2, 725; Jung, *Coolies and Cane*, 8. The popular perception was harsher than reality: Chinese laborers were not hired for fixed, long-term contracts, but under temporary debt servitude known as the credit-ticket system. *See* Smith, "Emancipating Peons, Excluding Coolies," 63; Lew-Williams, 34.

[35] Lew-Williams, *The Chinese Must Go*, 32-33.

[36] Lew-Williams, 32.

aristocracy more powerful, more selfish, more brutalizing than that which cost the nation a million lives and four billions of money to destroy."[37] One amendment offered at the Convention, to prohibit "Asiatic coolieism, a form of human slavery," sought to hold "[a]ll companies or corporations" that imported such labor "subject to the penalties and punishments provided in the law of Congress against the importers of African slaves."[38] Explained one delegate, "Slavery in the South was broken up by law, but in this State to-day it is upheld by a power above the law, by the power of the Central Pacific Railroad Company."[39]

Corporate-backed Chinese coolieism, Workingmen and their allies argued, threatened to reduce white men to slave-like status as well.[40] Corporations encouraged Chinese immigration to create a supply of cheap labor, they claimed, which would intentionally undercut the wages of white laborers, reducing them to poverty and dependency.[41] Invoking the infamous line from *Dred Scott v. Sanford* (1857), that "the class of persons who had been imported as slaves" and their descendants "had no rights which the white man was bound to respect," supporters of the new Constitution accused corporations of believing that "WORKINGMEN HAVE NO RIGHTS Which they are bound to respect."[42] Delegate C.R. Kleine, a Prussian immigrant shoemaker, asserted, "We have a class of capitalists that want cheap labor… They want to bring us down to the level of the coolie himself; to a level with slave labor."[43] The *Chronicle* explained that the attempt of "the railway corporation" to convince workingmen to vote against the new Constitution was "a repetition of the practice of the Southern planters" to coerce "poor whites…

[37] "Our Eastern Critics," *San Francisco Chronicle*, March 22, 1879.
[38] *Debates,* vol. 2, 724.
[39] *Debates,* vol. 2, 700.
[40] Smith, *Freedom's Frontier*, 81, 93; Jung, 9, 224; Lew-Williams, 32.
[41] "The Pending Struggle," *San Francisco Chronicle*, July 28, 1879; "Perkins as a Bureau Man," *San Francisco Chronicle*, August 3, 1879; *Debates*, vol. 1, 402.
[42] "The Pending Struggle," *San Francisco Chronicle*, July 28, 1879; *Dred Scott*, 407.
[43] *Debates,* vol. 2, 701.

to bolster up an institution… which was inevitably reducing them to a social condition on a dead level with that of the negro slaves."[44] San Francisco Mayor Isaac S. Kalloch made this point succinctly: "California is a slave State, and the monopolies are the masters and the Chinese the slaves, and we are becoming the poor white trash."[45]

By reducing white men to a condition akin to slavery, Workingmen argued, corporations threatened the very foundation of republican government – white men's status as masters of their households.[46] If Chinese competition continued to undercut white wages, delegates warned, white working men would be unable to "support a decent home"; their daughters would be "dragg[ed] down… into degradation and disgrace" and their sons "made hoodlums"; and their status as free laborers and heads of households would be destroyed.[47] Delegates like J. N. Barton, a farmer, equated white men's status with democratic government.[48] Barton, who explained that had successfully raised a family only to be "brought down by force of circumstances and misfortune to a level with these slaves," announced to the Convention, "I stand here today to defend my dignity and my manhood; to defend the principles of our government."[49] Providing opportunities for white men to form households and establish themselves was essential to ensuring their political power; as one delegate from San Francisco explained, if white men were employed they "would become part of the State, and own homes and enter business on their own account."[50] Instead,

[44] "Using the Chinese," *San Francisco Chronicle*, April 23, 1879.
[45] "Light Ahead," *San Francisco Chronicle*, May 5, 1879.
[46] Scholars have compellingly illustrated the importance that the status as head of household held for wage laborers, both black and white, in supporting their claim for political participation. *See* Stanley, *From Bondage to Contract*; Amy Dru Stanley, "Instead of Waiting for the Thirteenth Amendment: The War Power, Slave Marriage, and Inviolate Human Rights," *American Historical Review* 115, no. 3 (June 2010): 732-765; Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York, 1995).
[47] "The Pending Struggle," *San Francisco Chronicle*, Jul. 28, 1879; *Debates,* vol. 2, 654, 701, 653.
[48] Winfield Davis, *History of Political Conventions in California, 1849-1892* (Sacramento: Trustees of the California State Library, 1892), 392.
[49] *Debates,* vol. 2, 653.
[50] *Debates,* vol. 2, 701.

Workingmen lawyer Clitus Barbour contended, the threat of Chinese labor was "sapping the foundations of their political and civil liberty, and threatening its very existence."[51] If cheap Chinese labor "reduced the rate of wages so that the laboring man can no longer support himself, and wife, and little ones," delegates warned, corporations would gain control of the government and subvert popular democracy.[52] California would then become "the gibbering skeleton of a lost republic!"[53]

The Convention attempted to contain this threat to white labor and popular government by targeting corporations and Chinese laborers simultaneously. In addition to regulating Chinese immigrants and corporations separately, the new Constitution also contained a provision that attempted to kill both birds with one stone: "No corporation," it read, shall "employ, directly or indirectly, in any capacity, any Chinese or Mongolians."[54] Notably, this prohibition applied only to corporate employers, not individuals. [55] It would prove the linchpin for corporate claims of equal protection under the Fourteenth Amendment, in the case of *In re Tiburcio Parrott*.

[51] *Debates,* vol. 2, 650.
[52] *Debates,* vol. 2, 687, 688.
[53] *Debates*, vol. 1, 636, 637.
[54] California Constitution of 1879, Art. XIX, §3. For a discussion of the constitutional provisions targeting Chinese immigrants, *see* McClain, *In Search of Equality*, 82-83.
[55] *Debates,* vol. 2, 658-672.

Image 11: *"When Will This Ass Kick,"* The Wasp, *depicting Mark Hopkins, Leland Stanford, and a caricatured Chinese laborer astride a donkey labelled "California."*

"The People's Constitution": Equal Treatment under Law

In addition to free labor, the meaning of "equality" was also debated after the Civil War, not only with regard to African Americans, but to other non-white and non-male groups as well.[56] Some scholars have pointed out that anti-Chinese activists mobilized the language of "equality" and the "brotherhood of man" as strategic rhetorical tools.[57] Yet the Chinese exclusionists in the Convention were also ideologically committed to their own concept of equality.[58] This can be

[56] Smith, *Freedom's Frontier*, 5, 227; Edwards, *A Legal History of the Civil War and Reconstruction*, 148-49.
[57] Smith, *Freedom's Frontier*, 3; Kurashige, *Two Faces of Exclusion*, 4-5.
[58] Stacey Smith discusses how the free labor ideology underpinning the concept of equality was used to justify excluding non-free labor such as Chinese coolies. Smith, *Freedom's Frontier*, 5. Lon Kurashige has categorized supporters and opponents of Chinese exclusion broadly as "exclusionists" and "egalitarians," while also noting the malleability of the concept of egalitarianism. Kurashige, 3-4.

seen in the delegates' concern with ensuring "equal treatment under law" as opposed to "special legislation."

"Special legislation" singled out particular individuals or corporations for special privileges, such as government subsidies, exemption from taxation, or eminent domain power. These special privileges, Workingmen and their allies claimed, disrupted the right to equal opportunity that underlay the meaning of democracy. As a supporter of the new Constitution proclaimed, "Fellow-citizens, if this new Constitution guards any principle more than another,… it is, that before the law all men shall be equal."[59] To promote equality, the laws must "affect all alike," not "advance the interests of some particular person, or some particular corporation."[60] Constitution supporters specifically targeted "grasping corporations" as the beneficiaries of special legislation; the *San Bernardino Times* explained that "the people" simply wanted "equal rights, equal taxation and relief from the anaconda grip of crushing monopoly rule."[61]

Delegates' commitment to general laws echoed the concern with "class legislation" expressed by influential jurist Thomas Cooley in his 1868 treatise *Constitutional Limitations*. Cooley wrote that "every one has a right to demand that he be governed by general rules" and that any law that singled out a particular group was unconstitutional.[62] As a judge on the Michigan Supreme Court who dealt with a number of railroad cases, Cooley, like the delegates, was particularly concerned with the special privileges granted to corporations.[63] The new constitution forbade special legislation in a long list of enumerated cases, including the chartering of

[59] "Booming," *San Francisco Chronicle*, April 18, 1879.
[60] *Debates*, vol. 1, 434.
[61] "Both Sides," *San Francisco Chronicle*, Mar 28, 1879 (quoting the *San Bernardino Times*).
[62] Thomas Cooley, *A Treatise on the Constitutional Limitations which Rest upon The Legislative Power of the States of the American Union* (Boston: Little, Brown, & Co., 1868), 391, 392-93.
[63] Berk, *Alternative Tracks*, 101.

corporations.[64] It also mandated, "In all other cases where a general law can be made applicable, no local or special law shall be enacted."[65] Nonpartisan delegate T.B. McFarland, a lawyer, explained that it was "a fundamental principle in our government that no law shall be passed which affects one person and not the balance of the community. That is the principle... that saves all our personal rights."[66] For McFarland and others, this commitment to general laws served to promote democracy by curbing the legislature's ability to reward supporters with charters of incorporation that granted the ability to exercise eminent domain or exemption from taxation to a few wealthy donors – market advantages that were not available to small-scale enterprises or individuals.[67]

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[64] *Debates*, vol. 1, 434. This provision had been included in the first constitution of 1849 as well. *Id*. at 382.
[65] *Debates*, vol. 1, 363.
[66] *Debates*, vol. 1, 264.
[67] *Debates*, vol. 1, 434. This was the motivation behind the passage of general laws throughout the country beginning in the 1840s through the end of the century. Naomi R. Lamoreaux and John Joseph Wallis, "Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy," *Journal of the Early Republic* (forthcoming Fall 2021), 27. The California constitutional convention's prohibition on special charters accords with the rapid increase during this period in general incorporation statutes – laws that allowed any persons, sometimes limited to particular industries, but increasingly generally, to incorporate simply by filing documentation with a state official, instead of having to obtain a special charter from the legislature. Jonathan Levy, "Altruism and the Origins of Nonprofit Philanthropy," in *Philanthropy in Democratic Societies: History, Institutions, Values,* edited by Rob Reich, Chiara Cordelli, Lucy Bernholz (Chicago: University of Chicago Press, 2016): 19-43, 28-29; Naomi R. Lamoreaux, "Antimonopoly and State Regulation of Corporations in the Gilded Age and Progressive Era," October 28, 2020, 5 (unpublished article on file with the author); Pollman, "Reconceiving Corporate Personhood," 1640. Yet as industrial development and financial institutions expanded in the United States, and as partisan legislatures granted corporate charters only to their political supporters, market actors whose party was out of power or who did not have connections to state legislators began to demand general incorporation as a means of ensuring equal access to the marketplace. Lamoreaux and Wallis, 6; Pollman, "Reconceiving Corporate Personhood," 1640; Susan Hamill, "From Special Privilege to General Utility: A Continuation of Willard Hurst's Study of Corporations," *American University Law Review* 49, no.1 (October 1999): 81-180, 98-103. In the early 1840s, a fiscal crisis in which eight states defaulted on their bonded debt led five of these states, and three others that had come close to default, to also put general incorporation laws on the books. Lamoreaux, "Antimonopoly and State Regulation of Corporations," 4-5. California's first constitution in 1849 included a general incorporation statute, as well as a prohibition on incorporation through special legislation. California Constitution of 1849, Art. IV, §31. General incorporation accelerated during the late 1850s; by 1875, over ninety percent of states had passed general incorporation laws. Susan Pace Hamill, "The Origins behind the Limited Liability Company," *Ohio State Law Journal* 59, no. 5 (1998): 1459-1522, 1495; Hamill, "From Special Privilege to General Utility," 86-87; Horwitz, "*Santa Clara* Revisited," 181; Levy, "Altruism and the Origins of Nonprofit Philanthropy," 30. In many states, general and special incorporation coexisted, with most states continuing to pass special charters into the early twentieth century. Hamill, "From Special Privilege to General Utility," 87. Incorporators asked for special charters in cases where their enterprise was not covered by the general incorporation statute, or where they wished to obtain privileges from the legislature beyond those granted in the general incorporation statute. Lamoreaux and Wallis, "Economic Crisis," 22. As a result, the democratic access to the

Yet in spite of their invocation of equal treatment for all white men, in the final version of the Constitution, delegates explicitly provided that the constitution's commitment to "general laws" did not mean "that all differences founded upon class or sex should be ignored," but rather "that they shall operate uniformly… on all persons who stand in the same category."[68] Delegates were perfectly comfortable passing laws that discriminated against Chinese immigrants, women, and corporations; these groups were not in the same class as white men, and so the principle of general laws that treat all alike did not apply to them.[69] Delegate Barbour asserted that "this is a white man's government; a government of Caucasians established by white men, and for white men."[70] This echoed an important qualification on the principle of general legislation that Cooley had discussed, that the legislature may "deem it desirable to establish… distinctions in the rights, obligations, and legal capacities of different classes of citizens."[71] In other words, equality meant "treating likes alike"; laws must be applied equally among members of a group, but different groups could be subject to different sets of laws based on their particular characteristics, including race.[72]

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corporate form envisioned by proponents of general incorporation was hampered as legislatures continued to grant special corporate charters to political allies. Lamoreaux and Wallis, "Economic Crisis," 4.

[68] California Constitution of 1879, Art. I, §12. Robert Desty, *The Constitution Of The State Of California Adopted In 1879* (San Francisco: Sumner Whitney & Co., 1879), 186. Delegates also occasionally included white women in the scope of equal treatment. Although denying women the franchise, they passed provisions prohibiting the University of California from refusing admission on account of sex, and providing "that no person shall be disqualified, on account of sex, from pursuing any lawful business, vocation or profession." California Constitution of 1879, Art. XI §9, Art. XXXI §18. Women – by implication white women – here obtained a valuable right that Chinese men were explicitly denied: the right to freely labor. This provision may have been included as a response to the recent Supreme Court case *Bradwell v. Illinois*, holding that women had no constitutional right to labor in a particular profession. 83 U.S. 130 (1873).

[69] *Debates*, vol. 3, 680 (arguing that Cooley's prohibition on class legislation did not apply to laws that discriminated against Chinese immigrants in the name of public health and welfare).

[70] *Debates*, vol. 2, 649.

[71] Cooley, *Constitutional Limitations*, 390.

[72] At the time, race was a generally accepted basis on which to classify persons and was not considered to violate Cooley's general prohibition of "class legislation." Cooley, *A Treatise on the Constitutional Limitations which Rest upon The Legislative Power of the States of the American Union*, 1st ed. (Boston: Little, Brown, & Co., 1868), 390, 394; People v. Dean, 14 Mich. 406 (1866). n later editions of his treatise, Cooley explicitly stated that discrimination based on race did not violate the Fourteenth Amendment. Thomas Cooley, *A Treatise on the Constitutional Limitations which Rest upon The Legislative Power of the States of the American Union*, 4th ed., (Boston: Little, Brown, & Co., 1878), 490 n.1 ("It has been

Acknowledging that the term "persons" included both non-white and non-male persons, as well as artificial persons like corporations, delegates took pains to expressly exclude those groups from the promise of equal treatment.[73] As discussed previously, in corporate law of the nineteenth century, the corporation "for certain purposes" was "considered as a natural person," insofar as it possessed the right to own property, sue and be sued, and contract as a single entity.[74] Certain laws applying to "persons," such as taxation and debtor-creditor laws, often had been held to apply to corporations as well.[75] Delegates were well aware of this. In a debate over the new Constitution's "Declaration of Rights," which proclaimed, "All men are by nature free and independent, and have certain inalienable rights," delegates rejected a proposal to change "men" to "persons" on the ground that "[t]he word person includes artificial as well as natural persons… and therefore corporations would be included in this grant of rights."[76]

Some delegates did acknowledge the new, expansive vision of equality, espoused by Radical Republicans during the passage of the Reconstruction Amendments, that all persons were entitled to equal protection of their rights.[77] Although deriding this "brotherhood of man theory," convention delegates expressed concern that singling out Chinese immigrants for special treatment might run afoul of the Fourteenth Amendment, as well as the Burlingame Treaty of 1868, which entitled Chinese immigrants to "the same privileges, immunities and exemptions in

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decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution."). Cooley did note that arbitrary infliction of burdens would violate the equal protection clause: "When the law imposes a punishment… for the avowed purpose of affecting this class as others are not affected, it seems plain that… the equal protection of the laws [are] denied to the class…" Thomas McIntire Cooley, "Ho Ah Kow v. Matthew Nunan," *American Law Register* 27 (January to December 1879): 676-686, 686.

[73] *Debates,* vol. 2, 232-233.

[74] Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* (Boston: Hilliard, Gray, Little & Wilkins, 1832), 1.

[75] Angell & Ames, *Treatise of the Law of Private Corporations Aggregate*, 3-4.

[76] *Debates*, vol. 1, 233.

[77] On the Republican vision, *see* Foner, *Reconstruction*, Chapter 6.

respect to travel or residence" as immigrants from "most favored nations," such as Britain and France. [78] Democratic delegate Joseph Filcher, a journalist, bemoaned, "We find that we are hedged about, even in a constitutional capacity, by the principles of the Federal Constitution on all sides."[79] Their concern was well-founded; for a decade prior to the convention, California state courts had been debating whether anti-Chinese laws violated the Fourteenth Amendment, and at the time of the convention, the Ninth Circuit had already struck down one law discriminating against Chinese immigrants. [80]

Some of the more conservative delegates warned that the combined effect of the Fourteenth Amendment and the Burlingame Treaty was that, with the exception that they could not become citizens, "the Chinese are made equal in this country before the law."[81] San Francisco lawyer John Dickinson, pointing out "that if the Constitution of the State were directed against Englishmen, Irishmen or Germans it would not have been received favorably," contended that the law "must not be class legislation. It must not be in opposition to the doctrine of equality" under Fourteenth Amendment.[82] Delegate Samuel Wilson, "attorney for a score of millionaires" including the Central Pacific Railroad, and a close friend of Justice Stephen Field, made the most sophisticated legal argument regarding the unconstitutionality of anti-Chinese laws.[83] The language of the Fourteenth Amendment, he argued, "is not limited merely to the negro, it is comprehensive enough to embrace all others… It matters not who the individual is; it matters not

[78] *Debates*, vol. 2, 702, 674.
[79] *Debates*, vol. 2, 657, 700; Davis, *History of Political Conventions in California*, 391.
[80] "Chinese versus Caucasian," *Daily Alta California*, Dec. 13, 1868; "Chinese Testimony in the Test Case," *Daily Alta California*, Dec. 18, 1868; "Chinese Testimony," *Daily Alta California*, December 8, 1869; *In re Ah Fong*, 1 F.Cas. 213 (C.C.D. Cal. 1874); McClain, *In Search of Equality*, 33.
[81] *Debates*, vol. 2, 657, 674, 676.
[82] "The Chinese Must Go," *San Francisco Chronicle*, February 13, 1880.
[83] Oscar Tully Shuck, *History of the Bench and Bar in California* (San Francisco: Occident Printing House, 1889), 46; Swisher, *Motivation and Political Technique*, 86-87. Wilson had opposed the calling of a constitutional convention and likely worked to counter the influence of the Workingmen's Party at the convention. Swisher, *Motivation and Political Technique*, 17, 25-26. Wilson refused to sign the new California Constitution. Shuck, *History of the Bench and Bar,* 53.

how humble he is, or how base he is, the broad shield of the law extends over him, and he may demand all the right which any other person may have to the equal protection of the laws."[84] Wilson thus endorsed a broader interpretation of the meaning of "equality," as treating all the same regardless of their membership in a particular group. His capacious reading of the Fourteenth Amendment forecasted that of the court in *In re Tiburcio Parrott*.

In contrast to the debates over the equal protection rights of Chinese persons, no delegate entertained seriously the idea that the Fourteenth Amendment would apply to corporations. Like the proponents of corporate regulation discussed in the previous chapters, the delegates viewed the corporation as "a creature of the State, controlled by the State," that possessed only the rights the state had granted it in its charter.[85] Morris M. Estee, Chairman of the Committee on Corporations, explained that "there is no such thing as the existence of a railroad anywhere, in any country, except by and through the sovereign will of the State."[86] Because corporations were created by state law, former California Supreme Court Justice David S. Terry argued, "we can control corporations, and prevent them from employing any class of laborers we choose. We can make it a condition of the existence of their charter."[87] While some pointed out that the state could not prohibit individuals from employing whom they chose, delegates largely agreed that because of their nature as a state-created entity, corporations could not claim the same right to equal protection as natural persons.[88] Delegate Barbour denounced as "fallacious and sophistical"

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[84] Swisher, *Motivation and Political Technique*, 685.
[85] Swisher, *Motivation and Political Technique*, 700. Delegates considered incorporation to be a privilege the state allowed its citizens via its general incorporation statute.
[86] *Debates*, vol. 1, 380.
[87] *Debates* vol. 2, 699.
[88] *Debates* vol. 2, 658-672. Delegates did not elaborate on why they thought it would be unconstitutional when applied to individuals. Limiting the prohibition to corporations may have been a pragmatic decision; although corporations were the major employers of Chinese, some convention delegates and Workingmen's Party candidates were farmers who occasionally employed Chinese laborers as farmhands. "Dr. Glenn and the Chinese," *San Francisco Chronicle*, Jul. 31, 1879; "Ratified," *San Francisco Chronicle*, Jul 19, 1879; *Debates*, vol. 2, 642-43, 661.

the idea that the corporation's charter rights were on par with the "chartered rights of man."[89] Rather, as one delegate emphasized, "God made man, and man made corporations."[90]

That the delegates did not view corporations as constitutional rights-bearing persons is also made clear by the rhetoric and imagery used during the convention. A key trope in their discussions of corporate regulation was Frankenstein's monster, the "child of the state" run amuck.[91] One delegate warned of the Central Pacific Railroad, "Like Frankenstein's baby, there was no end to its growing, and no limit to its voracity. And, like that wonderful child, it started in to devour its author."[92] As with Frankenstein's creation, these corporate creatures had no souls, but were "godless" and devoid of moral conscience.[93] "*God made man, and man made corporations*," emphasized another delegate; "God alone could give us soul, and a spirit, and a conscience, but man has never given conscience, nor soul, nor moral honesty to a corporation yet, and never will."[94]

In addition to Frankenstein's monster, delegates also commonly compared corporations to dangerous animals. "The corporations of California," claimed a delegate, were "like an immense boa constrictor, having the whole State gripped within its coils, squeezing faster and faster all the time, until the whole State trembles with agitation and bleeds from every pore."[95] Another delegate excoriated the Central Pacific Railroad: "We have seen that corporation spreading its arms forth in every direction, monopolizing transportation… We have seen our

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[89] *Debates*, vol. 1, 532 (quoting from Edmund Burke, *Speech on Mr. Fox's East India Bill*, (Dublin: L. White, 1784), 6: "Political power and commercial monopoly are *not* the rights of men; and the rights to them are derived from charters, it is fallacious and sophistical to call 'the chartered rights of men.'").
[90] *Debates*, vol. 2, 417.
[91] *See* Mary Wollstonecraft Shelley, *Frankenstein: Or, The Modern Prometheus* (New York: Dover Publications, Inc., 1994) (originally published London: Colburn and Bentley, 1831).
[92] *Debates*, vol.1, at 533.
[93] *Debates*, vol.1, 386.
[94] *Debates*, vol.1, 417.
[95] *Debates*, vol.1, 402.

internal commerce falling under its power… We have seen it cajoling and corrupting our legislators… And we find it, day by day, and hour by hour, increasing in wealth and in power, and having still further opportunities to control and govern and trample on the people."[96] For this delegate, the railroad corporation was personified, with "arms" to control commerce, feet to "trample" over the people, and a voice to "cajole" elected officials.

[96] "Booming," *San Francisco Chronicle*, Apr. 18, 1879.

Image 12: "*The Curse of California" by George Keller (1882).*

Corporations, in this view, were distinct from their shareholders. When convention delegates did discuss local shareholders, they portrayed them as innocent working people, victims of voracious, conscience-less corporations. "Many suppose all stockholders in corporations are

capitalists," argued one delegate, "but such is not the case."[97] Inveighing against "stock gambling" and speculation, another delegate bemoaned the sight of the "pale and anxious faces of poor men, in seedy apparel, who, once respectable, honored, prosperous citizens, have been dragged down into this maelstrom of speculation and pollution."[98] Even delegate Samuel Wilson, a corporate lawyer and friend of Justice Field, viewed corporations and stockholders as separate, stating, "In a majority of cases, when disaster comes, the stockholder is innocent and has not participated in the management of the affairs of the institution, and is not to blame for the disaster."[99] The corporation, in their view, was not an aggregate of individuals but a separate entity, whose interests were potentially adverse to those of its shareholders.

For opponents of corporate power, if the entity of the corporation was identified with any person, it was its president or directors. This was especially true of railroads. When discussing abuses by the Central Pacific Railroad, for instance, opponents of the railroad portrayed the corporation as coextensive with its president, Leland Stanford, and his "corps of trained lieutenants."[100] They railed against "Stanford and company," "Stanford and his cohorts and minions," and "this railroad king, Stanford."[101] Political cartoons of railroads featured the heads of their presidents and the body of a monster. Corporate directors were not the shareholders' representatives, but powerful and potentially irresponsible actors unmoored from shareholder oversight.

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[97] *Debates*, vol.1, at 385.
[98] "Booming," *San Francisco Chronicle*, Apr. 18, 1879.
[99] *Debates*, vol. 1, at 384; Swisher, *Stephen J. Field*, 214.
[100] Swisher, *Motivation and Political Technique*, 53 (quoting the *San Francisco Chronicle*, April 19, 1878).
[101] *Debates*, vol. 1, 534, 550.

Ultimately, the convention voted to pass the provision prohibiting corporations from employing Chinese labor, and risk a challenge in the courts when it came.[102] As Barbour remarked, "The Supreme Court can set it aside if it wants to. We are not worse off."[103]

"The Despised Laborer from China" and "The Envied Master of Millions": A Joint Attack

After the Constitution was ratified in 1879, Denis Kearney, whose incitement to hang both Chinese laborers and corporate employers opened this article, took it upon himself to enforce the prohibition on Chinese employment. He and his band of Workingmen acolytes put up "threatening placards" around San Francisco, "warning employers of Chinese to desist from that practice, and vaguely hinting at terrible consequences in the event of refusal."[104] The "Kearney committee" visited companies where Chinese immigrants were employed and, with more or less intimation of violence, attempted to persuade them to "discharge their Chinese."[105] They targeted small corporations like cigar factories and laundries first. Although these employers initially refused to let their Chinese employees go, arguing that "it was impossible to get whites to

[102] *Debates*, vol. 1, 649, 659, 681, 687.
[103] *Debates*, vol. 1, 649.
[104] "Threatening Placards," *Sacramento Daily Union*, March 9, 1880.
[105] "Kearney's Victim," *Daily Alta California*, February 25, 1880; "The Gallows," *Daily Alta California*, February 23, 1880; "Pacific Slope News," *Sacramento Daily Union*, February 27, 1880; "A Laundry Discharges its Chinamen," *Daily Alta California*, February 21, 1880; "Threat Factory," *Daily Alta California*, February 21, 1880; "California, Unemployed, Another Parade Promised," *Sacramento Daily Union,* February 21, 1880.

do the work now done by the Chinese," within a few days many succumbed to the pressure and discharged their Chinese workers.[106]

The Sulphur Bank Quicksilver Mining Company, however, refused to fire its Chinese miners.[107] Its president, Tiburcio Parrott, "declined to be dictated to, saying he should obey the law when the United States Courts denied him the right to hire whom he pleased and pay what he pleased."[108] Parrott was the illegitimate son of one of the wealthiest men in San Francisco, whose family fortune had been made in banking, mining, and trade with China and Hong Kong.[109] Parrott, whose quicksilver mine employed 216 Chinese laborers, had a compelling interest in overturning the prohibition; especially so, because the sulphur smell was reportedly so noxious that no white men would consent to work there.[110]

Parrott's resistance inflamed Kearney and his supporters. Denouncing Parrott as "an infernal and inhuman villain, a vile wretch, a double-dyed ruffian, and a deep-rooted scoundrel," Kearney took up a collection to construct a gallows on the sand lot, warning that Parrott's refusal to comply was "sufficient to justify a resort to force and arms for the maintenance of the supremacy of the law."[111] Parrott was duly arrested and fined; he promptly sued, arguing that the prohibition violated the Fourteenth Amendment rights of both Chinese workers and corporations.

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[106] "Threat Factory," *Daily Alta California*, February 21, 1880; "A Laundry Discharges its Chinamen," *Daily Alta California*, February 21, 1880; "California, Unemployed, Another Parade Promised," *Sacramento Daily Union*, February 21, 1880.
[107] "Kearney's Victim," *Daily Alta California*, February 25, 1880.
[108] "Kearney's Victim."
[109] Andrew Scott Johnston, *Mercury and the Making of California: Mining, Landscape, and Race, 1840–1890* (Boulder: University Press of Colorado, 2013), 252.
[110] Johnston, *Mercury and the Making of California,* 231, 204, 252.
[111] "Sand-Lot Threats," *San Francisco Chronicle*, February 23, 1880; "The Gallows," *Daily Alta California*, February 23, 1880.

The Chinese consul immediately joined Parrott's suit, claiming that the Chinese "were directly interested in the question and had a right to be heard."[112] The alliance of the Chinese consulate with a major corporate player in California industry was not unusual, but rather highlights the intimate connection between the interests of the Chinese community and large corporations. Relations between the Chinese mercantile elite and the lawyers and capitalists of the city had long been amicable.[113] The coalition of mutual aid societies for Chinese immigrants, known as the Chinese Six Companies, was active in establishing this relationship.[114] The Six Companies' chief legal counsel and representative, the American Frederick A. Bee, was a self-proclaimed "capitalist" with railroad and mining interests, who moved in elite San Francisco circles.[115] Elaborate banquets hosted by the Six Companies and "the leading citizens of California" celebrated the commercial relationship between China and the United States.[116] At these banquets, Chinese dignitaries and merchants rubbed shoulders with California politicians, judges, lawyers, and industrial magnates, who praised the "extraordinary and auspicious" meeting of "the oldest and the newest civilizations."[117] Attendees included the lawyers who would later serve as counsel in *Parrott*, as well as the judges who would hear the case.

Parrott's case highlights not only the interconnection of the Chinese community and corporations in this period, but another important and little-known connection as well: the lawyers for Chinese immigrants and for corporations suing under the Fourteenth Amendment were predominantly the same. The Six Companies, founded by Chinese merchants in the late 1850s

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[112] "Parrott's Plea," *San Francisco Chronicle*, Mar 7, 1880.
[113] McClain, *In Search of Equality*, 25; Yucheng Qin, *The Diplomacy of Nationalism: The Six Companies and China's Policy Toward Exclusion* (Honolulu : University of Hawai'i Press, 2009), 53-54.
[114] Founded in the late 1850s, in 1878 the organization was renamed the Chinese Consolidated Benevolent Association. Qin, *The Diplomacy of Nationalism*, 44, 103.
[115] "South Fork of American River," *Sacramento Daily Union*, September 27, 1855
[116] Qin, *The Diplomacy of Nationalism*, 103, 53; Oscar Tully Shuck, *The California Scrap-book: A Repository of Useful Information and Select Reading* (San Francisco: H.H. Bancroft & Company, 1869), 221-24, 585.
[117] Shuck, *The California Scrap-book*, 220-222, 225, 224.

and which effectively directed the operation of the Chinese consulate after it was established in 1878, was well versed in the American legal system.[118] Early on the organization had realized that employing American legal counsel was necessary to managing its legal affairs as well as to combat discriminatory city ordinances and statutes.[119] Even before the Fourteenth Amendment was ratified, allies of the Chinese had mobilized the amendment and the Civil Rights Act to challenge state law prohibiting Chinese immigrants from testifying in court.[120] Throughout the 1870s, the Chinese Six Companies brought suits challenging this and other laws that targeted Chinese indirectly.[121]

Image 13: *"Arrival of the Embassy, Escorted by Resident Merchants."*

[118] McClain, *In Search of Equality*, 86, 23-24; Qin, *The Diplomacy of Nationalism*, 44, 31-33.
[119] Qin, *The Diplomacy of Nationalism*, 47; McClain, *In Search of Equality*, 54; McClain, "The Chinese Struggle for Civil Rights," 350.
[120] "Chinese versus Caucasian," *Daily Alta California*, Dec. 13, 1868; "Chinese Testimony in the Test Case," *Daily Alta California*, Dec. 18, 1868; *People v. Washington,* 36 Cal. 658 (1869); *Welch v. Ah Hund*; *People v. Brady* (San Francisco Police Court, Nov. 1869); *People v. Brady,* 40 Cal. 198 (1870). *See* McClain, *In Search of Equality*, 31-35.
[121] "The Pagan Ordinancies [sic]," *Daily Alta California*, June 3, 1873; "The 'Monitor' on the Chinese Ordinances," *Daily Alta California*, June 7, 1873; Qin, *The Diplomacy of Nationalism*, 88; Hudson N. Janisch, "The Chinese, the Courts, and the Constitution" (JSD diss., University of Chicago, 1971) (unpublished), 306.

The Six Companies employed the most prestigious lawyers in San Francisco in support of their cause. Among the most esteemed was the partnership of McAllister & Bergin.[122] Hall McAllister, a heavyset man fond of quoting Shakespeare, the Bible, and even his own poetry in the courtroom, had been a longtime supporter of U.S.-Chinese relations.[123] Notably, while representing the Chinese immigrant community, these lawyers also served as counsel for the major industrial players in California. McAllister regularly represented the Pacific Mail Steamship Company (which as the primary transporter of Chinese immigrants had a vested interest in the *Parrott* case), and McAllister and his partner Thomas Bergin served as counsel for several mining and railroad companies, including the Southern Pacific Railroad.[124]

The interests of their two core groups of clients, Chinese immigrants and corporations, came together in *In re Tiburcio Parrott*. McAllister and Bergin became the lead lawyers for Tiburcio Parrott, while Delos Lake, a lawyer for the Central Pacific Railroad who was also a supporter of Chinese trade, represented the Chinese consulate.[125] Lake, an attorney for the Central Pacific Railroad, was also a close friend of Justice Stephen Field, having saved his life from a package bomb some years earlier. [126] Although Lake, considered "a monster of sarcasm," ribbed

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[122] *See* Daniel Levy, "Classical Lawyers and the Southern Pacific Railroad," *Western Legal History* 9 (1996): 177-226, 226.

[123] Oscar Tully Schuck, *History of the Bench and Bar in California* (San Francisco: Occident Printing House, 1889), 420; Shuck, *The California Scrap-book*, 585; Hall McAllister, "The Statute Forbidding the Immigration of Chinese into California by Sea, Unconstitutional and Void," *Daily Alta California*, July 28, 1858.

[124] *See, e.g.,* Southern Pac. R. Co. v. Raymond, 53 Cal. 223 (1878) (for Southern Pacific); Fremont v. Merced Min. Co., 9 F. Cas. 772 (C.C.N.D. Cal. 1858) (for Fremont); Yonge v. Pac. Mail S.S. Co., 1 Cal. 353 (1850) (for Pacific Mail); Knox v. The New Idria Min. Co., 4 F. 813 (C.C.D. Cal. 1880) (with Bergin, for New Idria, before Field); Bd. of Health of Marine Hosp. for State of Cal. v. Pac. Mail S.S. Co., 1 Cal. 197 (1850); Phelps v. Union Copper Mining Co., 39 Cal. 407 (1870) (for mining co); George v. N. Pac. Transp. Co., 50 Cal. 589 (1875) (for N. Pac); Mahony Min. Co. v. Bennett, 16 F. Cas. 497 (C.C.D. Cal. 1878) (for min co); Knox v. Quicksilver Mining Co., 4 F. 809, 809 (C.C.D. Cal. 1880) (for mining co before Field).

[125] *See Southern Pac. R. Co. v. Orton*, 6 Sawy. 457 (1879); *In re Ah Chong*, 6 Sawy. 451 (D. Cal. 1880).

[126] Alonzo Phelps, *Contemporary Biography of California's Representative Men* (San Francisco: A.L. Bancroft and Co., 1881), 51. During a social call, the Justice received a suspicious package, which the quick-thinking Lake threw into a bucket of water. The package turned out to be a homemade bomb. Shuck, *History of the Bench and Bar*, 428. *See also* Graham, *Everyman's Constitution*, 146 n.30. Highlighting the concurrent representation of these lawyers of both corporations and Chinese persons, at the same time that he intervened in *Parrott*, Lake was representing the Central Pacific Railroad in

McAllister for quoting his verses in court, commenting that they contained "more poetry than truth" and "that was not saying anything for the poetry," the three attorneys launched an effective joint offensive.[127]

In their arguments, Bergin, McAllister, and Lake drew on a novel interpretation of the Fourteenth Amendment that Justice Stephen Field had recently begun to articulate while sitting on the Ninth Circuit.[128] The Fourteenth Amendment had been ratified in 1868 in order extend citizenship to formerly enslaved persons and their descendants and to guarantee them the protection of the federal government of certain fundamental rights.[129] The amendment mandated,

> 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.[130]

Although its core purpose was to protect formerly enslaved persons and their descendants, the question of who else could claim the amendment's protections immediately became a point of contention.[131] Some scholars have suggested that the drafters of the Fourteenth Amendment

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an infamous case involving the Mussel Shoals Massacre, in which settlers had been killed in a face-off with the railroad over contested property claims. "The Responsibility for the Tulare County Murders," *Sacramento Daily Union*, May 17, 1880. The same year, Lake also represented another Chinese immigrant in a case challenging a licensing requirement for Chinese fisherman. *Ah Chong*, 6 Sawy. 451.

[127] Shuck, *History of the Bench and Bar*, 420.

[128] At the time, cases in federal circuit court were heard by one circuit court judge, one district court judge, and/or the designated Supreme Court justice responsible for that circuit. Christian Fritz, *Federal Justice, The California Court of Ogden Hoffman*, 1851-1891 (Lincoln: University of Nebraska Press, 1991), 30.

[129] Slaughter-House Cases, 83 U.S. 36, 71-72 (1872). *See* Eric Foner, *A Short History Of Reconstruction, 1863-1877* (New York : Harper & Row, 1990), 93, 118. The Amendment was intended to strike dow the "Black Codes," laws the states of the former Confederacy had enacted to limit the ability of African Americans to exercise their freedom.

[130] U.S. Constitution, Amendment XIV, § 1.

[131] *See, e.g, Slaughter-House Cases*, 83 U.S. at 71 (butchers); Bradwell v. Illinois, 83 U.S. 130 (1873) (women); Bartemeyer v. State of Iowa, 85 U.S. 129 (1873) (alcohol purveyors); Minor v. Happersett, 88 U.S. 162 (1874) (women).

knew – or even intended – that the amendment would protect corporations.[132] As shown in Chapter 2, it is not improbable that the main drafter of the amendment, Rep. John Bingham, was aware that the language of the Fourteenth Amendment was broad enough to cover persons other than African Americans, including corporations.[133] Regardless of Bingham's intentions, the important point is that the scope of the amendment was not at all clear.

Even before ratification, groups other than African Americans had begun to consider how they could use the Fourteenth Amendment to their advantage.[134] Advocates for the Chinese immigrant community in California were among the first to invoke the amendment's protections.[135] Focusing specifically on the equal protection clause, they argued for a broad interpretation of the Fourteenth Amendment as covering not just African Americans, but any "persons" singled out for special discriminatory legislation.[136] California state judges early on evinced a willingness to read the amendment broadly in claims by Chinese immigrants. In a case

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[132] The originators of this "conspiracy" theory were Charles A. Beard and Mary Beard, T*he Rise Of American Civilization, 1874-1948* (New York: Macmillan, 1930), 112. The Beards argued that the Fourteenth Amendment's drafters had a twofold purpose: to protect the rights of formerly enslaved people and their descendants, and to reassert federal control over the economy and protect private property rights. *Id.* at 111-12. *See also* Carl Brent Swisher, *Stephen J. Field, Craftsman Of The Law* (Washington : The Brookings Institution, 1930), 416 (accepting this claim). They based this argument on the argument of Roscoe Conkling, an original drafter of the Fourteenth Amendment and a corporate lawyer who represented the Southern Pacific Railroad in the *San Mateo* case a few years before the Court issued its opinion in *Santa Clara*. Beard and Beard, *The Rise Of American Civilization*, 113; Winkler, *We the Corporations,* 133. Conkling's claim that the Fourteenth Amendment was intended to apply to corporations relied on scanty evidence, and though resurrected by the Beards, has since been scaled back significantly. Graham, *Everyman's Constitution*, 32-37 (discussing the "conspiracy theory" presented by Charles and Mary Beard), 94 (concluding that the Fourteenth Amendment was not "designed" to aid corporations but that the drafters may have been aware of the possibility it could be used that way); Hurst, *Legitimacy of the Business Corporation*, 67 ("No direct evidence supports this conspiracy theory…").

[133] Graham, *Everyman's Constitution*, 123 n.57.

[134] *See, e.g.,* People v. Washington, 36 Cal. 658 (1869) (hinting that under the Fourteenth Amendment, prohibitions on the testimony of Chinese persons would be unconstitutional); Kens, "Property, Liberty, and the Rights of the *Community*," 176 (2012) (discussing how railroad magnates considered using the Fourteenth Amendment to protect railroad corporations from regulation).

[135] *See* Evelyn Atkinson, "Slaves, Coolies, and Shareholders: Corporations Claim the Fourteenth Amendment," *Journal of the Civil War Era* 10, no. 1 (Spring 2020): 54-80, 64; J. McClain, *In Search of Equality*, 83-92; Qin, *The Diplomacy of Nationalism*, 52.

[136] McClain, *In Search of Equality*, 33-35. The first case to argue the equal protection clause applied to Chinese persons was the California lower court case of People v. Cunningham, discussed in "Chinese Testimony in the Test Case," *Daily Alta California*, Dec. 18, 1868. *See also* the cases of Welch v. Ah Hund, discussed in "Local Intelligence," *Daily Alta California*, November, 26 1869; People v. Washington, 36 Cal. 658 (1869); People v. Brady, 40 Cal. 198 (1870).

challenging a law that prohibited Chinese persons from testifying in court, Justice Lorenzo Sawyer, at the time serving on the California Supreme Court, had intimated his willingness to apply the nascent Fourteenth Amendment to Chinese immigrants, stating that it was "unmistakable" that the amendment "confers the right to testify in protection of his life or his property."[137] Justice Silas Sanderson, who would shortly retire from the bench to become lead counsel for the Central Pacific Railroad, agreed.[138] A few months later, a San Francisco police court judge echoed this position, allowing Chinese testimony in another case: "That the words 'any person,'" he said, "include every natural person, within the jurisdiction of the State, be he or she white or black, Chinese or Indian, citizen or alien, can admit of no doubt."[139] Sawyer and Sanderson would soon become key players in claims of both Chinese and corporate Fourteenth Amendment rights.

In the early years after the passage of the Fourteenth Amendment, national conversations about the amendment's scope centered on the privileges and immunities clause. Not only African Americans and women, but also white laborers and merchants took advantage of the clause to argue that state and local regulations infringed on the privileges and immunities of United States citizenship.[140] Yet both federal and state courts insisted on a narrow reading of the meaning of "privileges and immunities of citizenship," concluding that they did not include, *inter alia*, the right

[137] "The Question of Chinese Testimony," *Marysville Daily Appeal*, October 8, 1869; "Chinese Testimony in Our Courts," *Daily Alta California*, October 7, 1869.
[138] "Resignation of Judge Sanderson," *Sacramento Daily Union*, January 6, 1870; "The Railroad Crossing," *Sacramento Daily Union*, January 25, 1870; Levy, "Classical Lawyers," 182.
[139] "Chinese Testimony," *Daily Alta California*, December 8, 1869. The Supreme Court of California, however, ultimately came to the opposite conclusion in 1871. "What is Equal Protection," *Daily Alta California*, February 6, 1871.
[140] *See Slaughter-House Cases*, 83 U.S. at 71 (butchers); Bradwell v. Illinois, 83 U.S. 130 (1873) (women); Bartemeyer v. State of Iowa, 85 U.S. 129 (1873) (alcohol purveyors); Minor v. Happersett, 88 U.S. 162 (1874) (women).

of African Americans and white people to marry; the right of black children to attend white schools; or the right of women to vote.[141]

Neither Chinese immigrants nor corporations were citizens, however, and so the privileges and immunities clause of the Fourteenth Amendment would have done them no good, even if the courts had been willing to read it broadly.[142] Instead, lawyers for Chinese and corporate litigants turned to the second and third clauses of the amendment – the due process and equal protection clauses, which applied to "persons." Their goal was to cement the inclusion of Chinese immigrants and corporations under the umbrella of "persons," and to define the meaning of "equal protection" as treating all persons alike, regardless of any category or group to which they belonged. In *Slaughter-House*, the Court had noted in dicta that the Thirteenth Amendment's prohibition against slavery "equally forbids Mexican peonage or the Chinese coolie trade."[143] For corporate lawyers and supporters of Chinese immigration, this aside indicated that, with the right case, other persecuted racial minorities may have a chance to wedge open the Reconstruction Amendments to apply beyond formerly enslaved persons and their defendants. Cases involving

[141] *See, e.g., Slaughter-House*, 83 U.S. 371; *Bradwell*, 83 U.S. 130; *Bartemeyer*, 85 U.S. 129; *Minor*, 88 U.S. 162; Lonas v. State, 50 Tenn. 287 (Tenn. 1871); State ex rel. Garnes v. McCann, 21 Ohio St. 198 (Ohio 1871); State v. Gibson, 36 Ind. 389 (Ind. 1871); Cory v. Carter, 48 Ind. 327 (Ind. 1874); Spencer v. Board of Registration, 8 D.C. 169, (D.C. 1873); Ward v. Flood, 48 Cal. 36 (Cal. 1874). In so holding, the courts drew on longstanding precedent limiting the rights of citizenship, discussed in Chapter 2. The basis of this precedent was Corfield v. Coryell, in which the Court explained that the privileges and immunities of citizenship are confined to those "which are, in their nature, fundamental," namely "[p]rotection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole." Corfield v. Coryell, 6 F.Cas. 546, 551-552 (E.D. Pa. 1823). For elaborations on this narrower definition of citizenship rights, *see, e.g.,* Commonwealth v. Milton, 51 Ky. 212, 219 (Ky. 1851); Slaughter v. Commonwealth, 54 Va. 767, 774 (1856); William Wirt, "Rights of Free Virginia Negroes," in *Official Opinions of the Attorneys General of the United States*, vol. 1, compiled by Benjamin F. Hall (Washington, D.C.: Robert Farnham, 1821): 506-508, 508; George Washington Paschal, *The Constitution of the United States Defined and Carefully Annotated* (Washington, D.C., W.H.& O.H. Morrison, 1868), 225; Edward Bates, *Opinion of Attorney General Bates on Citizenship* (Washington, D.C.: Government Printing Office, 1862), 7.

[142] The Supreme Court had adamantly refused to recognize corporations as citizens for anything other than diversity jurisdiction. *See* Chapter 2.

[143] *Slaughter-House*, 83 U.S. at 37.

Chinese immigrants, therefore, presented an opportunity for corporate lawyers to advocate for expanding the amendments to cover other targeted groups as well – which they promptly did.[144]

In the spring of 1874, the chief counsel of the Central Pacific Railroad wrote to ex-justice Silas Sanderson, who now headed the railroad's legal department, and the railroad's director Collis P. Huntington, to advocate using the Fourteenth Amendment's due process clause to challenge California's existing railroad tax laws.[145] A few months later, Thomas Bergin, who along with his partner Hall McAllister would serve as counsel for Parrott, represented Chinese litigants in the first federal circuit court case to apply the Fourteenth Amendment to Chinese persons. *In re Ah Fong* was a *habeas corpus* petition by twelve Chinese women who had been detained on a Pacific Mail Steamship on the grounds that they were suspected prostitutes.[146] Bergin and McAllister often represented the Pacific Mail Steamship Company, which likely paid for the lawsuit. [147] Under a San Francisco ordinance, the master of any steamship carrying "lewd and debauched women" into the city had to post bond.[148] Bergin, in his brief, claimed that the law violated the women's constitutional rights because it deprived them of liberty without due process of law.

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[144] These corporate lawyers were so successful in defending the rights of Chinese persons that the California constitutional convention entertained the idea that any lawyer appearing on behalf of Chinese litigants should be disbarred. Janisch, *The Chinese, the Courts, and the Constitution*, 363.

[145] Huntington to Hopkins, March 30, 1874 (enclosing March 17, 1874 letter from Storrs to Huntington), Hopkins Correspondence, Stanford Archives, Stanford University, Palo Alto, CA. Railroad magnates in the Midwest were having similar discussions; also in 1874, counsel for the Chicago, Burlington, & Quincy Railroad discussed using the Fourteenth Amendment to challenge railroad regulations. *See* Kens, "Property, Liberty, and the Rights of the Community," 176.

[146] *Ah Fong*, 1 F.Cas. 213. Notably, Congress had only expanded the federal courts' jurisdiction over state *habeas* cases in 1863 and 1867, providing Chinese litigants with a new, more sympathetic forum for litigation. Edwards, *A Legal History of the Civil War and Reconstruction*, 150.

[147] John Haskell Kemble, "The Big Four at Sea: The History of the Occidental and Oriental Steamship Company," *Huntington Library Quarterly* 3 (1940): 339-357, 340-41. Bergin's representation of Ah Fong, was also possibly at the behest of the San Francisco *tongs*, or Chinese mafia, not the respectable Chinese mercantile elite, who condemned Chinese prostitution. Qin, *The Diplomacy of Nationalism*, 90; Smith, *Freedom's Frontier*, 219.

[148] *Ah Fong*, 1 F.Cas. 213.

Bergin found a willing ally in Justice Stephen Field, who heard the case of the Chinese women while riding circuit.[149] In fact, Field was so eager to write the opinion in *Ah Fong* that he took the case from now-Circuit Judge Lorenzo Sawyer, who had originally been the presiding judge appointed to the case.[150] Although Ah Fong's *habeas* petition had not argued that the law violated the Fourteenth Amendment's guarantee of equal protection, Justice Field of his own accord focused his opinion on this clause. He explained that "all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws."[151] Field pointed out that such discriminatory legislation, if allowed to stand, could just as easily be used to target "other parties, besides low and despised Chinese women."[152] If states were permitted to deny rights to one group of people, Field reasoned, there was nothing to stop them infringing on the rights of others. Although Field admitted that "there is ground for this feeling" of opposition to Chinese immigration, he emphasized that this did "not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith."[153]

Justice Field's goal in expounding on Ah Fong's equal protection rights was to expand the interpretation of the Fourteenth Amendment he had put forth a few years earlier in his dissent in the *Slaughter-House Cases*, one of the few Supreme Court decisions to interpret the Fourteenth

[149] At the time, each Supreme Court justice was responsible for serving on one federal circuit court. Field sat on the Ninth Circuit. Fritz, *Federal Justice*, 30.
[150] Graham, *Everyman's Constitution*, 145 n.125.
[151] *Ah Fong*, 1 F.Cas. at 218.
[152] *Ah Fong*, 1 F.Cas. at 217.
[153] *Ah Fong*, 1 F.Cas. at 217. Furthermore, he pointed out, the law violated this commitment to equal protection because it prohibited the "lewd and debauched" woman who arrived by ship (i.e., from China) from entering the state, but not the "bedizened and painted harlot of other countries" who entered by rail or over land. *Ah Fong*, 1 F.Cas. at 217. The case was subsequently appealed to the Supreme Court as Chy Lung v. Freeman, 92 U.S. 275 (1875). The Court held the law unconstitutional on the grounds that only Congress possessed the power to pass laws "which concern the admission of citizens and subjects of foreign nations to our shores." *Ah Fong*, 1 F.Cas. at 280. The Court did not discuss the equal protection claims.

Amendment at the time.[154] In the *Slaughter-House Cases*, butchers in New Orleans had sued the city for granting a slaughterhouse monopoly to one company, arguing that the Fourteenth Amendment's privileges and immunities clause protected their right to labor in their trade. The Supreme Court had denied their claim, reading the Fourteenth Amendment as primarily designed to secure "the freedom of the slave race" and the privileges of citizenship as not including the right to labor. The Court explained that the Court must "look to the purpose" that was "the pervading spirit" of the Reconstruction Amendments, to secure "the security and firm establishment of that freedom" of the "newly-made freeman and citizen."[155] With regard to the equal protection clause in particular, the Court elaborated that the "evil to be remedied by the clause" was the "existence of laws in the States… which discriminated with gross injustice and hardship" against "the newly emancipated negroes."[156] To make the point absolutely clear, the Court warned, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision."[157] The Court's narrow reading of the equal protection clause as applying solely to incursions on the freedom of African Americans set up a significant hurdle for use of the clause by other groups.

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[154] *Slaughter-House*, 83 U.S. at 71. See Graham, *Everyman's Constitution*, 144; Charles W. McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897," *The Journal of American History* 61, no. 4 (Mar., 1975): 970-1005, 971. One other case was Bradwell v. Illinois, which held that the right to practice a particular profession was not a privilege of citizenship under the Fourteenth Amendment. 83 U.S. 130 (1873). In Bartemeyer v. State of Iowa, the Court held that a state prohibition on the sale of alcohol did not deprive the plaintiff of his Fourteenth Amendment rights. 85 U.S. 129 (1873). Justice Field in his concurrence announced that the 14th amendment "was intended to make it possible for all persons, which necessarily included those of every race and color, to live in peace and security wherever the jurisdiction of the nation reached." Id. at 140 (Field, J., concurring). One month after Ah Fong, the Supreme Court decided Minor v. Happersett, which further limited the scope of the Fourteenth Amendment, holding that voting was not a "privilege and immunity of citizenship," and so laws prohibiting women from voting were not unconstitutional. 88 U.S. 162.

[155] *Slaughter-House*, 83 U.S. at 72, 71.

[156] *Slaughter-House*, 83 U.S. at 81.

[157] *Slaughter-House*, 83 U.S. at 81.

Justice Field had dissented in *Slaughter-House*, however, offering an expansive reading of the Fourteenth Amendment as applying beyond formerly enslaved persons and their descendants.[158] In another case decided the same year, Field argued, "The amendment was not… primarily intended to confer citizenship on the negro race. It had a much broader purpose… It was intended to make it possible for all persons… to live in peace and security."[159] In spite of the Court's narrow reading of the amendment in *Slaughter-House*, Field set about making his view the guiding doctrine of the Ninth Circuit, beginning with cases involving Chinese immigrants.[160] In contrast with the privileges and immunities clause, on which the Supreme Court had focused in *Slaughter-House*, Field focused on the equal protection clause.[161] As the presiding Supreme Court justice, Field's opinion prevailed as the majority for the circuit court, even if the lower federal judges disagreed.[162] Additionally, the initial Chinese and corporate Fourteenth Amendment cases that came before the Ninth Circuit took the form of *habeas corpus* cases, which at the time could not be appealed to the Supreme Court.[163] As a result, Field had significant leeway to shape the court's interpretation of the amendment as he saw fit. His renegade interpretation of the Fourteenth Amendment became known as "Ninth Circuit law."[164]

Field expanded the vision of the Fourteenth Amendment he had set out in *Slaughter-House* and *Ah Fong* a few years later in a case involving a San Francisco ordinance mandating that all

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[158] *Slaughter-House*, 83 U.S. at 71, 97 (Field, J., dissenting).
[159] *Bartemeyer*, 85 U.S. at 140 (Field, J., dissenting).
[160] Graham, *Everyman's Constitution*, 144;
[161] As discussed in Chapter 2, Field had written the opinion in Paul v. Virginia, 75 U.S. 168 (1869), which interpreted the privileges and immunities of Article IV very narrowly. *Paul* was cited in *Slaughter-House* to support the Court's reading of a narrow privileges and immunities clause. 83 U.S. at 76.
[162] Fritz, *Federal Justice*, 31; Kens, *Justice Stephen Field*, 209-10. Judge Lorenzo Sawyer complained to a fellow judge, "we are bound to follow him [Field] till reversed by the Supreme Court although every other Judge in the Circuit disagrees with him." Lorenzo Sawyer to Matthew Deady, November 9, 1884, Matthew Deady Papers, Oregon Historical Society, Portland, OR.
[163] McClain, *In Search of Equality*, 91.
[164] Graham, *Everyman's Constitution*, 573; Winkler, *We the Corporations*, 153-54. In 1885, Congress restored the Supreme Court's jurisdiction in *habeas* cases, largely in response to Field's Ninth Circuit jurisprudence. Graham, *Everyman's Constitution*, 141 n.114.

male prisoners in the city jail have their hair cut within one inch of their scalps. Colloquially known as the "Queue Ordinance," the purpose of this law was to compel Chinese inhabitants to pay fines rather than accept jail time by threatening to cut off their queues.[165] Ho Ah Kow, whose queue had been cut, alleged only tort claims for assault and mental anguish in his initial complaint.[166] Yet Field once more seized the opportunity to flesh out his vision of the Fourteenth Amendment. Again taking over the case from Judge Sawyer, Field held that the ordinance violated the equal protection clause because it "was intended only for the Chinese" and was "not enforced against any other persons."[167] Field posited that should the law have mandated that "all prisoners confined in the county jail should be fed on pork," this "would be seen by every one to be leveled" at Jewish prisoners, and "notwithstanding its general terms, would be regarded as a special law in its purpose and operation."[168] Allowing laws that appeared general but targeted persons of one "class, sect, creed or nation," he concluded, would open the door to laws aimed at any other group, and thus none of them could be permitted.

[165] *Ho Ah Kow*, 20 ALB. L.J. at 253.
[166] *Ho Ah Kow v. Nunan* Case File, National Archives at San Francisco, San Bruno, CA. Ho's complaint alleged that having his queue cut caused him mental anguish, suffering, violation of his "personal rights," and that he had been "banished from the society of his friends and countrymen."
[167] *Ho Ah Kow*, 20 ALB. L.J. at 255; Graham, *Everyman's Constitution*, 145 n.125. Sawyer, Graham reports, at first did not think the Fourteenth Amendment had any bearing on the *Ho Ah Kow* case. Graham, *Everyman's Constitution*, 145 n.127.
[168] *Ho Ah Kow*, 20 ALB. L.J. at 255.

Image 14: *"Judge Righteous Judgment,"* The Wasp, *depicting Justice Field braiding the queue of a caricatured Chinese laborer.*

Field's contention that racial and religious distinctions were illegitimate classifications for discrimination was in tension with the concept of equality voiced by the convention delegates and Thomas Cooley, as discussed above.[169] It also conflicted with previous decisions of the California Supreme Court, which used Cooley's treatise to guide their understanding of the Fourteenth Amendment.[170] The justices of the California Supreme Court – including future Ninth Circuit

[169] Cooley, *Constitutional Limitations*, 1st ed.. Field's understanding of equality invokes Aristotle's definition, of treating "likes alike" and "unalikes unalike." *See* MacKinnon, *Sex Equality*. Cooley and Field also clashed when Cooley was appointed as head of the new Interstate Commerce Commission in 1887. Berk, *Alternative Tracks*, 103-0.

[170] Howard Gillman has argued that the equal protection clause was a "formalization" of Cooley's view of the "singular aim of the law, which was the protection of equality of rights and privileges." Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers* (Durham: Duke University Press, 1993), 59. *See, e.g.*, People v. Central

Judge Lorenzo Sawyer and future railroad counsel Silas Sanderson – at first adopted Cooley's view of equal treatment as prohibiting class legislation among white men, while permitting special legislation for persons in particular categories.[171] In one opinion written by then-Justice Sanderson, the court explained that a law prohibiting women from frequenting public houses after hours did not violate the equal protection clause because it treated men and women differently.[172] The meaning of equal treatment, Sanderson explained, did not mean "that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly, or in the same manner upon all persons who stand in the same category, that is to say, upon all persons who stand in the same relation to the law."[173] Equal treatment "was not intended to overturn the laws of nature, … or obliterate distinctions, where, from the very nature and necessity of things, distinctions must exist."[174] A broader definition of equality as applying to all persons regardless of their membership in a particular class, Sanderson warned, "would be to erase three fourths of the statutes of this State, to overturn the foundations of the common law itself and to discard as useless, the main pillars of the social compact."[175] Then-Justice Sawyer, who would soon be named to the federal court, joined Sanderson's opinion.[176] Yet both Sanderson and Sawyer, in their new capacities as railroad counsel and federal judge,

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Pac. R. Co., 43 Cal. 398 (1872); Barbier v. Connolly, 113 U.S. 27 (1884); Soon Hing v. Crowley, 113 U.S. 703 (1885); The Stockton Laundry Case, 11 Sawy. 472 (1886); In re Lee Sing, 43 F. 359 (N.D. Cal. 1890). Notably, Field did believe that differential treatment among different categories of persons was permissible when such distinctions were based on legitimate police power concerns, such as safety, but he objected to singling out racial groups for discriminatory treatment, as he feared this would permit Congress to exercise "arbitrary and despotic power" over any other minority, including capitalists. Fong Yue Ting v. U.S., 149 U.S. 698, 754 (1893) (Field, J., dissenting).

[171] *See* Brooks v. Hyde, 37 Cal. 366, 377 (1869); Ex parte Smith, 38 Cal. 702 (1869); People v. Central Pac. R. Co., 43 Cal. 398 (1872). The California Supreme Court's commitment to general laws predated Cooley's treatise. *See* People ex rel. Smith v. Judge of Twelfth Dist., 17 Cal. 547 (1861); Ex parte Ah Pong, 19 Cal. 106 (1861).

[172] Ex parte Smith, 38 Cal. 702 (1869).

[173] *Id.* at 710.

[174] *Id.* at 711. The Supreme Court similarly adopted this view in *Bradwell*, 83 U.S. 130, and *Minor*, 88 U.S. 162, continuing to recognize women as a separate class meriting distinct legislation through the early twentieth century. *See* Muller v. Oregon, 208 U.S. 412 (1908); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[175] Ex parte Smith, 38 Cal. at 711-12.

[176] *Id.* at 712.

would later endorse Justice Field's broader conception of equality that challenged some categories – namely, race and corporate membership – as legitimate bases for differential legal treatment.

Competing Visions of the Corporation: The Case of In Re Tiburcio Parrott

In Re Tiburcio Parrott provided first opportunity for California corporate lawyers to advocate for Fourteenth Amendment rights for corporations.[177] The case, considered to be "of great importance; in fact, of unusual importance," caused much excitement.[178] The courtroom during oral argument was "so crowded that it became necessary in a few moments after the opening to close the doors against more spectators."[179] Members of the "sand-lot" as well as representatives from the Chinese community attended. [180] *Parrott* was not just a political stand-off, but a crucial decision point for the ideology of egalitarianism: it required the federal circuit court to determine whether the meaning of "equal protection" in the Fourteenth Amendment should be defined narrowly – treating likes alike, as the Workingmen argued – or broadly as the Reconstruction Republicans claimed. It also presented a question that has been overlooked, but which by now should be quite familiar: the nature of the corporation and its relationship to the state.

The lawyers devoted significant portions of their oral arguments to the question of the corporate personhood under the Fourteenth Amendment. Denying that corporations possessed Fourteenth Amendment rights, California's Attorney General, like the state lawyers in the previous chapters, drew on the by-now long established conception of the corporation as existing

[177] *Parrott*, 1 F. at 498.
[178] "Leading Cases," *Daily Alta California*, February 29, 1880.
[179] "Parrott's Plea," *San Francisco Chronicle*, March 7, 1880.
[180] "Parrott's Plea."

in a hierarchical relationship with the public based on duty, and subject to legislative control. As discussed above, the view of the corporation as a creature of the state underlay the convention's discussion of the constitutional provision at issue in *Parrott*. The state's lawyers adopted this same view during oral argument. The corporation, claimed California's Attorney General, was "the child of the State – a creature of the law," that "received its life" from the state" and so "was subject to its laws."[181] No right of the Chinese to equal protection, he argued, could "restrict the power of the State in controlling the acts of its corporations, its own natural offspring."[182] "[I]f the State cannot control its own child, its own corporation," he warned, "then is State sovereignty a farce, and no power at all can be said to be reserved to a State of this Union."[183] As state creations, corporations could exercise only the rights granted in their charters, not constitutional rights.[184] The State "breathes the breath of life" into corporations, whose powers "are derived from the statute that authorized their existence"; as such the corporation "claims no rights and can assert no rights except those that are enumerated in the charter that gives it its organization."[185]

In contrast, Parrott's lawyers advocated for the opposing vision of the corporation as a private, profit-making entity, with the same rights as individual market actors, including the rights to contract and own property. Lake, McAllister, and Bergin focused first on the rights of Chinese immigrants impacted by the prohibition. "EQUALITY OF PROTECTION," McAllister proclaimed, "is the Constitutional right of all persons in the United States."[186] Although the Fourteenth Amendment's primary purpose "was to protect the negro," Lake admitted, its "great

[181] "Parrott's Plea"; "Corporations and Chinese," *Daily Alta California*, March 7, 1880.
[182] "Corporations and Chinese."
[183] "Will It Hold Water?" *San Francisco Chronicle*, Mar .9, 1880.
[184] "The Parrott Case," *Daily Alta California*, Mar. 9, 1880.
[185] "The Parrott Case"; "Will It Hold Water?"
[186] "Corporations and Chinese."

object" was in fact "to put all persons within the several States on the same broad footing in respect to gaining an honest livelihood, whether native born or foreign, white or black."[187]

The law violated the Fourteenth Amendment rights of both corporations and Chinese workers, Delos Lake argued, because it denied them the equal protection of their right to property.[188] Invoking the centrality of free labor to the meaning of equality in Reconstruction discourse, Lake argued that prohibiting the right to labor was tantamount to a deprivation of property without due process: "The right to labor is property; it is impossible to conceive the idea of property without labor."[189] The prohibition denied Chinese persons equal protection of the law because it took from workers "one of the most sacred rights – the right to labor in a lawful business in a lawful manner."[190] Blurring the line between Chinese laborers and their corporate employers, the corporate lawyers contended that the law not only denied Chinese persons their right to labor/property, but also deprived corporations of their right to use their property as they saw fit by contracting with laborers of their choosing.[191] The prohibition, he claimed, "deprives corporations of employing the cheapest means of using their property, and hence of the means of making a profit out of it and of competing with all other natural persons engaged in the same kind of business, and to that extent they are deprived of their property."[192] In his two-hour closing argument, Bergin spoke of the rights of the Chinese to labor and of corporations to employ labor in one breath: "A corporation possesses the same right to employ whom it pleases as a natural

[187] "The Chinese Question," *Sacramento Daily Union*, March 8, 1880.
[188] "Chinese Testimony in the Test Case," *Daily Alta California*, Dec. 18, 1868. Unlike in Fourteenth Amendment jurisprudence today, the lawyers in *Parrott* discussed the due process clause and equal protection clauses as a single unit: the right to equal protection of the fundamental rights of life, liberty, and property. This view of the amendment had been prevalent in the cases involving Chinese testimony, discussed *supra*, in which lawyers for the Chinese argued that the Fourteenth Amendment provided "equal benefit of all laws and proceedings for the protection of life and property."
[189] "Corporations and Chinese."
[190] "Corporations and Chinese."
[191] "The Chinese Question."
[192] "The Chinese Question."

person has, and the friendly alien coming here is entitled to exercise his vocation in a lawful manner complying with the laws of the State."[193]

Challenging the claim that corporations possessed only the rights granted in their charter, the corporate lawyers argued that the corporation had rights "conferred upon it by the organic law," which included the constitutional right "to employ who it chooses."[194] Thus, Lake reasoned, the law was "no more constitutional as confined to corporations than it would be if applied to natural persons."[195] If the state could prohibit corporations from employing Chinese, he warned, "it can go a step farther and enact that no natural person shall employ them, and by so doing deprive them of an inalienable right."[196] Corporate rights were just as sacrosanct as private rights, Bergin continued: the corporation was "an artificial person invested with certain rights, immunities, and privileges, which the Legislature can no more take from them, under the Constitution, than it could the life, liberty, or property of a natural person."[197]

In this strain of their argument, Lake and Bergin spoke of the corporate "person" as a single, rights-bearing entity itself.[198] Yet, echoing the common law understanding of the dual nature of the corporation as both a single entity and an aggregation of members, they also portrayed the corporation as a collective body. "In affecting injuriously the rights of a corporation, which is but an aggregation of natural persons," Lake concluded, "the rights of naturalized persons are injured."[199] To prohibit corporations from employing Chinese laborers, Bergin argued, "would deprive citizens of this State of a constitutional privilege, and is therefore

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193 "The Last Word," *San Francisco Chronicle*, March 10, 1880.
194 "The Parrott Case," *Daily Alta California*, March 9, 1880.
195 "The Parrott Case."
196 "Corporations and Chinese."
197 "Corporations and Chinese."
198 The lawyers' argument contradicts claims by corporate personhood scholars that the aggregate theory of the corporation was dominant in the late nineteenth century and that corporate lawyers relied on it in their arguments about extending Fourteenth Amendment rights to corporations, as discussed in the Introduction.
199 "Corporations and Chinese."; "The Chinese Question."

unconstitutional."[200] "They," he continued, without explaining whether he meant shareholders or corporations, "possess a constitutional right to employ just who they choose."[201] For these corporate lawyers, the corporation was both a combination of rights-bearing persons *and* a single, rights-bearing "person" itself.

This argument proved compelling to District Judge Ogden Hoffman, who wrote the majority opinion in the *Parrott* case, and Circuit Judge Sawyer, who wrote a concurrence. The scholarly, meticulous Hoffman, a member of the New York elite who had studied under Joseph Story and Simon Greenleaf at Harvard Law School, prided himself on his integrity and impartiality.[202] Sawyer, a "quiet, unassuming man" with a wry insight, was a self-taught farmer turned lawyer turned judge.[203]

Hoffman and Sawyer were well versed in Chinese claims to Fourteenth Amendment rights. In an 1869 case involving the right of Chinese litigants to testify, Judge Sawyer, as a justice on the California Supreme Court, had declared that it was "unmistakable" that the Fourteenth Amendment "confers the right to testify in protection of his life or his property."[204] By March 1880, when *Parrott* arose, both Sawyer and Judge Hoffman had struck down several other ordinances as unconstitutional.[205] Sawyer was known to be sympathetic to the Chinese; speaking of discriminatory legislation, he mourned, "The ingenuity of our people in devising means for annoying the Chinese seems inexhaustible."[206] Allies of Chinese immigrants praised him as

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[200] "The Parrott Case."
[201] "The Parrott Case."
[202] Fritz, *Federal Justice*, 15, 26, 38; Shuck, *History of the Bench and Bar*, 472-73.
[203] Shuck, *History of the Bench and Bar*, 66, 67.
[204] "The Question of Chinese Testimony," *Marysville Daily Appeal*, October 8, 1869; "Chinese Testimony in Our Courts," *Daily Alta California*, October 7, 1869; *People v. Washington*, 36 Cal. 658.
[205] See People v. Awa, 27 Cal. 638 (1865); *Welch v. Ah Hund* (1868), discussed in McClain, *In Search of Equality*, 33; *Ho Ah Kow v. Nunan*, 20 Alb. L.J.; *but see* In re Ah Yup, I F. Cas. 223 (C.C.D. Cal. 1878).
[206] Sawyer to Deady, Dec 4, 1882, Matthew Deady Papers, Oregon Historical Society. *See* Linda C. A. Przybyszewski, "Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit," *Western Legal History* 1 (1988): 23-56, 23.

"maintaining the rights of the Chinese with courage and energy in opposition to a strong current of popular clamor."[207] Sawyer also denigrated Denis Kearney and the Workingmen as "lunatics."[208] Hoffman was similarly known for treating Chinese litigants no differently than white litigants, accepting Chinese testimony as a judge in federal district court even when the state court prohibited it.[209] Both he and Sawyer also moved in the same social circles as Chinese consul Frederick Bee, railroad and industry magnates, and the lawyers arguing for Parrott and the consulate.[210]

In their opinions, Hoffman and Sawyer adopted Justice Field's expansive view of the Fourteenth Amendment.[211] Citing Field's previous equal protection cases involving Chinese immigrants, Hoffman and Sawyer concluded that racial distinctions were illegitimate bases for differential treatment. Warning of a slippery slope, Hoffman wrote that if the power to pass such a law exists, "it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment of any of these classes of persons to the exclusion of the rest."[212] Sawyer concluded in his concurrence that the equal protection clause "places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution."[213] He explained that under the amendment, "the law in the states

[207] Sawyer to Deady, Dec. 22, 1884, Matthew Deady Papers, Oregon Historical Society.
[208] Sawyer to Deady, June 9, 1880, Matthew Deady Papers, Oregon Historical Society.
[209] McClain, *In Search of Equality*, 23. *See* Bottoms, *An Aristocracy of Color*, 175 (saying "both men were scrupulously fair" on the bench, while noting that they both expressed anti-Chinese sentiment in their personal views); Fritz, *Federal Justice*, 211, 214-15, 217; Przybyszewski, "Judge Lorenzo Sawyer and the Chinese," 53.
[210] Delos Lake to Matthew Deady, June 3, 1870, Matthew Deady Papers, Oregon Historical Society; Silas Sanderson to Matthew Deady, July 20, 1882, Matthew Deady Papers, Oregon Historical Society.
[211] They may have had no choice. Lower courts were compelled to follow the opinion of the Supreme Court justice riding circuit, a practice at which Sawyer chafed.
[212] *Parrott*, 1 F. at 491.
[213] *Parrott*, 1 F. at 509 (Sawyer, J., concurring).

shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states."[214] These Ninth Circuit judges incorporated Cooley's prohibition on class legislation into their interpretation of the Fourteenth amendment. Yet unlike Cooley and the delegates to the California constitutional convention, for Hoffman and Sawyer, national origin, religion, and race were all unconstitutional bases for classification. In eroding the boundaries among these groups, these judges expanded Cooley's prohibition on class legislation to include ethnic and religious minorities within the category of those entitled to the protection of "general" laws – in other words, the right to equal protection.[215]

The law did not only violate the Fourteenth Amendment, the Ninth Circuit held; it violated the privileges and immunities that were guaranteed to Chinese immigrants under the United States' treaty with China. Ignoring the Supreme Court's limited definition of privileges and immunities in *Slaughter-House*, Hoffman asserted, "No enumeration would, I think, be attempted of the privileges, immunities, and exemptions… of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor."[216] Judge Sawyer concurred. Noting that the Supreme Court had recently defined "privileges and immunities" and that "the definitions given are equally applicable to the same words as used in the treaty with China," Sawyer nonetheless concluded that both the Fourteenth Amendment and the treaty protected "the right to pursue a lawful employment in a

[214] *Parrott*, 1 F. at 512 (Sawyer, J., concurring).
[215] This analysis complements that made by Naomi Lamoreaux and John Wallis, who have argued that general laws, including general incorporation, served to "level the playing field" in the market somewhat, making the economic and political system more competitive. "Economic Crisis," 27, 32.
[216] *Parrott*, 1 F. at 512 The Burlingame Treaty guaranteed Chinese immigrants "the same privileges, immunities, and exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation." *Parrott*, 1 F. at 504. Perhaps Hoffman distinguished his interpretation of privileges and immunities on the grounds that the treaty applied to noncitizens, while the Fourteenth Amendment's privileges and immunities clause was specifically intended for United States citizens. Or perhaps Field insisted that the circuit court adopt his broader definition of privileges and immunities.

lawful manner, without other restraint than such as equally affects all persons."[217] He cited the dissenting opinions of Justice Field and Justice Bradley in the *Slaughter-House Cases* in support of this holding, without explicitly noting that the majority opinion in *Slaughter-House* had explicitly determined that the "privileges and immunities" protected by the Fourteenth Amendment did not include the right to labor.[218] Thus, Hoffman and Sawyer concluded, restricting their right to labor unconstitutionally deprived Chinese workers of their constitutional and treaty rights to protection of life, liberty, and property.[219]

The judges then turned to address the rights of corporations. Not only did the law violate the rights of Chinese immigrants, the court held, but it also violated the rights of corporate shareholders. Ignoring the common-law view, echoed by Parrot's lawyers themselves, of the corporation as both a legal "person" and a group of individuals, Hoffman stated that the corporation was purely an aggregate of its members – a sum of its parts. "Behind the artificial or ideal being created by the statute and called a corporation," he explained, "are the corporators—natural persons" who had purchased shares in the corporation.[220] Corporations as such had no identity or interests separate from their shareholders: "The corporation, though it holds the title, is the trustee, agent, and representative of the shareholders, who are the real owners."[221] Erasing the corporate entity's separate identity, Hoffman reasoned that shareholders' "right to use and enjoy their property is as secure under constitutional guarantees as are the rights of private persons

[217] *Parrott*, 1 F. at 504.
[218] *Parrott*, 1 F. at 505, 506. Sawyer demurred, "Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement." *Id* at 506.
[219] *Parrott*, 1 F. at 510.
[220] *Parrott*, 1 F. at 491. *See* Angell & Ames, *Treatise of the Law of Private Corporations Aggregate*, 1st edition, 1.
[221] *Parrott*, 1 F. at 492. There was precedent for this view. *See Dartmouth College*, 17 U.S. 518; *Charles River Bridge*, 36 U.S. 420; *Deveaux*, 9 U.S. 61 (looking through the corporation to its shareholders for purposes of the Contract Clause and federal jurisdiction). Hoffman's reasoning took this precedent one step farther by framing the corporation solely as a collection of shareholders and by attributing Fourteenth Amendment rights of shareholders to corporations.

to the property they may own."[222] Hoffman's reasoning directly contradicted the Supreme Court's holding in *Paul v. Virginia* that the privileges and immunities of the corporations' shareholders were *not* transferable to the corporation itself.

Discrimination based on incorporated status, concluded Hoffman, was no different than discrimination based on race.[223] "Such an exercise of legislative power" as this provision, he announced, "can only be maintained on the ground *that stockholders of corporations have no rights which the legislature is bound to respect*."[224] By invoking the notorious line from *Dred Scott*, Hoffman compared corporate shareholders to the descendants of slaves. Whereas the convention delegates had invoked *Dred Scott* in comparing white workingmen to slaves and corporations to slaveholders, Hoffman flipped this script by analogizing stockholders to descendants of slaves instead, with the legislature – the representative of the people – as slave masters. This acknowledged the master-servant relationship claimed by the state's lawyers, but portrayed this status relation not as one of reciprocal benevolence and duty but as a violation of fundamental rights. Corporations were not "servants," but collections of independent, constitutional rights-bearing individuals. The concept of the corporation as purely an aggregation of natural persons was instrumental in Hoffman's analogy of shareholders to African Americans; in his understanding, corporate shareholders were a group specially targeted by the law, akin to slaves and their descendants.

Judges Hoffman and Sawyer drew on the Convention delegates' rhetoric of free versus unfree labor in their holding in *Parrott*, but turned it on its head. For the Convention delegates, the claim that Chinese "coolies" were effectively slaves had been used to denigrate them and justify their expulsion. The comparison to slavery was used to create a dichotomy between free

[222] *Parrott*, 1 F. at 492.
[223] *Parrott*, 1 F. at 491.
[224] *Parrott*, 1 F. at 491 (emphasis added).

and unfree labor; since the free labor of white men must be protected, the unfree labor of Chinese coolies must be stopped. Yet for Hoffman and Sawyer, the questionable status of the Chinese workers merited a different conclusion: because Chinese workers were a minority whose fundamental right to freely labor was threatened, they could claim the protection of the Fourteenth Amendment. Indeed, the Supreme Court had indicated in the *Slaughter-House Cases* that the Thirteenth Amendment protected against other forms of unfree labor, noting that should "Mexican peonage or the Chinese coolie labor system" rise to the level of slavery, the amendment would "safely be trusted to make it void."[225] Notably, Sawyer and Hoffman engaged in no examination of whether the labor of Chinese workers was actually "free" under the contract labor system. In effect, the free labor rhetoric of the Convention, meant to be the grounds for exclusion, became for Hoffman and Sawyer grounds to protect Chinese workers instead.

If Chinese workers were a persecuted minority like freedpeople, corporations were "like" Chinese workers insofar as both were singled out in the new Constitution for discriminatory treatment. Their interconnected relationship and the fact that both were specially targeted allowed Hoffman and Sawyer to move seamlessly in their analysis from the rights of one to the rights of the other. By conceptualizing corporations simply as collections of shareholders, the court could conclude that shareholders were a group subject to special burdens under the law, like Chinese laborers and African Americans.

The decision in *Parrott* provoked intense feeling. Anti-Workingmen papers applauded the result. The *San Francisco Chronicle* scoffed, "The decision takes no intelligent person possessing a reasonable knowledge of the data of the question by surprise. Every lawyer worthy of the name

[225] *Parrott*, 1 F. at 72.

anticipated it."[226] The *Daily Alta California* praised the judges' "very able and elaborate opinion": "On the Circuit Bench there is no catering to the influence of the Sand-lot, nor no yielding to the howling of the mob."[227] Meanwhile, the Workingmen's Ward Presidents petitioned the Governor to appeal Parrott's case to the Supreme Court; yet this proved impossible because of a law prohibiting the Supreme Court from hearing appeals in such cases.[228] For the time being, the opinions of Hoffman and Sawyer stood as the final determination on the question of the right of corporations under the Fourteenth Amendment.

As the debates surrounding the California constitution reveal, Judge Hoffman's view of corporations as purely aggregates of rights-bearing individuals was contrary to the imagery surrounding corporations in popular discourse, which portrayed corporations no longer as children of the state but as Frankenstein's monster. By framing the corporation purely as a collection of rights-bearing individuals, however, Hoffman could justify attributing constitutional rights to corporations on the basis of comparisons to racial minorities; shareholders, like Chinese laborers, were simply a group of persons singled out for unequal treatment that deprived them of their fundamental rights.

"The Despised Laborer from China, or the Envied Master of Millions": the Railroad Tax Cases

[226] "The Chinese Labor Decision," *San Francisco Chronicle*, March 23, 1880.
[227] "Judge Sawyer's Decision," *Daily Alta California*, March 27, 1880.
[228] "The Ward Presidents," *Daily Alta California*, March 29, 1880; "Employing Chinese," *Daily Alta California*, May 24, 1880. *See* Winkler, *We the Corporations*, 153. Congress later eliminated this law.

Parrott proved the entry point for corporate claims of Fourteenth Amendment rights. In *Parrott*, the Ninth Circuit drew a through-line from African Americans, to Chinese immigrants, to corporate shareholders: all were persecuted groups whose rights were protected by the Fourteenth Amendment. The same coterie of corporate lawyers wasted no time in employing this analogy to challenge the taxation provisions of the new California constitution, which specifically targeted railroad corporations. In the Railroad Tax Cases – of which *Santa Clara v. Southern Pacific Railroad* is the most well-known – corporate lawyers and Ninth Circuit judges cemented both the expansive interpretation of the Fourteenth Amendment, and the legal concept of the corporation as an aggregate of constitutional rights-bearing persons.

The "question of taxation," according to one convention delegate, was "perhaps, of more importance and greater in its bearings" than any other reforms the constitutional convention had been called to address.[229] A central concern was the taxation of mortgaged property. The California Supreme Court had recently determined that debtors could not deduct mortgages from the value of their taxable property, a decision that caused outrage among farmers.[230] By taxing the borrower of the mortgage on the full value of the property, it was claimed, the decision placed a heavy burden on farmers already barely eking out a living from their mortgaged farms, while allowing capitalists and moneylenders to escape taxation altogether.[231] The 1879 constitution, attempting to rectify this "great inequality,"[232] mandated that mortgages be deducted from the value of taxable property, "except as to railroad and other quasi public corporations."[233] One delegate explained that "unless, this exception is made, the railroad companies will have a good

[229] *Debates,* vol. 2, 857.
[230] People v. Hibernia Savings and Loan Society, 51 Cal. 243 (Cal. 1876).
[231] "Booming," *San Francisco Chronicle*, Apr. 18, 1879.
[232] *Debates,* vol. 2, 857.
[233] California Constitution of 1879, Art. XIII, § 4.

thing of it," since they would be able to deduct the value of their bonds.[234] Because most railroads were mortgaged to the hilt, this meant they would have very little taxable property left.[235]

Railroad corporations were quick to challenge this new tax regime. The Central Pacific Railroad and its subsidiaries, the Southern Pacific Railroad and the Northern Railroad Company, along with other smaller railroads in the state, refused to pay the full assessment of their taxes, claiming that this and other provisions violated their Fourteenth Amendment rights to due process and equal protection. The goal, railroad lawyer Creed Hammond explained, was not just to evade the tax scheme, but to expand the Fourteenth Amendment to cover corporate "persons" as well. [236] Under the amendment, Hammond claimed, states could not "give to any person rights which under the same terms and conditions were not opened to all persons."[237] Justice Field and Judge Sawyer heard the cases. The question before the court was whether a railroad, "being a corporation," was "a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws?"[238]

The cases were understood to be momentous. Not only did they involve "more than a million of dollars of the public revenue," stated the *San Francisco Chronicle*, but they concerned "a new application of that amendment which will revolutionize our system of government."[239] This question was "of the gravest importance to all State Governments," as it threatened the ability of the legislature to regulate corporations.[240] Judge Sawyer himself acknowledged that "it will be hard on the State, and still harder on the counties" if the new taxation scheme should be found

[234] California Constitution of 1879, Art. XIII, § 4; *Debates,* vol. 2, 908.
[235] *Debates,* vol. 2, 908.
[236] "The Railroad Taxes," *San Francisco Chronicle*, May 11, 1886.
[237] "The Railroad Taxes," *San Francisco Chronicle*, May 11, 1886.
[238] *Railroad Tax Cases*, 13 F. at 738.
[239] "The Railroad Tax Cases," *San Francisco Chronicle*, Aug. 13, 1883.
[240] "The Railroad Tax Cases," *San Francisco Chronicle*, Aug. 13, 1883.

unconstitutional, as "the validity of all the taxes upon railroads in the State" hung in the balance.[241] The case also threatened to prompt a popular uprising: "If we upset the taxes," he observed, "won't there be a howl?"[242] Yet the sympathies of both Sawyer and Field lay with the corporations. Sawyer confided to a fellow judge that he considered agitators from the anti-railroad Workingmen's Party to be "lunatics."[243] Field himself was well known to be a good friend of Leland Stanford and other railroad magnates.[244] Additionally, having witnessed the Paris Commune and Communist uprisings in Rome and Vienna during his European travels, Field may have feared that the working-class movement for railroad regulation would lead to a populist uprising if not checked by the Supreme Court.[245]

It is little known that early in the Railroad Tax Cases, Field and Sawyer issued an opinion in response to a motion to remand to state court, which spelled out a litigation strategy for how corporations could claim protection under the Fourteenth Amendment.[246] Although unnecessary to decide the jurisdictional point at issue, Field and Sawyer took this opportunity to expound on their views about why the Fourteenth Amendment might apply to corporations. They relied

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[241] Sawyer to Deady, August 26, 1882, Matthew Deady Papers, Oregon Historical Society.; Sawyer to Deady, Sept 23, 1882, Matthew Deady Papers, Oregon Historical Society.

[242] Sawyer to Deady, Sept 23, 1882, Matthew Deady Papers, Oregon Historical Society.

[243] Sawyer to Deady, June 9, 1880, Matthew Deady Papers, Oregon Historical Society.

[244] Kens, *Justice Stephen Field*, 245; Fritz, *Federal Justice*, 35-36; Swisher, *Motivation and Political Technique*, 86-87; Graham, *Everyman's Constitution*, 14.

[245] Howard Graham posits that Field's experience with radicalism in Europe prompted the pro-individualism, anti-government regulation shift in his jurisprudence during the 1870s-80s. Graham, "Justice Field and the Fourteenth Amendment," 857. Carl Brent Swisher attributes Field's disdain for "the masses" of "undifferentiated citizens" to his perception that they "humiliated him" by failing to support his political ambitions and threatened the property of his powerful industrial friends. Swisher, *Stephen J. Field*, 428. Charles McCurdy, alternatively, contends that Field was "Jacksonian" in that he supported the rights of individuals to pursue their avocations and enjoy their property with limited legislative interference, and feared state grants of monopolistic power to private corporations. McCurdy, "Justice Field and the Fourteenth Amendment," 973, 977. In response, Charles J. McClain argues that what motivated Field was not "a desire to protect wealth and property per se," but an opposition to special legislation "favoring certain individuals and groups at the expense of others." McClain, *In Search of Equality*, 75 n.164.

[246] *Opinion on Motion to Remand brought by San Mateo* (July 31, 1882), San Mateo Case File, National Archives at San Francisco, San Bruno, CA. Howard Graham cites this opinion in a footnote but without discussion. Graham, *Everyman's Constitution*, 573 n.48.

heavily on Hoffman's view of corporations as aggregates of constitutional rights-bearing persons, as well as Field's previous cases involving Chinese immigrants. In so doing, they charted a roadmap for the railroads' lawyers to follow in future briefs.

After denying the motion to remand, Field and Sawyer proceeded to scrutinize the meaning of equal protection. Echoing the broad interpretation put forth in the Chinese immigrant cases and *Parrott*, they explained that the clause was "designed to cover all cases of possible discriminating and partial legislation against any class… [e]quality of protection is thus made the constitutional right of every person." [247] This sweeping definition of equal protection left little room for Cooley's caveat that treating different classes of persons differently was acceptable. Applied to the current case, they surmised, "No one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens."[248]

Building on Hoffman's decision in *Parrott*, Field and Sawyer reasoned that if corporations were simply aggregations of rights-bearing persons, the prohibition on unequal taxation would apply to them as well. In other words, corporate shareholders were "similarly situated" to individuals, and so should be considered members of the same class entitled to the same treatment.[249] Although "it must be admitted" that the Fourteenth Amendment was originally passed to protect "the rights of natural persons," they suggested, "[i]f it also include[s] artificial persons as corporations…, it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation."[250] In this formulation, the corporation

[247] *Opinion on Motion to Remand.*
[248] *Opinion on Motion to Remand.*
[249] *Opinion on Motion to Remand.*
[250] *Opinion on Motion to Remand.*

simply embodied the collective rights of its shareholders. "We express no opinion," Field and Sawyer took care to caution, upon whether the Fourteenth Amendment would protect corporations in this particular case, "but invite for it the most thoughtful consideration of counsel."[251] This claim was facetious; the opinion clearly laid out the railroad's argument for a successful Fourteenth Amendment claim.[252]

In their lengthy opinions in the Railroad Tax Cases, Field and Sawyer followed the reasoning they had outlined in their ruling on the motion to remand.[253] Guided by *Parrott*, they also drew an explicit comparison between shareholders and racial minorities. If laws targeting corporations were in effect targeting corporate shareholders, then shareholders were a group singled out for unequal treatment, just as were persecuted racial minorities; all were "persons" protected by the amendment from unjust discrimination. Although "the occasion of the amendment was the supposed denial of rights" to black Americans, Field stated, "the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile state action of any kind."[254] The Fourteenth Amendment thus "stands in the constitution as a perpetual shield against all unequal and partial legislation by the states… whether directed against the most humble or the most powerful; against the despised

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[251] *Opinion on Motion to Remand*.

[252] Field also communicated with the railroad's lawyer John Norton Pomeroy the next year regarding the Supreme Court's forthcoming decision in *San Mateo*, passing along "certain memoranda" from two of the Justices that, he counselled Pomeroy, were "intended only for your eye." Howard Jay Graham, "Four Letters of Mr. Justice Field," *Yale Law Journal* 47 (1938): 1100-1108, 1106.

[253] "The Railroad Taxes Invalid," *San Francisco Chronicle*, Sep. 26, 1882; "Railroad Tax Cases," *Daily Evening Bulletin*, Sept. 25, 1882.

[254] *Railroad Tax Cases*, 13 F. at 740. *See also Santa Clara*, 18 F. at 397 (the amendment "undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color…")

laborer from China, or the envied master of millions."[255] For Field, incorporated status was a "condition" protected against discrimination on par with racial identity.

Where property was taxed differently based on the owner of the property rather than the type of property itself, there was necessarily a constitutional violation. "Strangely, indeed," posed Field, "would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men…, and not deducted if owned by black men… deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations…"[256] Field here deftly elided the difference between African Americans and "men doing business in… other associations," *i.e.* corporations. Sawyer was more explicit. His stated, "The rights of the negro are, certainly, no more sacred or worthy of protection than… the rights of corporations, and, through them, the rights of the real parties,— the corporators."[257]

While emphasizing the right to equal protection of all racial groups, Field and Sawyer adroitly included the rights of shareholders under the umbrella of the Fourteenth Amendment. For Field, the relative power disparity between "masters of millions" and "despised laborers from China" made no difference; any laws that singled out a particular group for special treatment violated their right to equal protection. Just as Field had noted the "positive hostility" against Chinese immigrants in the Chinese cases, he also framed railroad corporations as a persecuted group.[258] The court, Field said, was aware of the profound animosity toward corporations in the state; yet "[w]hatever acts may be imputed justly or unjustly to the corporations, they are entitled

[255] *Railroad Tax Cases*, 13 F. at 741.
[256] *Santa Clara*, 18 F. at 396.
[257] *Santa Clara*, 18 F. at 761 (Sawyer, J., concurring).
[258] *Ho Ah Kow*, 20 ALB. L. J. at 256.

when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others."[259] In Field's reasoning, Chinese immigrants and corporate shareholders were both despised groups subject to unequal treatment, and so both could claim protection under the Fourteenth Amendment.

Field and Sawyer could obscure the difference between persecuted minorities and corporations because, as their opinion on the motion to remand had dictated, they presented the corporation as simply a collection of natural persons.[260] As Field explained, "Private corporations are, it is true, artificial persons, but… they consist of aggregations of individuals united for some legitimate business."[261] Individuals did not lose their constitutional rights when they became stockholders, for "[i]t would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation."[262] The corporation's status of "person" under the Fourteenth Amendment, therefore, was based on the constitutional-rights-bearing personhood of its shareholders.

Yet despite emphasizing the aggregate nature of the corporation, Field then moved seamlessly back to the view of a corporation as a single entity. He claimed that it was "well established by numerous adjudications of the supreme court of the United States and of the several states" that "[a]ll the guaranties and safeguards of the constitution for the protection of property

[259] *Railroad Tax Cases*, 13 F. at 730.
[260] Gregory Mark and Morton Horwitz have analyzed how Field's basis for extending constitutional rights to corporations was based on the aggregate theory of corporate personhood, but have not explained why they focused on this theory at the expense of other coexisting understandings of the corporation. This chapter builds off their work by revealing that doing so allowed corporate lawyers to analogize groups of shareholders to persecuted minorities. Mark, "Personification of the Business Corporation," 1464-65; Horwitz, "*Santa Clara* Revisited," 178, 181.
[261] *Railroad Tax Cases*, 13 F. at 743.
[262] *Railroad Tax Cases*, 13 F. at 744.

possessed by individuals may… be invoked for the protection of the property of corporations."[263] Such a broad statement of the constitutional rights of corporations was simply unfounded, as evidenced by Field's failure to cite a single case as precedent. Yet he relied on this false claim to conclude that "as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained."[264] As Sawyer explained, "within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons."[265] The constitutional rights of the corporate person itself were thus no different than the constitutional rights of individuals.[266]

Supporters of the new California constitution condemned the opinions in the Railroad Tax Cases, warning they were "of such a character as to create suspicion and excite alarm throughout our whole country."[267] The *San Francisco Chronicle* derided the comparison of corporations to persecuted racial minorities as "a piece of nonsense."[268] It opined, "As to the claim that an amendment which was passed wholly and solely for the protection of negroes from oppression by their former masters, can be invoked by a corporation to avoid paying taxes levied under the sovereign authority of the State, it is really too absurd for discussion."[269] Referencing Field's well-known friendships with California railroad magnates C. P. Huntington and Leland

[263] *Railroad Tax Cases*, 13 F. at 744, 748.
[264] *Railroad Tax Cases*, 13 F. at 748.
[265] *Railroad Tax Cases*, 13 F. at 758 (Sawyer, J., concurring).
[266] Field and Sawyer completely declined to address the state's argument that corporations were creatures of the state who were subject to special public duties, even though the law itself explicitly targeted "railroad and other quasi public corporations." *See* William J. Novak, "The Public Utility Idea and the Origins of Modern Business Regulation," in *Corporations and American Democracy*, edited by Naomi R. Lamoreaux and William J. Novak. (Cambridge: Harvard University Press, 2017): 139-176.
[267] "Railroad Tax Cases," *San Francisco Chronicle*, Oct. 27, 1883.
[268] "Judge Field Again," *San Francisco Chronicle*, Jan. 29, 1885.
[269] "Judge Field Again."

Stanford, the paper accused Field of "pervert[ing] the Fourteenth Amendment so as to serve his own political purposes."[270] Critics hoped that the Supreme Court would overturn Field's decision; but they feared that "Judge Field exercises an influence over his brethren which is not commensurate either with his standing as a jurist, or his reputation as a fair man."[271]

Santa Clara and *Yick Wo*: the Foundation of Equal Protection

The Railroad Tax Cases were quickly appealed to the Supreme Court, in the cases of *County of San Mateo v. Southern Pacific Railroad* (1885), *County of Santa Clara v. Southern Pacific Railroad* (1886), and *County of San Bernardino v. Southern Pacific Railroad* (1886).[272] In these cases, the Court again confronted the perennial question: was the corporation a "child of the state," a separate entity with distinct rights and duties to the public? Or was it simply an aggregation of rights-bearing individuals, whose rights became those of the corporation itself?

[270] "Field's Conflicting Views," *San Francisco Chronicle*, Jan. 27, 1885; "The Field Faction Scored," *San Francisco Chronicle*, Apr 1, 1885. *See* Kens, *Justice Stephen Field*, 266.
[271] "Field's Conflicting Views."
[272] San Mateo County v. Southern Pac. R. Co., 116 U.S. 138 (1885); *Santa Clara*, 118 U.S. 394; San Bernardino County v. Southern Pac. R. Co., 118 U.S. 417 (1886).

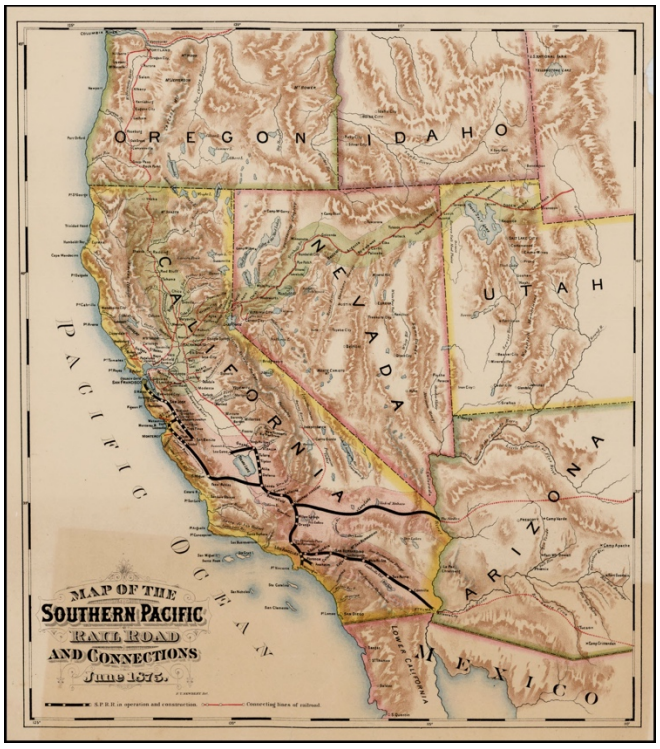

Image 15: *Map of the Southern Pacific Railroad, 1875.*

In their briefs and initial arguments before the Court, the counties' attorneys insisted that corporations were not "persons for all the purposes contemplated by the fourteenth amendment."[273] "The rights and liabilities of a corporation are not the mere sum of the rights and liabilities of the individuals constituting the corporation"; rather, the corporation was "the creature of the State, the privileges it enjoys are derived from the State," while "the individual is a creature of God and exercises his inherent rights from Nature."[274] The counties' lawyers drew on Cooley's treatise as well as the common law view that corporations exercised special privileges in return for public duties: "The discrimination [in taxation] is a reasonable one, because the persons concerned have been specially favored by the State."[275] Although counsel D. M. Delmas

[273] "Delmas' Argument," *San Francisco Chronicle*, Aug. 3, 1883; "Brief for Plaintiff in Error," *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886). The case was first argued in 1883 and then reargued in 1886.
[274] "Brief for Plaintiff in Error," *Santa Clara*; "Delmas' Argument."
[275] "The Railroad Tax Cases," *San Francisco Chronicle*, Aug 13, 1883.

applauded the "dream of the statesman" that "throughout the world there should be equality and fraternity between men," he emphatically denied that "corporations – the creatures of man's handiwork – should be placed upon the same plane with the creatures of God."[276] Rather, invoking the popular view of the corporation as a hungry monster, Delmas opined that the railroads "have grown so great, they have waxed so arrogant, that their creator, the State, our own beautiful California, grovels at the feet of its creatures, bound, shrinking and helpless, prey to their rapacity, an object of their contempt."[277]

In contrast, the corporate lawyers again argued for a conception of the corporation as both the equivalent of a constitutional rights-bearing person itself and as an aggregate of rights-bearing individuals. Silas Sanderson, the former California Supreme Court justice and now lead counsel for the Central Pacific Railroad, argued in *San Bernardino* that "corporations have been recognized and treated as legal persons, and as having all the right of natural persons in respect to such property as they may lawfully acquire and possess."[278] Sanderson ignored the difference between the rights of property that corporations had enjoyed under common law, and the constitutional rights to due process and equal protection that his clients now claimed.

In addition to arguing that corporations themselves were constitutional rights-bearing persons, the railroad lawyers also invoked the aggregate theory of the corporation, just as Field and Sawyer had suggested. In the *San Mateo* case, John Norton Pomeroy, a good friend of Justice Field's, explained that "s*tatutes violating [the Fourteenth Amendment's] prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons.* In applying and enforcing these

[276] "Delmas' Argument."
[277] "Delmas' Argument."
[278] "Brief for Defendant-in-Error," *San Bernardino County v. Southern Pac. R. Co.*, 118 U.S. 417 (1886).

constitutional guaranties, *corporations cannot be separated from the natural persons who compose them*."[279] Echoing Justice Field's opinion in the Railroad Tax Cases, Sanderson claimed that it would be absurd "to hold that the right of a person in relation to his property should be protected under these provisions of the Constitution and law where he was simply an individual, and the rights of the same person as to property as a member of a corporation should not be protected."[280]

Sanderson also drew upon racial analogies to make his point. He argued, "A law which taxes A upon certain property and does not tax B upon the same kind or class of property… does not afford to A equal protection with B. This is self-evident, and if A was a negro and B a white man such a law, without hesitation, would be declared to be within the inhibition of the equality clause."[281] Unless the Fourteenth Amendment "confers greater rights and privileges upon negroes than are enjoyed by white men, it is not easy to perceive why a tax law which imposes a greater burden, under the same conditions, upon one white man than it does upon another, does not equally violate this equality clause."[282] In other words, a law discriminating between white men who were incorporated and white men who were not violated the class legislation principle of treating "likes alike"; incorporated status, like race, was not a legitimate basis for differential legal treatment. To countenance California's taxation scheme, Sanderson concluded, "is tantamount to saying that corporations are not under the protection of the Fourteenth Amendment; that *they have no rights which legislative or judicial bodies are bound to respect*."[283] Like Judge Hoffman in *Parrott*, Sanderson invoked *Dred Scott*'s specter of inequality and unfreedom to argue that the corporation

[279] Horwitz, "*Santa Clara* Revisited," 177 (quoting "Argument for Defendant," *San Mateo v. Southern Pac. R.R. Co*., 116 U.S. 138 (1882) (emphasis in original)). Field had facilitated Pomeroy's employment by the Central and Southern Pacific. Graham, *Everyman's Constitution*, 400-01.
[280] "Brief for Defendant-in-Error," *San Bernardino County.*
[281] "Brief for Defendant-in-Error," *San Bernardino County*.
[282] "Brief for Defendant-in-Error," *San Bernardino County.*
[283] "Brief for Defendant in Error," *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886) (emphasis added).

did not exist in a hierarchical relationship with the state, and to claim that like African Americans, corporate shareholders were entitled to full protection of their constitutional rights.

Disregarding the extensive briefing on the nature of the corporation and the circuit opinions of Justice Field and Judge Sawyer, however, Chief Justice Morrison Waite famously declined to hear argument on whether the Fourteenth Amendment applied to corporations, stating at the outset of the second round of oral arguments in *Santa Clara*, "we are all of the opinion that it does."[284] In a remarkable about-face, the counties' lawyers conceded the point, perhaps in light of Waite's unequivocal pronouncement. The attorney for Santa Clara County quickly capitulated, "Of course, corporations are persons, and of course, they are protected by the Fourteenth Amendment. No one, I presume has ever questioned it."[285]

Following Waite's dictum, the Supreme Court's opinion in *Santa Clara v. Southern Pacific Railroad* did not address the issue of whether California's taxation scheme violated the Fourteenth Amendment rights of corporations.[286] Setting aside the constitutional question, the Court remanded the case on a technicality.[287] By refusing to address the equal protection claim, the Court let Justice Field's appellate opinion stand as the most definitive explanation of why the equal protection clause should apply to corporations.[288]

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[284] *Santa Clara*, 118 U.S. 394; "Argument of the Railroad Tax Cases," *San Francisco Chronicle*, Jan. 27, 1886.
[285] "Oral Argument for Plaintiff-in-Error," *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886).
[286] The parties in the *San Mateo* had agreed that the rule of decision in *Santa Clara* would decide their case as well. *San Mateo*, 116 U.S. at 141. The judgment in *San Bernardino* was against the plaintiff county for the same reasons as in *Santa Clara*. *San Bernardino*, 118 U.S. at 421.
[287] The technicality was including fences in the valuation of the railroad's property. "The Railroad Taxes," *San Francisco Chronicle*, May 11, 1886.
[288] Field chastised the Court for not reaching the constitutional question. Citing a Chinese Fourteenth Amendment case, Field warned that the question was "of transcendent importance, and it will come here, and continue to come, until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws." *San Bernardino*, 118 U.S. at 423 (Field, J., concurring).

For years, scholars have pondered Chief Justice Morrison Waite's famously blithe comment about corporate Fourteenth Amendment rights.[289] Waite himself insisted that his statement had little importance, as the Court had "avoided meeting the constitutional question in the decision."[290] This chapter suggests that a possible explanation lies in another case decided the very same day: *Yick Wo v. Hopkins*, also arising from the Ninth Circuit, in which the Court held that a law allowing San Francisco commissioners to discretionarily deny laundry permits violated the equal protection clause when those permits were denied exclusively to Chinese laundry owners.[291] Unsurprisingly, Yick Wo was represented by a corporate lawyer – Hall McAllister, who, along with his law partner Thomas Bergin, was simultaneously representing Southern Pacific in the Railroad Tax Cases.[292]

Unlike in *Santa Clara,* in *Yick Wo* the Supreme Court thoroughly addressed the equal protection claim. Departing significantly from the majority opinion in the *Slaughter-House Cases*, the Court for the first time adopted the expansive theory of equal protection that the Ninth Circuit had developed in the Chinese and corporate Fourteenth Amendment cases.[293] Following in the

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[289] *Santa Clara*, 118 U.S. 394. *See, e.g.,* Howard Jay Graham, "The Waite Court and the Fourteenth Amendment," *Vanderbilt Law Review* 17, no. 2 (1964): 525-548 ("Nowhere in the United States Reports are there to be found words more momentous or more baffling than these."); Horwitz, "*Santa Clara* Revisited," 173 (the decision "has always been puzzling and controversial); Pollman, "Reconceiving Corporate Personhood," 164 (noting that "the unusual circumstances of this case have evoked skepticism and debate"). Adam Winkler posits that the misinterpretation of *Santa Clara*'s holding going forward was the result of a perfidious court reporter misleadingly putting Waite's statement in the headnote to the case. Winkler, *We the Corporations*, 151.

[290] Graham, *Everyman's Constitution*, 567.

[291] *Yick Wo*, 118 U.S. 356.

[292] McAllister represented Yick Wo in both the Ninth Circuit and Supreme Court, and the Southern Pacific Railroad in the Ninth Circuit. Levy, "Classical Lawyers," 182.

[293] Swisher, *Stephen J. Field*, 424. Yick Wo also broke ground regarding the right to freely labor as a component of the "liberty" interest protected by the Fourteenth Amendment's due process clause. In contrast to *Slaughter-House*'s holding that the right to labor was not a privilege and immunity of citizenship, the Court in *Yick Wo* held that the right to "the means of living," *i.e.* labor, was a "material right", and that infringement on this right was "the essence of slavery itself." *Yick Wo,* 118 U.S. at 370. This statement echoed Judge Sawyer's claim in *Parrott* that labor was a component of liberty, as well as another case brought by McAllister and Bergin, *In re Quong Woo*, which involved a law conditioning the dispensation of permits to operate a laundry on the approval of 12 citizens and tax-payers on the block in which the laundry was located. 13 F. 229 (D. Cal. 1882). Justice Field, riding circuit, had held that the law was unconstitutional because it did not guarantee an equal process for determining which laundries could obtain a license,

footsteps of the Chinese immigrant cases, *Parrott*, and the Railroad Tax Cases, Justice Stanley Matthews held that the provisions of the Fourteenth Amendment "are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."[294] Race, as the corporate lawyers and Ninth Circuit judges had contended, was an illegitimate basis for class legislation. Yet like the Ninth Circuit, Matthews did not limit the scope of the equal protection clause to prohibiting racial discrimination, proclaiming that when a law made "unjust and illegal discriminations between persons in similar circumstances," this was a "denial of equal justice… within the prohibition of the constitution."[295] Reading Matthews' definition of equal protection – identical to that propounded by Justice Field – in light of the preceding decade of Ninth Circuit Fourteenth Amendment jurisprudence, "persons in similar circumstances" would include not just men regardless of race, but men regardless of incorporated status as well. The Court's reasoning in *Yick Wo* thus suggests another explanation for Waite's statement in *Santa Clara*: taken together, the twin rulings of *Yick Wo* and *Santa Clara* put forth a broad interpretation of the Fourteenth Amendment as applying not just to African Americans, but to all "persons" who suffered unjust discrimination, be they natural or artificial, "despised laborers" or "masters of millions."

Indeed, the Supreme Court never did issue an opinion explaining in any detail why corporations were persons under the Fourteenth Amendment. Two years later, in an opinion written by Justice Field, the Court stated offhand, "It is conceded that corporations are persons

which infringed on the fundamental liberty of Chinese launderers to "follow any of the lawful ordinary trades and pursuits of life." *Quong Woo*, 13 F. at 233.

[294] *Yick Wo*, 118 U.S. at 369.

[295] *Yick Wo*, 118 U.S. 373-74.

within the meaning of the amendment."[296] Field cited to *Santa Clara* for support of this statement, although the actual *Santa Clara* opinion itself had held no such thing.[297] That same year, Field, again writing for the majority, elaborated, "Under the designation of 'person'" in the Fourteenth Amendment, "there is no doubt that a private corporation is included," for "such corporations are merely associations of individuals united for a special purpose."[298] In this swift sleight of hand, Field adopted the aggregate theory of corporate personhood and used it to justify the extension of Fourteenth Amendment to corporate persons themselves. Without any comprehensive explanation of his reasoning, and citing to *Santa Clara*, which likewise had offered nothing by way of explanation, Field cemented corporate equal protection rights as the official law of the land. [299] By the end of the nineteenth century, the equal protection rights of corporations were taken as a given; in 1897, the Court stated blithely, "A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens."[300] Through it all, the Court never explained in any detail why the Fourteenth Amendment applied to corporations, even as over time it solidified corporations' claim to its protection.

Conclusion: Corporations and the Fourteenth Amendment in the Era of Jim Crow and Chinese Exclusion

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[296] Missouri Pac. Ry. Co. v. Mackey, 127 U.S. 205, 209 (1888).
[297] *Mackey*, 127 U.S. at 209.
[298] Pembina Consol. Silver Mining & Milling Co. v. Com. of Pennsylvania, 125 U.S. 181, 190 (1888).
[299] After these cases, corporations seized on the Fourteenth Amendment as a shield against state regulation. Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown, & Company, 1912), 129. Gregory Mark discusses the twentieth century evolution of the doctrine, Mark, "Personification of the Business Corporation," as does Adam Winkler. Winkler, *We the Corporations*.
[300] Gulf, C. & S.F. Ry. Co. v. Ellis, 165 U.S. 150, 154 (1897). *See also* Missouri Pac. Ry. Co. v. State of Nebraska, 164 U.S. 403, 417 (1896); Minneapolis & St. L. Ry. Co. v. Beckwith, 129 U.S. 26 (1889); Charlotte, C. & A.R. Co. v. Gibbes, 142 U.S. 386 (1892); *Pembina*, 125 U.S. 18; *Ellis*, 165 U.S. 150; Smyth v. Ames, 169 U.S. 466 (1898); *Mackey*, 127 U.S.; Kentucky Finance Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544 (1923). This precedent, however, was circumscribed slightly in Northwestern Nat. Life Ins. Co. v. Riggs, in which the Court stated offhand and without explanation that "The liberty referred to in that Amendment is the liberty of natural, not artificial, persons." 203 U.S. 243, 255 (1906).

While *Yick Wo* and *Santa Clara* did extend Fourteenth Amendment equal protection rights to all persons, the cases did not provide a shield against all state regulation. Although the right to equal treatment protected Chinese immigrants and corporate shareholders against discriminatory state and local laws, states could justify targeted legislation by asserting a valid police power interest in protecting the public welfare.[301] Federal judges, including Justice Field, were willing to permit reasonable regulations that served "the interest of the public," even when they infringed on constitutional rights.[302] Yet Supreme Court decisions regarding corporate Fourteenth Amendment rights continued to espouse Justice Field's vision of an expansive equal protection clause and a robust corporate constitutional personhood, even in cases where they upheld the challenged regulations.[303] For instance, two years after *Santa Clara*, the Court, in an opinion by Field, concluded that special safety regulations for railroads did not violate the equal protection clause.[304] However, in the same breath Field reiterated that "corporations are persons within the meaning of the amendment," citing to *Santa Clara* without elaboration.[305] Even as he recognized public safety as a valid reason for restricting rights, Field cemented corporations' status as persons with equal protection rights.

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[301] *See* Novak, *The People's Welfare* (discussing "public interest" limits on individual rights). Ruth H. Bloch and Naomi R. Lamoreaux argue that the protection the Fourteenth Amendment offered to corporations after *Santa Clara* was actually "very limited" on the grounds that corporations were often unsuccessful in their Fourteenth Amendment claims. Bloch and Lamoreaux, "Corporations and the Fourteenth Amendment," 286. However, although the police power restrained Fourteenth Amendment claims, corporations did successfully recast themselves as persons protected by the amendment, which had important precedent for future claims of corporate rights under other provisions of the Constitution and civil rights statutes.

[302] McCurdy, "Justice Field and the Jurisprudence of Government-Business Relations," 978-79. For instance, the Court regularly held that non-arbitrary safety and administrative regulations did not violate the Fourteenth Amendment. *See, e.g.,* Beckwith, 129 U.S. 26; Gibbes, 142 U.S. 386.

[303] *See, e.g.*, *Mackey*, 127 U.S. at 210; *Ellis*, 165 U.S. 150; *Smyth*, 169 U.S. 466.

[304] *Mackey*, 127 U.S. at 210.

[305] *Mackey*, 127 U.S. at 210.

The same exception for laws that were intended to protect the public interest applied to state regulation of Chinese immigrants. Even prior to *Yick Wo*, Field had shown that he was willing to uphold laws that had the effect of discriminating against Chinese immigrants when they applied to all persons within a particular class, were not arbitrary in their application, and were justified by a legitimate state police power.[306] Field also was willing to uphold legislation that had the effect of discriminating against certain classes of Chinese persons. [307] He was careful to justify these decisions on bases other than race, explaining that such laws were legitimate exercises of state or federal police power and were not motivated by racism. He noted, "Thoughtful persons who were exempt from race prejudices" favored legislation to curb the immigration of Chinese laborers in the name of public welfare, namely "to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization."[308]

By the late 1870s, anti-Chinese sentiment on the West Coast had prompted politicians of all stripes to endorse a more flagrantly anti-immigration agenda.[309] In 1880, the United States ratified a treaty with China that gave Congress the power to limit or suspend the immigration of Chinese laborers, while maintaining protections for those already resident in the United States.[310] Congress utilized this power in the Chinese Exclusion Acts – the first meaningful federal

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[306] For instance, *Barbier v. Connolly* involved a laundry ordinance requiring all laundries to obtain a certificate verifying that they met certain fire and public safety standards and prohibiting the operation of laundries at night. 113 U.S. 27 (1884). Although several of the required safety provisions disproportionately impacted Chinese laundries, the law applied equally to all persons, was not arbitrarily administered, and the plaintiff in this case was a white launderer. As Field explained, "There is no invidious discrimination against any one within the prescribed limits by such regulations… All persons engaged in the same business within it are treated alike; are subject to the same restrictions, and are entitled to the same privileges under similar conditions." 113 U.S. at 30-31. For these reasons, the ordinance differed from that in *Yick Wo*, which was well known to be targeted at Chinese launderers and where the granting of the license depended on the arbitrary discretion of the city official and the surrounding neighbors.

[307] Chew Heong v. U.S., 112 U.S. 536, 569 (1884) (Field, J., dissenting); Case of the Chinese Merchant, In re Low Yam Chow, 13 F. 605, 607 (C.C.D. Cal. 1882).

[308] *Chew Heong,* 112 U.S. at 569 (Field, J., dissenting).

[309] *Chew Heong,* 112 U.S. at 14. See also Smith, *Freedom's Frontier*, 227; Qin, *The Diplomacy of Nationalism*, 115.

[310] Lucy E. Salyer, *Laws Harsh As Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* (Durham, N.C.: The University of North Carolina Press, 1995), 14; Qin, *The Diplomacy of Nationalism*, 110; Smith, *Freedom's Frontier*, 225-26. For a thorough timeline and discussion of the treaties and acts, *see Fong Yue Ting*, 149 U.S. 698.

restrictions on immigration – by prohibiting new immigration of Chinese laborers for ten years and requiring Chinese immigrants currently residing in the states to obtain a certificate of residence if they wished to leave the country temporarily.[311] In 1888 and 1892, Congress further restricted Chinese immigration and imposed burdensome new requirements on Chinese residents.[312]

Each of these Exclusion Acts gave rise to litigation that flooded federal courts, overwhelming dockets.[313] Thomas Bergin and Hall McAllister continued to represent both Chinese immigrants and corporate clients into the early twentieth century.[314] Yet although the Ninth Circuit had ruled favorably for Chinese immigrants when the cases involved state and local laws, federal statutes posed new questions: the scope of Congress's power over immigration; the constitutional and treaty rights of immigrants in transit and of resident aliens; the separation of powers between the judiciary and administrative agencies; and the interplay between Congressional statutes and treaties.[315] Although federal courts at first read the Exclusion Acts narrowly in order to reconcile them with Chinese immigrants' treaty rights,[316] subsequent legislation made clear that Congress intended to abrogate treaty terms that guaranteed Chinese

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[311] Salyer, *Laws Harsh As* Tigers. 6; Smith, *Freedom's Frontier*, 228; Qin, *The Diplomacy of Nationalism*, 101. For the text of the 1882 and 1884 Chinese Exclusion Laws, *see Chew Heong*, 112 U.S. 536. For a sampling of cases interpreting the scope of these laws, *see, e.g., In re Low Yam Chow*, 13 F. 605 (C.C.Ca. 1882); In re Leong Yick Dew, 19 F. 490 (C.D.C. Cal., 1884); In re Cheen Heong, 21 F. 791 (C.C.D. Cal., 1884); U.S. v. Jung Ah Lung, 124 U.S. 621 (1888); Chinese Exclusion Case, Chae Chan Ping v. U.S., 130 U.S. 581 (1889).

[312] Qin, *The Diplomacy of Nationalism*, 123. *See Chae Chan Ping*, 130 U.S. 581; Lau Ow Bew v. U.S., 144 U.S. 47 (1892); *Fong Yue Ting*, 149 U.S. 698; Wong Wing v. U.S., 163 U.S. 228 (1896).

[313] Judge Hoffman warned, "if the Chinese immigrants come in the future in anything like the number in which they have recently arrived, it will be impossible for the courts to fulfill their ordinary functions if these habeas corpus cases are to be investigated and disposed of by them." In re Chow Goo Pooi, 25 F. 77, 82 (C.C.D. Cal., 1884). The Supreme Court voiced this concern as well. Lem Moon Sing v. U.S., 158 U.S. 538, 547 (1895).

[314] *See, e.g.,* People v. Lee Chuck, 74 Cal. 30 (Cal. 1887); In re Baldwin, 27 F. 187 (C.C.D. Cal., 1886); Baldwin v. Franks, 120 U.S. 678 (1887); In re Pacific Mail S.S. Co., 130 F. 76 (9th Cir. 1904).

[315] *See, e.g.*, *Chew Heong*, 112 U.S. 536; In re Ah Ping, 23 F. 329 (C.C.D. Cal., 1885); *Jung Ah Lung*, 124 U.S. 621; In re Ping, 36 F. 431 (C.N.D. Cal. 1888); *Fong Yue Ting*, 149 U.S. 698.

[316] *In re Ah Ping*, 23 F. 329; *Chew Heong*, 112 U.S. 536.

immigrants equal treatment.[317] As Justice Hoffman explained, somewhat regretfully, it would be "a gross assumption of authority for the court" to overturn a statute that in "clear and unambiguous language" contradicted the terms of a treaty, even if it caused "great hardship" to immigrants and constituted "a violation of the faith of the nation."[318] Rather, such a violation could be addressed through diplomatic channels only.[319] On the Supreme Court, Justice Field continued to assert that the constitutional rights of Chinese residents guarded against egregious due process violations, but he was in the minority.[320] Given the federal courts' growing deference to Congress's power over immigration, an expansive Fourteenth Amendment clause, which applied only to action by states, offered little protection for Chinese immigrants.[321]

The Court also narrowed the ability of the Reconstruction Amendments to address discrimination against African Americans. Civil right lawyers continued to bring claims under the Reconstruction Amendments and Civil Rights Acts, but the Court's interpretation of the Fourteenth Amendment as limited to state action and its endorsement of "separate but equal"

[317] *In re Ping*, 36 F. 431.
[318] *In re Ping*, 36 F. at 432, 433.
[319] *In re Ping*, 36 F. at 435.
[320] *Fong Yue Ting*, 149 U.S. at 754 (Field, J., dissenting). The Court, including Justice Field, held that Congress's power over immigration and the 1882 treaty allowed Congress to prohibit Chinese laborers from entering regardless of their previous residency in the United States. *Chae Chan Ping*, 130 U.S. 581. The Court extended Congress's power over immigration to include aliens currently resident in the U.S., holding that deportation without trial did not violate the immigrants' right to due process, among others. Justice Field, along with Justices Brewer and Fuller, dissented in *Fong Yue Ting*, arguing that the law in question violated the Fifth Amendment's due process and equal protection principles, citing *Yick Wo* five times. *Fong Yue Ting*, 149 U.S. at 739, 742, 744 (Brewer, J., dissenting); *id*. at 755 (Field. J., dissenting); *id*. at 762 (Fuller, J., dissenting).
[321] Salyer, *Laws Harsh As Tigers*, 23.

doctrine shattered the amendment's power to combat Jim Crow laws.[322] Women were likewise unsuccessful in claiming the Fourteenth Amendment to protect against gender discrimination.[323]

Yet corporations continued to assert an expansive interpretation of equal protection into the twentieth century. They were the most prolific litigators of the Fourteenth Amendment in the century after its passage.[324] In 1912, one commentator calculated that corporations had brought more than half of all Fourteenth Amendment cases between 1868-1912 – significantly more than African Americans.[325] Even as it crippled the amendment's capacity to address racial discrimination, the Supreme Court bolstered its protections of private property for businesses, most notably in the cases of the so-called "Lochner Era."[326] The Supreme Court also continued to rely on *Yick Wo* as well as other Chinese immigrant cases when considering Fourteenth Amendment claims by business entities.[327] Although analogies between shareholders and racial

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[322] *See* United States v. Cruikshank, 92 U.S. 542 (1875); Civil Rights Cases, 109 U.S. 3 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896). Eric Foner has said that *Cruikshank* rendered the Fourteenth Amendment "all but meaningless" to African Americans. Foner, *Reconstruction: America's Unfinished Revolution*, 636. For a small sampling of the extensive scholarship on African American civil rights lawyers and their allies, *see* Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2010); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (Oxford, U.K.: Oxford University Press, 2011); Kenneth W. Mack, *Representing The Race: The Creation Of The Civil Rights* Lawyer (Cambridge, Mass.: Harvard University Press. 2012).

[323] *See Bradwell*, 83 U.S. 130; *Minor*, 88 U.S. 162.

[324] For a very small sample of the thousands of Fourteenth Amendment cases brought by corporations between *Santa Clara* and the *Carolene Products* decision, *see, e.g.*, State v. Loomis, 22 S.W. 350, 352 (Mo. 1893); Covington & L. Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896); Ellis, 165 U.S. at 154; Connolly v. Union Sewer Pipe Co., 184 U.S. 540, 558 (1902); Power Mfg. Co. v. Saunders, 274 U.S. 490, 493 (1927); Quaker City Cab Co. v. Commonwealth of Pennsylvania, 277 U.S. 389, 400 (1928); Louis K. Liggett Co. v. Lee, 288 U.S. 517, 534 (1933). The Supreme Court noted in 1898, "A majority of the cases which have since arisen [under the amendment] have turned, not upon a denial to the colored race of rights therein secured to them, but upon alleged discriminations in matters entirely outside of the political relations of the parties aggrieved." Holden v. Hardy, 169 U.S. 366, 382–83 (1898).

[325] Of the 604 cases argued in the Supreme Court involving the Fourteenth Amendment between 1868-1912, 312 involved corporations, while only about one per year involved African Americans. Collins, *The Fourteenth Amendment and the States.* 129.

[326] *Lochner*, 198 U.S. 45. *See* Gary D. Rowe, "The Legacy of Lochner: Lochner Revisionism Revisited," *Law & Social Inquiry* 24, no.1 (1999): 221-252, 244.

[327] For a small sampling of business-entity Fourteenth Amendment cases that invoked *Yick Wo*, *see, e.g.*, *Ellis*, 165 U.S. at 159; *Pembina*, 125 U.S. at 190; *Holden*, 169 U.S. at 383; Atchison, T. & S.F.R. Co. v. Matthews, 174 U.S. 96, 105 (1899); *Connolly*, 184 U.S. at 559 (1902); Cotting v. Godard, 183 U.S. 79, 107 (1901); Dobbins v. City of Los Angeles, 195 U.S. 223, 240 (1904); German All. Ins. Co. v. Hale, 219 U.S. 307, 319 (1911); Iowa-Des Moines Nat. Bank v. Bennett, 284 U.S. 239, 247 n.5 (1931); Michigan Millers' Mut. Fire Ins. Co. v. McDonough, 358 Ill. 575, 584 (Il. 1934); Senn v. Tile Layers Protective Union, Local No. 5, 301 U.S. 468, 491 (1937) (Butler, J., dissenting).

minorities surfaced occasionally, as decisions upholding Jim Crow legislation inhibited the ability of African Americans to claim substantive equal protection, such analogies vanished.[328] They had done their work.

When the Supreme Court finally retreated from its permissive approach to the Fourteenth Amendment claims of business entities during the New Deal era, it left space for the possibility that the amendment retained some power to protect "discrete and insular minorities."[329] As the Civil Rights movement gained momentum, turnover on the bench made the Court more predisposed towards civil rights claims.[330] The holding of the twin cases of *Yick Wo* and *Santa Clara* – that the equal protection clause applies to all "persons", understood broadly to include even corporations, and that equality meant treating all alike, rather than just likes alike – finally allowed disempowered groups to claim the amendment's protection as well. During the 1940s-50s, when racial minorities began to successfully invoke *Yick Wo* to combat discrimination in education[331], property ownership[332], employment[333], voting[334], and marriage[335]; in the 1960s-70s, when

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[328] For instance, in a case involving a law that required railroad corporations to pay attorneys' fees if they were the losing party in certain cases, but had no such requirement for individual litigants, the Supreme Court explained that such a classification was an unconstitutional violation of the rights of shareholders. *Ellis*, 165 U.S. 150. Following the template of the Railroad Tax Cases, the Court analogized wealthy shareholders to black men: "The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them, and all black men not," just as it may not target "all men possessed of a certain wealth." *Ellis*, 165 U.S. at155. Interestingly, *Ellis* was decided in 1897, the year after *Plessy v. Ferguson*.

[329] United States v. Carolene Products Co., 304 U.S. 144, 154 n.4 (1938). Justice Lewis Powell dubbed footnote 4 "the most celebrated footnote in constitutional law" because it became a basis of strict scrutiny judicial review in cases involving legislation that infringed on the constitutional rights of minority groups. Lewis F. Powell, Jr., "Carolene Products Revisited," *Columbia Law Review* 82, no. 6 (Oct., 1982): 1087-1092, 1087. *See also* Owen M. Fiss, "Foreword: The Forms of Justice," *Harvard Law Review* 93, no. 1 (November 1979): 1-59, 6; Robert M. Cover, "The Origins of Judicial Activism in the Protection of Minorities," *Yale Law Journal* 91, no. 7 (June 1982): 1287-1316, 1292.

[330] *See* Morton Horwitz, *The Warren Court and the Pursuit of Justice* (New York: Hill and Wang, 1998). Melvin I. Urofsky, *The Warren Court: Justices, Rulings, and Legacy* (Santa Barbara, CA: ABC-CLIO, 2001), 10-11.

[331] *See, e.g.,* Westminster Sch. Dist. of Orange Cty. v. Mendez, 161 F.2d 774, 777 n.5 (9th Cir. 1947); Pitts v. Bd. of Trustees of De Witt Special Sch. Dist. No. 1, 84 F. Supp. 975, 983 (E.D. Ark. 1949).

[332] *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1, 21 (1948); Kenji Namba v. McCourt, 185 Or. 579, 589 (Or. 1949).

[333] *See, e.g.*, Davis v. Cook, 80 F. Supp. 443, 452 (N.D. Ga. 1948); Schware v. Bd. of Bar Exam. of State of N.M., 353 U.S. 232, 239 (1957).

[334] *See, e.g.*, Davis v. Schnell, 81 F. Supp. 872, 878 (S.D. Ala.), aff'd, 336 U.S. 933 (1949); Byrd v. Brice, 104 F. Supp. 442, 444 (W.D. La. 1952), aff'd sub nom. Bryce v. Byrd, 201 F.2d 664 (5th Cir. 1953).

[335] *See, e.g.*, McLaughlin v. State of Fla., 379 U.S. 184, 194 (1964).

women's rights activists cited *Yick Wo* to claim reproductive rights[336], equality in sports[337], and equal benefits[338]; and in the 1990s-2000s, when gay rights activists relied on *Yick Wo* to claim equal treatment under law[339], they based their claims on the broad interpretation of the equal protection clause established by the Ninth Circuit's Chinese and corporate Fourteenth Amendment cases.

Yet corporate Fourteenth Amendment litigation also restricted the potential of the equal protection clause to address issues of inequity. Treating all alike, while useful in targeting legislation that singles out a disempowered group for unjust discrimination, has also been used to overturn legislation that aims to rectify past or current inequalities by levelling the playing field, on the grounds that it does not treat historically advantaged groups "like" disempowered ones.[340] This privileging of formal over substantive equality is a direct product of the intertwined Chinese and corporate Fourteenth Amendment cases that developed out of the late-nineteenth century Ninth Circuit. In the formal equality world of Justice Field's Fourteenth Amendment, the "master of millions" and the "despised laborer" must be treated the same.

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[336] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (White, J., concurring).
[337] *See, e.g.*, Haas v. S. Bend Cmty. Sch. Corp., 259 Ind. 515, 523 (Ind. 1972).
[338] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 685 n.14 (1973).
[339] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 634 (1996).
[340] *See* Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More than Ever*, 37 HARV. J.L. & GENDER 569, 570-71 (2014). Affirmative action in schools provides a contentious example. In the historic case *Regents of University of California v. Bakke*, the Court held an affirmative action policy unconstitutional because it discriminated against white males. Regents of University of California v. Bakke, 438 U.S. 265 (1978). Referencing *Yick Wo* a total of five times, the majority explained, "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Bakke*, 438 U.S. at 289-90. The effect of this "formal" over "substantive" equality interpretation of the equal protection clause is to maintain the historical power imbalance between advantaged and disadvantaged groups and to limit the state's ability to ameliorate the effects of past discrimination. Colker, *Reflections on Race,* 69 OHIO ST. L.J. at 1091 ("Formal equality has become a political and litigation tool for some white parents to derail an attempt by school districts to create an educational program that is likely to be more successful for minority children."); MacKinnon, *Toward a Renewed Equal Rights Amendment*, 37 HARV. J.L. & GENDER at 571 (the result of a formal equality approach "is that imposed inequalities… are at best ignored or are denigratingly compensated for, in order to try to produce equal results."), Crenshaw, *Race, Reform, and Retrenchment,* 101 HARV. L. REV. at 1345 (stating that the "equality as process" approach makes "no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present"). The most recent in the line of cases stemming from *Bakke* is Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198 (2016).

CONCLUSION

In 1933, in the midst of the Great Depression, Supreme Court Justice Louis Brandeis denounced corporate constitutional rights. The majority of the Court had struck down a Florida law regulating incorporated retail chain stores, on the grounds that "[c]orporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons."[1] Castigating the Court's opinion, Brandeis's dissent expounded on the singular wealth and power of business corporations and their role in precipitating the Great Depression.[2] "Such is the Frankenstein monster," he concluded, that now "menaces the public welfare."[3]

Brandeis penned his dissent more than a hundred years after corporations had first begun to claim constitutional rights. His view of the corporate-state relationship echoed the widespread nineteenth century vision of the corporation as a creature of the state, created to promote the public interest and subject to state control. Over the course of the nineteenth century, corporate lawyers challenged this traditional view, arguing that corporations were no different than constitutional rights-bearing individuals. By the time of Brandeis' writing in 1933, the Supreme Court had largely adopted this new vision of the constitutional rights-bearing corporate person. Wielding the Constitution, corporations had transformed themselves from subservient "children of the state" to independent, rights-bearing legal persons: Frankenstein's baby with constitutional rights.

[1] Louis K. Liggett Co. v. Lee, 288 U.S. 517, 536 (1933).
[2] *Id.* at 566-69 (Brandeis, J., dissenting).
[3] *Id.* at 567, 574.

Image 16: *"Eureka" by M. Wuerker. Corporations are still commonly portrayed as Frankenstein's monster today.*

How apt was the Frankenstein metaphor? Like Frankenstein's monster, the corporation was a "soulless," "inhuman," "creature of man." Like Frankenstein's monster, the corporation was so powerful it could not be restrained. Unlike Frankenstein's creation, however, corporations had not been cast aside by their creator. Rather, the people and their representatives throughout the nineteenth century strove to maintain their familial relationship with their corporate offspring. Contrary to Frankenstein's monster, it was corporations themselves who broke free of their maker, claiming the rights to pursue self-interested profit-making in the marketplace the same as individuals.

The federal Constitution was the means by which corporation effected this move out of the household and into the marketplace. By invoking the Constitution, particularly the Fourteenth Amendment, corporations aligned themselves with persecuted minorities. In so doing, corporate

lawyers and federal judges not only successfully recast corporations as constitutional rights-bearing persons, but developed influential constitutional law doctrine that had lasting implications for claims by disempowered groups as well.

Where does that leave us? The story of corporate constitutional personhood clearly did not end with the equal protection clause. Rather, throughout the twentieth and into the twenty-first century, corporations have continued to claim constitutional as well as civil rights. Some of these claims have been unsuccessful, as with corporations' attempts to claim the Fifth Amendment's protection against self-incrimination[4] and the Fourteenth Amendment's protection against deprivation of "liberty" without due process.[5] Yet in recent decades the Supreme Court has recognized the constitutional rights of corporations in a host of other contexts. Well known examples include extending First Amendment free speech protections to corporations, including in the contentious context of political expenditures,[6] and recognizing the religious freedom rights of corporations under the Religious Freedom Restoration Act.[7] The conception of the corporation as an aggregate of private, rights-bearing individuals has continued to play a prominent role in courts' opinions regarding corporate constitutional rights.[8] Corporate rights-claiming also

[4] Hale v. Henkel, 201 U.S. 43 (1906).

[5] This is a more complicated story than has been recognized. Jurists have concluded that corporations do not have a protected liberty interest under the Fourteenth Amendment based on the case of Northwestern Nat. Life Ins. Co. v. Riggs, 203 U.S. 243 (1906). In that case, the Supreme Court without explanation stated offhand that "The liberty referred to in that Amendment is the liberty of natural, not artificial, persons." *Id.* at 255. This contradicted the Court's acknowledgement earlier in the opinion that "the statute in some degree restricts the company's power of contracting," as the right to contract was seen as a fundamental liberty included in the Fourteenth Amendment. *Id.* at 253. *Northwestern National Life Insurance* is an unusual case because of the extremely public scandal that accompanied the case, involving embezzlement by nefarious directors of an insurance company who had been convicted and sentenced to prison. Although further research is necessary, the incendiary nature of the facts of the case may have played some role in the Court's unwillingness to engage with the corporation's due process claim.

[6] *See* NAACP v. Alabama, 357 U.S. 449 (1958); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010).

[7] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014); Little Sisters of the Poor Home for the Aged, 794 F.3d 1151 (10th Cir. 2015).

[8] See Hale v. Henkel, 201 U.S. 43, 76 (1906) (noting in dicta that corporations are entitled under the Fourth Amendment to protection against unreasonable searches and seizures on the basis that a corporation "is, after all, but an association of individuals under an assumed name and with a distinct legal entity.").

continues to be imbricated with race. For instance, corporations have successfully claimed racial identities in order to bring claims under the 1866 Civil Rights Act for discrimination in contracting.[9] The history of corporate rights-claiming is the first step toward illuminating this ongoing evolution of the constitutional rights-bearing corporate person.

[9] *See, e.g.*, Robert Strassfield, *Corporate Standing To Allege Race Discrimination In Civil Rights Actions*, 69 Va. L. Rev. 1153, 1154 (1983); Brandon L. Garrett, *The Constitutional Standing Of Corporations*, 163 U. Pa. L. Rev. 95, 98 (2014); Richard R.W. Brooks, Incorporating Race, 106 Colum. L. Rev. 2023, 2026 (2006); Susanna Kim Ripken, Corporate Personhood (New York, NY : Cambridge University Press, 2019); Evelyn Atkinson Corporations of Color? Corporate Claims for Racial Discrimination under Section 1981 of the Civil Rights Act (on file with author).

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