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The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How a Historical Myth Continues to Bedevil the Legal System

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The Uneasy Relationship of *Hobby Lobby*, *Conestoga Wood*, the Affordable Care Act and the
Corporate Person: How a Historical Myth Woven Out of Whole Cloth Has Bedeviled the Legal
System for Almost 150 Years.

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I. Introduction

On November 26, 2013, the Supreme Court of the United States agreed to hear two cases—*Sebelius v. Hobby Lobby Stores, Inc.*,¹ and *Conestoga Wood Specialties v. Sebelius*²—challenging the validity of the Affordable Care Act’s (“ACA”) mandate that employer-sponsored health plans cover all FDA-approved contraceptives (the “Contraceptive Mandate”). In each case, closely held plaintiff corporations contend that the Contraceptive Mandate illegally infringed upon the corporations’ freedom to exercise religion.

The cases attracted attention because the Supreme Court had agreed to hear yet another challenge to the validity of the ACA’s provisions, but it has been less noticed that both cases, and others like them, implicate a fundamental question that the Supreme Court has never decided; on what basis, if any, is a corporation a “person” entitled to assert the constitutional and statutory rights of natural persons. Without denying the significance of the challenge to the ACA’s Contraceptive Mandate, the Supreme Court’s failure to define a principled corporate person theory has had—and continues to have—far more important and pervasive implications for the American legal system.

Typically, legal concepts creating and regulating societal rights and obligations, like the corporate personhood concept, come into being incrementally in an extended evolutionary process. That evolutionary process is characterized by a dialectic give and take in which the principles justifying—or precluding—application of the concept in a variety of different factual scenarios are gradually clarified, defined and developed through a series of judicial decisions. Familiarity with such precedents and with the reasoning underlying the courts’ application of the

¹ 870 F. Supp. 2d 1278 (2012), *rev’d. and remanded for further proceedings*, 723 F.3d 1114 (2013), *cert. granted* ___S.Ct. ___, 2013 W.L. 5297798, 82 U.S.L.W. 3139 (2013).

² 917 F. Supp. 2d 394, *aff’d*. 724 F.3d 377, *cert. granted* ___S.Ct. ___, 2013 W.L. 5297800, 82 U.S.L.W. 3139 (2013).

concept allows courts, lawyers and policy-makers to assess whether proposed legislation or regulatory changes are sufficiently analogous to prior precedents that the legal viability of the proposal can be determined by reference to the principles that courts previously have relied upon to determine the applicability of a concept in other situations.

The problem confronting the Supreme Court as it takes up the *Hobby Lobby* and *Conestoga Wood* cases is that the concept of corporate personhood did not develop gradually or in an evolutionary process in which the meaning of the concept was developed and defined. Instead, the concept of the corporate person was imposed on the law *ipse dixit*, that is, by judicial fiat and without definition, in a series of late nineteenth century Supreme Court cases decisions. Those opinions were written by the same Supreme Court Justice, Stephen J. Field, who, if not beholden to railroad interests, was certainly a devoted friend of the railroads. Moreover, Field has no occasion to explain the reasons that corporations possessed the rights of natural persons because, in every one of those cases, the Supreme Court held that, person or not, the corporations had no viable claim for relief.

As a result, the concept of the corporate person lacks a principled definition and, therefore, seems to expand, or contract, depending on the circumstances and on the personal predilections of the speaker. The resultant confusion about the meaning of corporate personhood makes application of the concept troublesome in any case, but it is particularly problematic in the context of statutes, like the ACA, which attempt to fundamentally change basic aspects of societal structure and, therefore, implicate divisive questions—here, contraception and abortion—grounded in deeply-held and profoundly personal beliefs. As *Conestoga Wood* and *Hobby Lobby* illustrate, the undefined and ubiquitous corporate person provides little guidance to those who must assess the legal viability of statutes like the ACA and, equally problematic, results in

polarization and politicization of already difficult matters, thereby preventing or impeding implementation of ground-breaking reforms, like the ACA.

The corporate person issue is central in both *Conestoga Wood* and *Hobby Lobby* for two reasons: First, in each case, the plaintiffs' allege that the Contraceptive Mandate violates the Religious Freedom Restoration Act ("RFRA").³ RFRA provides that the "Government shall not substantially burden a *person's* exercise of religion."⁴ Thus, unless a corporation is a person, the statute provides no protection. Second, in each case, the plaintiffs also alleged that the Contraceptive Mandate violated the Free Exercise Clause of the First Amendment to the Constitution. The First Amendment's Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." The Free Exercise Clause clearly secures the rights of natural persons, but the government argued that the Clause affords no protection to for-profit corporate entities.

The *Conestoga Wood* and *Hobby Lobby* ACA challenges are paradigms of the problems caused by the Court's ad hoc approach to corporate personhood. On virtually identical facts, the Third Circuit in *Conestoga Wood* held that a for-profit corporation had no protected Free Exercise rights, but the Tenth Circuit in *Hobby Lobby* held that such a corporation was, indeed, a "person" with protected rights.⁵ Moreover, the two courts were deeply divided on the most basic questions of the meaning of corporate personhood. Indeed, eleven sitting circuit judges produced a total of eight separate opinions between them.

To be sure, the Supreme Court has on many occasions held that both for-profit and non-profit corporations may, or may not, assert constitutional and other rights, including rights

³ 42 U.S.C. § 2000bb-1(a), (b).

⁴ *Id.* (emphasis added).

⁵ *Compare Conestoga Wood*, 724 F.3d at 388; *with Hobby Lobby*, 723 F.3d at 1147-46.

protected by the First Amendment.⁶ Recently, for example, in *Citizens United v. Federal Election Commission* the Supreme Court held that a for-profit corporation’s right to engage in political speech is protected by the First Amendment.⁷ Yet, although corporations have been treated as legal persons capable of exercising at least some of the rights of natural persons since Colonial times,⁸ and despite urban legends to the contrary,⁹ the Supreme Court has never provided a rationale that explains why, or when, a corporation is allowed to assert the rights of a natural person. The absence of a principled explanation and rationale for allowing corporations, at least in some instances, to exercise the rights of natural persons has led to a web of conflicting and confusing precedent in a plethora of constitutional and statutory contexts and made application of corporate personhood appear irrational, inconsistent, result-oriented and, to say the least, unpredictable.

The question whether a corporation is a “person” able to assert the constitutional and statutory rights of natural persons¹⁰—and, if so, the basis on which it may do so—has been debated for over 150 years.¹¹ That debate has, at times, had aspects of a Civil War era melodrama.

⁶ See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 778 n.14 (1978) (collecting cases).

⁷ 558 U.S. 310, 342-43 (2010).

⁸ *The Soc’y for the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven*, 21 U.S. 464 (1823) (Interpreting ‘person’ in the treaty ending the Revolutionary War to include corporations); *United States v. Amedy*, 11 Wheat. 392, 412-13 (1826) (Story, J.) (interpreting ‘person’ in criminal statute to include corporations).

⁹ *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978); see also *id.* at 822 (Rehnquist, J., dissenting). Cf. Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundation of the Modern Political Economy*, 50 WASH. L.J. 635, 662 (2010-2011).

¹⁰ See, e.g., Gregory A. Mark, *The Personification of the Business Corporation In American Law*, 5 U. CHI. L. REV. 1441, 1442 (1987) (hereafter Mark).

¹¹ A list of the articles and books that have addressed the question would be voluminous. No one, however, has explored the legal history in more depth and meticulous detail, or with more insight, than Howard Jay Graham. See, e.g., Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment, Part One*, 47 YALE L.J. 371 (1938) [hereinafter Graham, *Conspiracy Theory, Part One*]; Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment, Part Two*, 48 YALE L.J. 171 (1938) [hereinafter Graham, *Conspiracy Theory, Part Two*]; Howard J. Graham, *Justice Field and the Fourteenth Amendment*, 52 YALE L.J. 851 (1942–43) [hereinafter Graham, *Fourteenth Amendment*]; Howard J. Graham, *An Innocent Abroad: The Constitutional Corporate Person*, 2 UCLA L. REV. 155

It has featured contrived test cases, blatantly false evidence, a facetious Supreme Court argument, the reappearance—and then re-disappearance—of a supposedly secret *Journal* of the authors of the Fourteenth Amendment, a Supreme Court Reporter who knowingly and falsely stated in a headnote that the existence of the constitutional corporate person had been decided, and a Supreme Court Justice who used the false headnote and the nineteenth century Court’s decision-making process to embed the corporate person in constitutional law at virtually the same time that his brethren asserted that the issue remained undecided. Not surprisingly, all of this led to allegations by respected New Deal and Progressive Age historians that Gilded Age robber barons and their legislative henchmen had successfully conspired to secretly insert protection for corporations into the text of the Fourteenth Amendment.

The confusion and uncertainty caused by the Supreme Court’s failure was anticipated in the late nineteenth century when the Court first refused to define the corporate person. Railroad corporations had structured a series of test cases believing that the Supreme Court would be compelled to determine the existence and meaning of corporate personhood. The Supreme Court, however, declined to address the “grave questions of constitutional law” whose “importance cannot well be over-estimated”.¹² The Court refused to address the question despite one Justice’s warning that: “The question is of transcendent importance, and it will come here [to the Supreme Court], and continue to come, until it is authoritatively decided. . . .”¹³

(1954–55) [hereinafter Graham, *Innocent Abroad*]; Howard J. Graham, *Buildded Better than They Knew*, 17 U. PITT. L. REV. 537 (1955–56) [hereinafter Graham, *Buildded Better*]; Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525 (1963–64) [hereinafter Graham, *Waite Court*]. Mr. Graham’s scholarship on the issue (including the articles cited above as well as others) is collected in HOWARD JAY GRAHAM, EVERYMAN’S CONSTITUTION: HISTORICAL ESSAYS ON THE FOURTEENTH AMENDMENT, THE “CONSPIRACY THEORY” AND AMERICAN CONSTITUTIONALISM (1968) [hereinafter GRAHAM, EVERYMAN’S CONSTITUTION].

¹² *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 410, 411 (1886).

¹³ *County of San Bernardino v. Southern Pacific Railroad Co.*, 118 U.S. 417, 423 (Field, J., concurring).

In fact, the question has continued to come to the Supreme Court. Indeed, *Hobby Lobby* and *Conestoga Wood* are merely the latest iterations of the corporate person question. For example, on September 9, 2009, during oral argument in *Citizens United v. Federal Election Commission*, a case testing the constitutionality of statutory limits imposed on corporate political speech, Justices Ruth Bader Ginsburg and Sonia Sotomayor reignited the debate.¹⁴

¹⁴ Transcript of Oral Argument at 4, 33–34, *Citizens United v. Federal Election Commission* (No. 08-205) [hereinafter *Citizens United Transcript*].

Citizens United, of course, involved the ability of the Federal government to restrict speech and, therefore, arose under the First Amendment’s Free Speech Clause. The scope of First Amendment protection, of course, is not explicitly limited to “persons.” In recent decisions, including *Citizens United*, the Court’s majority has rejected the notion that First Amendment protection of speech turns on whether “its source is a corporation” or a natural person. See *Citizens United v. Federal Election Commission*, ___ U.S. ___, 130 S. Ct. 876, 899-904 (2010), quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978). The majority opinions in such cases either explicitly or implicitly appear to rest on the proposition that:

The proper question therefore is not whether corporations “have” First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Federal statute] abridges expression that the First Amendment was meant to protect.

Bellotti, 435 U.S. at 776. In contrast to the majorities’ focus on the conduct protected, the dissenters in First Amendment cases do emphasize, among other things, their belief that the Amendment protects only natural persons, not corporations. See, e.g., *Citizens United*, 130 S.Ct. at 945-968 (Stevens, J. dissenting) (Arguing that Framers did not intend First Amendment to protect corporate speech and that ability of corporations to amass wealth as well as potential to exercise disproportionate and corrupting power in public forum provides rationale for excluding corporations from First Amendment protection). But see *Citizens United*, 130 S.Ct. at 928-29 (Scalia, J. concurring) (Arguing that: (1) an “individual person’s right to speak includes the right to speak in association with other individual persons”; (2) “the text [of the Amendment] offers no foothold for excluding any category of speaker” from individuals to partnerships to unincorporated associations to corporations.).

As discussed, *infra* at ___, the *Hobby Lobby* and *Conestoga Wood* opinions reflect deep disagreement about whether First Amendment Free Exercise Clause rights are inherently attributes of natural persons which can be exercised only by such natural persons. For example, all of the *Hobby Lobby* and *Conestoga Wood* opinions recognize that *Citizens United* held that corporate political speech was protected without regard to the corporate identity of the speaker. The opinions, however, diverge on whether religious exercise is a purely personal attribute of natural persons versus whether corporations’ Free Exercise rights are protected in order to protect the rights of the individuals who exercise such rights collectively through the corporate form. In those cases, then, whether a judge would permit the corporate *Hobby Lobby* or *Conestoga Wood* plaintiffs to assert Free Exercise rights ultimately depends on the judge’s view of the characteristics of the corporate person.

In contrast, whether corporate speech is protected against abridgement by state law depends on whether the corporate speaker is a “person.” The First Amendment applies to state regulation of speech through the due process clause of the Fourteenth Amendment, and the text of the Fourteenth Amendment—unlike the First Amendment—expressly protects only “persons.” Thus, the threshold question in any case asserting a First Amendment challenge to state regulation of corporate speech is whether the corporate speaker is a “person” protected by the Fourteenth Amendment. The Court routinely holds that corporate speakers are “persons” protected by the Fourteenth, and therefore, the First, Amendments. See, e.g., *Bellotti*, 413 U.S. at 780 (First Amendment freedoms have “always been viewed as

Justice Sotomayor opined that “[t]here could be an argument made that . . . the Court[] error[ed] when it created corporations as persons, gave birth to corporations as persons.”¹⁵ Earlier, Justice Ginsburg had asked counsel:

[a]re you taking the position that there are no differences in the First Amendment rights of an individual [and a corporation]? A corporation, after all, is not endowed by its creator with inalienable rights. So is there any distinction that Congress could draw between corporations and natural human beings for purposes of campaign finance?”¹⁶

Unlike most questions asked at oral argument, the Justices’ questions sparked public debate about the nature of the corporate person.

On September 17, 2009, *The Wall Street Journal* proclaimed “Sotomayor Issues Challenge to a Century of Corporate Law.”¹⁷ Asserting that “[p]rogressives have to feel reassured that this was one of [Justice Sotomayor’s] first questions,” the *Journal* also briefly sketched the utilitarian arguments for according corporations constitutional protections.¹⁸ Although pointing out that Justices as philosophically diverse as William O. Douglas and William Rehnquist have “vacillated” and “been skeptical” of the extent of corporate rights, the *Journal*, confidently

fundamental components of the liberty safeguarded by the Due Process Clause and the Court has not identified a separate source for the right when it has been asserted by corporations” which “for almost a century” have been held to be persons protected by the Fourteenth Amendment, citing *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394 (1886) and *Covington & Lexington Turnpike R. Co. v. Sanford*, 164 U.S. 578 (1896) (citations omitted from text)); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (Corporate speaker is a Fourteenth Amendment “person”, citing *Covington*, 164 U.S. 578, 592 (1896)). In addition, the protective cloak of certain Federal statutes is available only to “persons”. See, e.g., Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (“RFRA”).

¹⁵ *Citizens United* Transcript, *supra* note ____ at 33-34.

¹⁶ *Id.* at 4.

¹⁷ Jess Bravin, *Sotomayor Issues Challenge to a Century of Corporate Law*, WALL ST. J., Sept. 22, 2009, at A19.

¹⁸ *Id.*

declaimed that “[o]n today’s Court, the direction Justice Sotomayor suggested is unlikely to prevail” even though the Justice “may have found a like mind in Justice Ruth Bader Ginsburg.”¹⁹

On September 22, 2009, *The New York Times*²⁰ rejoined, asserting that “[t]o us, as well as many legal scholars, former justices and, indeed, the drafters of the Constitution, the answer is that the[ir] rights [of corporations] should be quite limited.”²¹ Acknowledging that “[t]he courts have long treated corporations as persons in limited ways for some legal purposes,” the *Times* stated that “corporations could not and should not” be allowed to do what, as artificial persons, no one ever has claimed they might do—“vote, run for office or bear arms.”²² The *Times* criticized “the Court’s conservative bloc” for betraying “their often-proclaimed devotion to the text of the constitution.”²³

The Justices’ questions, The *Journal* article and the *Times* editorial, all are founded on the supposed history of the constitutional corporate person. All appeal to a history that they imagine is consistent with their world-view.²⁴

¹⁹ *Id.*

²⁰ Editorial, *The Rights of Corporations*, N. Y. TIMES, Sept. 22, 2009, at A26. See also Linda Greenhouse, Opinion, “Over the Cliff”, N.Y. Times, Aug. 24, 2011, <http://opinionator.blogs.nytimes.com/2011/08/24/over-the-cliff/> (Discussing *Bellotti* and development of corporate speech jurisprudence); Martha C. White, “Idea of Company-As-Person Originated in Late 19th Century,” Wash. Post, Jan. 31, 2010 http://washingtonpost.com/wp-dyn/content/article/2010/01/30/AR_2010013000030.html

²¹ *Id.* There is no reason to believe that the “founders of this nation” even thought about the question. Corporations were addressed only once during the Constitutional Convention. James Madison and Charles Pickney sought to add a provision authorizing Congress to create corporations. The effort failed and corporations are not mentioned in the Constitution. See 2 RECORDS OF THE FEDERAL CONVENTION, at Chp. Saturday, August 18, 1787 (ed. Max Farrand 1911), available at <http://oll.libertyfund.org/title/1786/96066/2148049,2148056,2148090>; *id.* at Chap. Sept. 14, 1787, 96189/2150591, 2150630, 2150676.

²² *Id.*

²³ *Id.*

²⁴ Referring to Progressive Era theories about the manner in which corporations became constitutional persons, Howard Jay Graham offers an apt assessment that is capable of more general application:

This article argues that, while it is clear that there was no robber baron-driven corporate conspiracy to hijack the drafting of the Fourteenth Amendment, as was once popularly believed, constitutional protection for the corporate person became settled law because Justice Stephen J. Field, in a series of *ipse dixit* assertions, made it so. The historical significance of Field's achievement cannot be gainsaid: If "person," as used in the Constitution, does not include a corporation, a corporation is not entitled to equal protection of the laws and it is irrelevant whether the due process clauses imposes substantive limits on regulation of corporations. By establishing the constitutional corporate person as settled law, Field erected the foundation for the development of substantive due process and for the Court's *laissez-faire* era.

This article begins by reviewing the legal context in which the debate regarding the constitutional person arose. Two Federal Circuit Court cases in which Field first addressed the issue are examined. The article then examines the handling and resolution of Field's decisions by the Supreme Court of the United States, one of which, *County of Santa Clara v. Southern Pacific Railroad Co.*—thanks to Justice Field—has erroneously been viewed by "[m]any scholars, judges, and even U.S. Supreme Court Justices . . . as affirming the concept of corporate personhood because of an inaccurate headnote in the official published version of the opinion written by the Supreme Court Reporter, J.C. Bancroft Davis"²⁵

[T]he Beard's Conspiracy Theory, or, speaking more accurately, the progressive-New Deal generation's Conspiracy Theory, really was anachronized – "Pogo"-ized history. To quote the learned Walt Kelly, "Incongruity is the nature of the natural You develops a good memory, then you reverses the whole process" Forty years of constitutional development were misread, and read back into, that one word "person."

Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 VAND. L. REV. 525, 545 (1963-64).

²⁵ Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASH. L.J. 635, ____ (2010-2011) 662.

Thereafter, each Supreme Court decision expressly addressing the corporate person question between 1886, when *Santa Clara* was decided, and Justice Field's 1897 retirement is examined. This analysis demonstrates that Field unilaterally created a web of cross-corroborating decisions claiming that corporate personhood had been definitively established by Supreme Court precedent. Field did so largely based on the Reporter's headnote and accompanying commentary attributed to the Chief Justice, which he clearly knew falsely claimed that the corporate person issue had been decided in *Santa Clara*. Indeed, Field had contemporaneously castigated the Court for refusing to decide the question. Field was able to establish the existence of the constitutional corporate person by taking advantage of opportunities and personal prerogatives afforded by the Court's then far less collaborative decision-making process and, ultimately, through the silent acquiescence of his brethren on the Court.

This article then considers the practical implications of Field's actions, focusing first on whether Field's corporate person decisions, even if *sui generis*, nonetheless reflected the position of the Court or were simply one man's opinion. After concluding that Field was not authorized to speak for the Court on the issues, this article concludes, arguing that the discussion regarding corporate personhood needs to focus on what it means to be a corporate person and on identifying the source of corporate constitutional rights, not on whether or not "the Court[] error[ed] when it created corporations as persons, [and] gave birth to corporations as persons."²⁶ This is so for two reasons: First, the historical record demonstrates that the term "person" has universally been understood since at least the Colonial Era to include corporations. Second, Field's Supreme Court decisions established the constitutional corporate person by preemptory declaration. As a result, notwithstanding general agreement that corporate persons and natural persons share some

²⁶ *Citizens United* Transcript at 4, 33-34.

constitutionally protected rights, the corporate person has never had the benefit of incremental, evolutionary development that tests, validates and clarifies most common law concepts. Instead, the Court has never articulated a consistent, principled rationale for the corporate person, making it largely impossible—other than on a case-by-case basis—to identify the scope, nature or limits of such rights.

Finally, the circuit decisions in *Hobby Lobby* and *Conestoga Wood* are examined. The virtually unexplained and unexplainable discordant outcomes in *Hobby Lobby* and *Conestoga Wood* are merely among the latest illustrations of the confusion and contradictory precedent resulting from the Supreme Court’s failure to establish a definitive rationale explaining when a corporation may, and may not, assert the rights of a natural person. Failure to define the meaning of corporate personhood exhaults ad hoc judicial decision-making over the structure, predictability and even-handedness that the law ought to provide. This article then argues that the resultant uncertainty impedes meaningful assessment of the legal viability of complex statutes that attempt to restructure important societal programs and promotes divisiveness by creating the impression that the validity of such legislation is dependent on personal predilection rather than on consistently applied standards, both of which forestall effect implementation of such legislation. The Supreme Court can, and should, use *Hobby Lobby* and *Conestoga Wood* to eliminate the uncertainties and define the meaning of the corporate person.

II. Background

A. The Corporate Person in Historical Context

The status of corporations had been an issue in the early years of the Republic. For example, in 1823 the Supreme Court, interpreting the provisions of the treaty that ended the Revolutionary War, held that “there is no difference between a corporation and a natural person, in

respect to their capacity to hold real property”, and that the “civil rights of both are the same.”²⁷

Other state and federal courts reached the same conclusion in the early and mid-nineteenth century.²⁸

However, prior to adoption of the Fourteenth Amendment, corporations had limited protection from state regulation. Early on, in 1833, the Supreme Court held in *Barron v. Baltimore* that the Constitution’s Bill of Rights inhibited action by the federal government only and did not proscribe state action.²⁹ The only viable cause of action to challenge state regulation available to private corporations under the federal constitution was the claim that the regulation violated the proscription that states may not impair the obligations of contracts.

Initially, when the Court decided *Trustees of Dartmouth College v. Woodward*, it appeared that the argument that state regulations at odds with corporate charters constituted an unconstitutional impairment of contract might provide something of a bulwark against state regulation.³⁰ Such hopes were dashed, however, by the Court’s decision in *Charles River Bridge, Co. v. Warren Bridge*³¹ and its progeny which held, in effect, that, notwithstanding the terms of a corporate charter, states always retained the right to regulate in the public interest.

Adoption of the Fourteenth Amendment gave new hope to corporate interests that a Constitutional tool to defeat state regulation now was available to them. First, the Amendment expressly proscribed state actions. Second, the Amendment mandated that state actions must be

²⁷ *The Society for the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven*, 21 U.S. 464, 482 (1823) (Applying anti-divestiture provisions of treaties of 1793 and 1794 between United States and Great Britain.).

²⁸ See, *infra* at notes ____ ____.

²⁹ 7 Pet. 243 (1833).

³⁰ 4 Wheat. 518 (1819).

³¹ 36 U.S. 420 (1837). See also *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884) (Upholding state’s amendment of incorporation statute to permit price regulation.).

consistent with due process and guaranteed equal protection of the laws. Third, the Amendment expressly protected the rights of “persons.” Notwithstanding the debate that would later erupt, a long litany of English common law decisions, Supreme Court decisions and state court decisions provided a basis to believe that the term “person” included a corporation.³²

The Supreme Court, however, soon appeared to disagree. In 1873, the Supreme Court, in the *Slaughter-House Cases*³³—a case in which plaintiff-corporations claimed constitutional protection—interpreted the Privileges and Immunities Clause of the Fourteenth Amendment narrowly, making the Amendment, according to Mr. Justice Field, “a vain and idle enactment.”³⁴ Even more damning to corporate hopes, however, Mr. Justice Miller, writing for the five-justice majority, was virtually certain that only the recently freed slaves, could claim the protection of the Amendment:

The existence of laws in the states where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this [equal protection] clause
. . . 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. It is so clearly a provision for that race . . . that a strong case would be necessary for its application to any other.³⁵

Known as the “African race theory” of the Fourteenth Amendment, the supposed limitation, appeared to exclude corporations from *any* protections afforded by the Amendment.

³² *See, infra*, at ____.

³³ 16 Wall. 36 (1873).

³⁴ *Id.* at 83 (Field, J. dissenting).

³⁵ *Id.* at 71. For a thoughtful, and thought-provoking, re-examination of the *Slaughter House* cases, see Kevin Christopher Newsom, *Setting Incorporationism Straight: A Re-Interpretation of the Slaughter-House Cases*, 109 YALE L.J. 643 (2000); *see also* Akhil Reed Amar, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION PART II (1998).

A few years later, in *Munn v. Illinois*³⁶ and in *The Granger Cases*,³⁷ the Court upheld state price controls and other regulations against challenges that the state's exercise of such authority was precluded by the Fourteenth Amendment's due process clause. Taken together, the Court's *Slaughter-House* ruling appeared to exclude corporations from the coverage of the Fourteenth Amendment and, even if they had been covered, according to the *Munn* line of cases, the Amendment's due process clause afforded little substantive protection.

The rulings in the *Slaughter-House Cases*, *Munn* and *The Granger Cases* were a major problem for corporations, but especially for railroads which, unlike most other contemporary businesses, operated across state lines. Those cases seemed to say that each state was free to subject railroad corporations to whatever regulations and taxes each state's legislature deemed consistent with the public interest. The railroads began a campaign in the courts aimed at undermining the holdings of *The Slaughter-House Cases*, *Munn* and *The Granger Cases*. The decisions had special significance to business interests because they were rendered when the country was transforming from a locally-based economy to a national economy. That transformation was driven in large measure by building of railroads. In this sense, the railroad's impact on the national economy in the late nineteenth century parallels the significance of health care in the economy currently

Railroads—the first businesses to conduct large scale, interstate commerce—rendered state boundaries less significant in one sense, but more problematic in another. Perceived problems attributed to inconsistent and allegedly discriminatory state regulations led the railroads to seek to

³⁶ 94 U.S. 113 (1877).

³⁷ *Chicago, Burlington & Quincy R. Co. v. Iowa*, 94 U.S. 155 (1877); *Peik v. Chicago & Northwestern R. Co.*, 94 U.S. 164 (1877); *Chicago, Milwaukee & St. Paul R. Co. v. Ackley*, 94 U.S. 179 (1877); *Winona & St. Paul R. Co. v. Blake*, 94 U.S. 180 (1877); and *Stone v. Wisconsin*, 94 U.S. 181 (1877).

limit state regulation. In addition, as contrasted with the local artisan and agrarian-based economy that it was supplanting, the developing industrial economy was dependent upon capital investment of a magnitude beyond the means of a single individual. Because it allowed groups of investors to jointly fund an enterprise, existed in perpetuity and limited the potential liabilities and risks to which investors were exposed, the corporation became essential to economic growth.³⁸

Notwithstanding the early lack of success in the courts, the railroads firmly believed that popularly-elected legislatures could not be counted on to protect their interests, the railroads, therefore, continue to seek judicial relief. The railroads' efforts focused on establishing two cornerstone propositions: (1) that the term "person" as used in Section 1 of the Fourteenth Amendment (which guaranteed due process and equal protection of the law) included corporations; and (2) that corporate personhood meant that corporations, as aggregations of natural persons, derived rights from their incorporators and were entitled to assert the same rights and protections afforded natural persons.

Ultimately, the railroads achieved their first goal—albeit not exactly as they had planned—and the corporate person was established as a cornerstone of American law. They failed, however, to establish the "corporation aggregate" theory. Indeed, the railroads failed to obtain any settled, principled articulation of what it means to be a corporate person.

B. The Supreme Court's Seminal Decisions: the Corporate Person and the Fourteenth Amendment: *County of San Mateo v. Southern Pacific Railroad Co.* and *County of Santa Clara v. Southern Pacific Railroad Co.*

The Fourteenth Amendment, the second in the trilogy of Civil War Amendments, was drafted by the Joint Congressional Committee on the War and Reconstruction and proposed by

³⁸ Cf. Joseph E. Casson and Julia McMillen, *Protecting Nursing Home Companies: Limiting Liability Through Corporate Restructuring*, 3.6 JOURNAL OF HEALTH LAW 577, 577-580 (Fall 2003).

Congress on June 13, 1866. The Amendment became effective on July 9, 1868. The Amendment has two components of importance here, both of which are found in Section One: (1) the Privileges and Immunities clause; and (2) the Equal Protection and Due Process clauses.³⁹

1. Round One: *San Mateo* in the Circuit

The railroads sought to induce the judiciary to definitively hold that corporations were “persons” protected by the Fourteenth Amendment in a series of cases brought before Justice Field sitting as Circuit Justice, of which *County of San Mateo v. Southern Pacific Railroad*⁴⁰ was the first. *San Mateo* challenged the constitutionality of taxes authorized by the California state constitution. The *San Mateo* case, from its inception, was a test case designed to compel the Supreme Court to decide definitively whether corporations were persons within the meaning of the Fourteenth Amendment.⁴¹

It was no accident that the cases were brought in the court in which Field sat as Circuit Justice. Field had made clear, especially in cases such as *The Slaughter-House Cases*,⁴² *The Sinking Fund Cases*,⁴³ *Munn*,⁴⁴ *The Legal Tender Cases*⁴⁵ and *Bartemeyer v. Iowa*⁴⁶ that he read

³⁹ In its entirety, Section One of the Amendment reads as follows:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. XIV, § 1.

⁴⁰ 13 F. 722 (C.C.D. Cal., 1882, writ of error *dismissed as moot*, 116 U.S. 138 (1886). The case was originally filed in state court, but was removed to federal court. *See* 13 F. 145 (C.C.D. Cal. 1882).

⁴¹ 116 U.S. 138 (1886). Carl Brent Swisher, Stephen J. Field: CRAFTSMAN OF THE LAW 258 (The Brookings Institution 1930-2) (“Swisher”). (Both sides agreed that *San Mateo* would test validity of California taxes).

⁴² 83 U.S. 36, 83 (1873) (Field, J. Dissenting).

⁴³ 99 U.S. 700, 750 (1878) (Field, J. Dissenting).

⁴⁴ 94 U.S. 113 (1877) (Field, J. Dissenting).

⁴⁵ 110 U.S. 421, 451 (Field, J. Dissenting).

the Fourteenth Amendment far more expansively than most of his Supreme Court brethren with respect to both the scope of coverage and with respect to the substance of the protections afforded. When Field sat as Circuit Justice, Field's broader view of the Amendment, which became known as "Ninth Circuit Law," prevailed, not that of the Supreme Court.⁴⁷

Field also was a close friend of Leland Stanford, Charles Crocker, Mark Hopkins and Collis P. Huntington, the founders of the Central Pacific Railroad who also controlled the Southern Pacific Railroad. In fact, when Congress created a new Circuit for California, it was Stanford—then Republican governor of California—who urged President Lincoln to appoint California Supreme Court Chief Justice and War Democrat Stephen Field to the Supreme Court.⁴⁸

Such was the Stanford-Field relationship that Justice Field was one of the original trustees-for-life appointed to the Board of the newly-founded Stanford University.⁴⁹ Further, notwithstanding his position on the bench, Field provided legal advice and counsel to Stanford and, after Stanford's death, to Stanford's widow.⁵⁰ In fact, Field, as a practical matter, selected counsel—another Field friend, Hastings Law professor, John N. Pomeroy—to represent the Southern Pacific before Field in the Circuit Court.⁵¹ At the time it was rumored—and ultimately

⁴⁶ 85 U.S. 129, 139-141 (Field, J. concurring in judgment).

⁴⁷ Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 *Yale L.J.* 851, 881-88 (1943) (Discussing Field's propensity to follow his Supreme Court dissents in the Circuit and reaction thereto.)

⁴⁸ Swisher, *supra* note ____ at 243-246; Paul Kens, *THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888*, 102-105 (THE UNIV. OF S. CAR. PRESS 2010).

⁴⁹ Stanford University, "The Founding Grant With Amendments, Legislation, and Court Duress" 3 (Stanford University 1987). Note that federal Circuit Judges Lorenzo Sawyer and Matthew P. Deady also were among the original trustees.

⁵⁰ Swisher, *supra* note ____ at 245; Paul Kens, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 190 (University Press of Kansas 1997).

⁵¹ C. Peter Magrath, Morrison R. Waite: *The Triumph of Character* 221 (The Macmillan Co. 1963); Howard Jay Graham, *Four Letters of Mr. Justice Field*, 47 *YALE L.J.* 1100, 1106 (1937-38) (hereinafter "*Four Letters*").

shown to be true—that Field provided confidential information—including internal court memoranda—and advice to railroad interests, both with respect to the presentation of cases before courts on which he sat and with respect to the deliberations of such courts.⁵² To state the obvious, the railroad’s case in Field’s court, at the very least, assured a professionally and personally sympathetic audience.

San Mateo originated when the County sued the railroad for delinquent taxes.⁵³ The gravamen of the railroad’s defense was that the tax illegally denied the railroad equal protection of the law because all taxpayers, other than railroads, were assessed based on the net value of their property, after any mortgage was deducted. Railroads, however, were taxed on the full assessed value of their property, without any allowance for mortgages.⁵⁴ This had substantial financial implications for the railroads because, generally speaking, the mortgages on railroad property far exceeded the value of the property. Thus, if the railroad’s suit was successful, they would pay no property tax while earning substantial profits in California.⁵⁵ According to the railroad, the differential treatment “subjected them to an unjust proportion of the public burdens and denied the equal protection of the laws guaranteed by the Fourteenth Amendment of the federal constitution.”⁵⁶

⁵² *Four letters, supra* note ___ at 1106. *See also* *Kens, supra* note ___ at 239-40. Field seemed unfazed by such rumors. For example, the evening that the Supreme Court arguments in *San Mateo* concluded, Field attended a dinner given for the railroad’s counsel by Stanford at a Washington restaurant.

⁵³ 13 F. 722, 724 (C.C.D. Cal.).

⁵⁴ 13 F. at 726

⁵⁵ *See, infra* at ___

⁵⁶ 13 F. at 729. The Complaint filed by the county is a short (five paragraphs), straight forward statement that the tax assessed pursuant to state law had not been paid and demanding payment. *See* Complaint at 1-2, *San Mateo* Transcript of Record *supra* note ___. In contrast, the railroad’s Answer is lengthy, meandering and repetitive. *See* Answer at 2-15, *San Mateo* Transcript of Record *supra* note ___. Although the Answer addresses state law, those allegations arguably (but not, clearly) are not independent claims for relief. Instead, they seem to have been included

Although the railroad's Answer included allegations that the California tax had been imposed in violation of state law,⁵⁷ in addition to the constitutional challenges, the state law allegations were cursory and were buried in claims of illegal discrimination. The state law claims were virtually ignored in both the briefing and arguments.⁵⁸

Predictably, the plaintiff County argued that the Supreme Court's decision in the *Slaughter-House Cases*⁵⁹ barred the railroad's claims: "[t]he Fourteenth Amendment of the constitution . . . was adopted to protect the newly-made citizens of the African race . . . and should not be extended beyond that purpose."⁶⁰ Accordingly, the County argued, "corporations are not persons within the meaning of that amendment."⁶¹

In 1882, Justice Field held that the taxes unconstitutionally discriminated against the railroad.⁶² Justice Field first characterized "[t]he questions thus presented" as of "the greatest

primarily to provide background for the federal claims. The federal claims include: (1) that the railroads were denied a hearing to challenge the tax; (2) that the assessment was ad hoc; (3) that the railroad was the victim of discrimination because it was not permitted to offset the mortgage on its property; (4) that the railroads were denied rights given all other persons; (5) that the assessments were excessive, applying to a higher proportion of the value of the railroad's property than any other property; (6) that the railroads, as federal corporations, could not be taxed by the state; and (7) that the tax was applied to property not owned by the railroads. *See id.*

⁵⁷ See Answer at 10-11, §§ XXV, *San Mateo* Transcript of Record, *supra* at ____.

⁵⁸ The Circuit argument made on behalf of the railroad by Professor John Norton Pomeroy rested on four propositions, all based on the Constitution. First, "[p]rivate corporations are "persons" within the meaning of section one of the Fourteenth Amendment" Second, "[t]he mode of assessing the defendant prescribed by the Constitution of California, and the assessment made thereunder, violate the [due process] clause of section one of the Fourteenth Amendment" Third, the tax "violate[s] the [equal protection] clause of . . . the Fourteenth Amendment" Fourth, "[t]he power reserved to the State . . . to alter . . . charters of private corporations does not take the defendant out from those guarantees of the Fourteenth Amendment" See Argument for Defendant by John Norton Pomeroy at 1-2 (C.C.D. Cal.), *San Mateo* Transcript of Record, *supra* note ____.

⁵⁹ 83 U.S. 36 (1873).

⁶⁰ 13 F. at 729-30.

⁶¹ 13 F. at 730.

⁶² 13 F. 722 (C.C.D. Cal. 1882). Circuit Judge Lorenzo Sawyer concurred and wrote a separate opinion.

The case was argued from August 21 to 29, 1882 in the Circuit. Swisher, *supra* note ____ at 214. See Argument of Creed Haymond at 1 (C.C.D. Cal.), contained in Supreme Court Transcript of Record, *County of San Mateo v.*

magnitude and importance” and “of the highest interest” to “all corporations in the United States.”⁶³ After stating that “it is not possible to conceive of equal protection . . . where arbitrary and unequal taxation is permissible,” Field turned to the pivotal question: “[i]s the defendant, being a corporation, 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?”⁶⁴

Holding that a corporation was a protected “person”, Field began his analysis by rejecting the plaintiff’s *Slaughter-House*-based argument that the Fourteenth Amendment protected “only the newly-made citizens of the African race.”⁶⁵ Quoting at length from Chief Justice Marshall’s *Dartmouth College* opinion, Field held that the words used in the Fourteenth Amendment were so clear and well understood that the intent of the authors was largely irrelevant:

It is more than possible that the preservation of rights of this description [*i.e.*, corporate] was not particularly in view of the framers of the constitution when the clause under consideration was introduced into that instrument . . . but although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless

Southern Pac. R. Co., No. 1063 (U.S. Oct. 1885) (Copy in possession of author; original in Supreme Court records maintained in Library of Congress) (noting that, in addition to Mr. Haymond, the case in the Circuit was argued by “Ex-[California Supreme Court] Chief Justice Rhodes, Attorney-General Hart, District Attorney Tolles of Marin County, and District Attorney Ware of Sonoma County for the plaintiffs, and by Professor Pomeroy, Mr. T. I. Bergin, and Mr. T. B. Bishop for the defendants, and by Governor Johnson . . .”).

⁶³ 13 F. at 730.

⁶⁴ 13 F. at 738.

⁶⁵ 13 F. at 738-741. Field, in an earlier opinion denying a motion to remand the case to state court, had acknowledged that the “amendment was undoubtedly proposed for the purpose of fully protecting the newly-made citizen of the African race in the enjoyment of their freedom....” *County of San Mateo v. Southern Pacific Railroad Co.*, 13 F.145, 149 (C.C.D. Cal. 1882).

some plain and strong reason for excluding it can be given . . . the case being within the words of the rule must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous or repugnant to the general spirit of the instrument, as to justify those who expound the constitution in making an exception.⁶⁶

“[T]hat authority,” Field concluded, precluded a “narrow view” of the Amendment because “[i]t has a broader operation,” prohibiting a state from “depriv[ing] anyone of rights which others similarly situated are allowed to enjoy.”⁶⁷

This was not a new approach for Field. On Circuit, Field had previously and routinely ignored the “African race” limitation of the *Slaughter-House cases*. Indeed, Field’s *Slaughter-House* dissent was a more accurate statement of the governing law in the Circuit than Justice Miller’s opinion for the *Slaughter-House* Court. Field, for example, in some circumstances utilized the Fourteenth Amendment to overturn state legislation that discriminated against the Chinese.⁶⁸

⁶⁶ 13 F. at 741, *quoting* 4 Wheat. at 644 [internal quotation marks omitted].

⁶⁷ 13 F. at 741. Field’s approach exploited the weakness in the textual argument relied upon later by, among others, Justices Black and Douglas. *See Wheeling Steel Corp. v. Glander*, 337 U.S. 572, 576 (1949) (Douglas, J. dissenting); *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J. dissenting). That argument would define “persons” and “citizens,” used earlier in the Amendment as referring to the same individuals—the Freedmen—because they were the intended beneficiaries of the Amendment. It is, however, difficult to imagine that the Reconstruction Congress or the ratifying states would have agreed that the Amendment protected only one race to the exclusion of all others. Certainly, given the time, an argument that the Amendment intended to confer on the Freedmen greater protection than the constitution provided to white citizens, would be farfetched. *See* Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About Its Interpretation*, 39 AKRON L. REV. 289, ___ (2006).

⁶⁸ *See* 13 F. at 761 (Sawyer, J. *concurring*) (Rejecting “African-race” theory, noting that Amendment was applied in the Ninth Circuit to protect Chinese immigrants.). Field wrote the concepts of constitutional personhood and liberty that he had articulated in his *Slaughter-House*, *Sinking Fund* and *Granger* dissents into Ninth Circuit law in largely unappealable habeas corpus and other cases. *See, e.g., Waite Court*, *supra* note ___ at 524. Although Field early in his career rejected attempts to deny the Chinese the right to engage in lawful occupation, some have argued that his

Arguably, the most important aspect of Field’s *San Mateo* opinion is the analysis—generally overlooked—of the reason that corporate property rights are protected by the Amendment. Rather than following John Marshall’s dictum in *Trustees of Dartmouth College v. Woodward*⁶⁹ that “[b]eing the mere creature of law [a corporation] possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence”, Field followed the common law “corporation aggregate” approach, and found that corporations acquire protected rights derivatively because the Amendment protects “the property of the corporators.”⁷⁰

Field’s analysis begins by acknowledging that “[p]rivate corporations are, it is true, artificial persons,”⁷¹ and immediately looks through the corporate form to the “aggregations of individuals united for some legitimate business.”⁷² Asserting that corporations were profligate, meeting almost every need of the people and “enrich[ing] and enobl[ing] humanity,” Field stated his overarching principle:

solicitude was really for the corporations that would have employed the Chinese had they been legally able to work. Be that as it may, Field extended the scope of the amendment beyond citizens to include resident aliens, among others. *See, e.g., Innocent Abroad, supra note ___ at 536; Waite Court, supra note ___ at 175.* By 1884, Field’s “Ninth Circuit Law” became so great an intrusion upon the Western states’ ability to legislate that it became the object of a campaign to roll it back. *See Kens, supra note ___ at 190.*

⁶⁹ 4 Wheat. 518, 636 (1819).

⁷⁰ 13 F. at 746-48. Some writers characterize this approach as being grounded in partnership theory. *See Mark, supra note ___ at 1463.* Field had utilized this approach in refusing to remand the case to state court: “If [the Amendment] also include[s] artificial persons, [such] as corporations, . . . it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation.” 13 F. at 151.

⁷¹ 13 F. at 743.

⁷² 13 F. at 743. *Compare Bank of the United States v. Deveaux*, 5 Cranch 86, (1809) (on which Field relied, in which Chief Justice Marshall applies English common law and looks through corporation to identities of individual corporators). *See also Bacox v. Robins*, 18 How. 480, 485 (1855) (Discussing common law principles which “have been adopted in the United States[’]” cases characterizing corporations as “private partnerships” and holding that individuals associated in corporations are not thereby “deprived of their civil rights.”).

It 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. We cannot accept such a conclusion.⁷³

According to Field, “the property of a corporation is in fact the property of the corporators,” so that “[t]o deprive the corporation of its property, or to burden it, is, in fact, to deprive the corporators of their property or to lessen its value.”⁷⁴ If a “corporation is deprived of its property . . . in every just sense of the constitutional guarantee, [the corporators] are also deprived of their property.”⁷⁵ Field argued that his conclusion was nothing new: “it is well established by numerous adjudications of the supreme court of the United States and of the several states, that whenever a provision of the constitution, or of a law, guaranties [*sic*] the enjoyment of property . . . the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents.”⁷⁶

In other words, corporations are treated as legal persons in order to protect the incorporators who, as natural persons, clearly are “persons” protected by the Amendment. Field points out that in *The Society for the Propagation of the Gospel in Foreign Parts v. Town of New-Haven*, the Supreme Court had held that the term “person,” as used in the 1783 Treaty of Peace

⁷³ 13 F. at 747.

⁷⁴ 13 F. at 747.

⁷⁵ 13 F. at 747. Note: In the published opinion, the sentence states that “in every just sense of the constitutional guarantee corporations are also deprived of their property.” Read in context, use of “corporations” is a scrivener’s error, the correct word is “corporators.”

⁷⁶ 13 F. at 744.

with Great Britain, included corporations.⁷⁷ Next, Field asserts that “[t]he same point was presented in . . . *Marshall v. Baltimore and Ohio Railroad Company*”⁷⁸ which held:

A citizen who has made a contract, and has a controversy with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons . . . and that his contract was made with them as the legal representatives of numerous unknown associates, who were secret and dormant partners.⁷⁹

Although the Supreme Court’s decisions were far from consistent—and Field ignored those, like *Dartmouth College*, seemingly at odds with his view—Field did have a point. In 1882 when Field was writing, a substantial number of Federal court decisions could have been cited for the proposition that corporations possessed rights derived from the natural persons who had incorporated them.⁸⁰

⁷⁷ 13 F. at 744-45, *discussing* 8 Wheat. 464 (1823). Field noted that the *Town of New-Haven* Court had rested its conclusion that “when necessary” a court “will look beyond the name of the corporation to reach and protect those whom it represents,” 13 F. at 745, on *Bank of the United States v. Deveaux*, 5 Cranch 86 (1809). Field did not indicate, however, that *Deveaux* had been overruled, at least in part, by *Louisville, Cincinnati, and Charleston Railroad Company v. Letson*, 43 U.S. 497 (1844). Arguably, the decision was overruled on unrelated grounds because the Court continued, for some purposes, to look through the corporate form to the character of the incorporators. *See supra* note ____.

⁷⁸ 16 How. 326 (1853).

⁷⁹ 13 F. at 746.

⁸⁰ The Supreme Court of the United States had held that the term “person” included a corporation, whether the term was used in a treaty pre-dating the Constitution, *The Soc’y for the Propagation of the Gospel in Foreign Parts v. The Town of New-Haven*, 21 U.S. 464 (1823), in criminal statutes, *United States v. Amedy*, 11 Wheat. 392, 412-13 (1826) (Story, J.), in civil statutes, *Beaston v. The Farmers’ Bank of Delaware*, 37 U.S. 102, 134-35 (1838), or in the Constitution itself, *The Bank of the United States v. Deveaux*, 9 U.S. 61, 86-92 (1809) (appearing to adopt corporation aggregate theory and looking through corporate form to person who incorporated the entity). *Cf. Bacon v. Robertson*, 59 U.S. 480, 485-89 (1855) (Stockholders not “deprived of their civil rights *inter se*,” because they associate in corporation.) At about the same time, several federal circuit courts also had occasion to address, or comment on the corporate person issue. *See, e.g., Spring Valley Water-Works v. Bartlett*, 16 F. 615, 621-22 (C.C. D. Cal. 1883)

Field continued, arguing that provisions protecting “persons” against the deprivation of life, liberty and property without due process of law were found in nearly all state constitutions⁸¹ and that:

At all times, and in all courts, it has been held, either by tacit assent or expressed adjudication, to extend, so far as their property is concerned to corporations. And this has been because the property of a corporation is in fact the property of the corporators.⁸²

Field asserted that his view was supported by “[d]ecisions of state courts . . . in [such] numbers” that it was “unnecessary to cite them.”⁸³ Further, according to Field, “all text writers, in all civil

(Municipal corporation subject to judicial process “as any other body or person, natural or artificial”) (Sawyer, J.); *Indiana ex rel. Wolf v. Pullman Palace Car Co.*, 16 F. 193, 198, 200 (C.C. D. Ind. 1883) (Equating corporations and persons with respect to state taxation and right to engage in interstate commerce); *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. 393, 293-94 (C.C. N.D. Ill. 1873) (holding that corporations were “persons” protected by the “act of the 20th April, 1891 (17 Stat. 13)”, i.e., the Civil Rights Act of 1871); *Live-Stock Dealers & Butchers’ Ass’n. v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. 649, 651 (C.C. D. La. 1870) (Privileges and Immunities Clause protects corporations.) (Bradley, Cir. J.); *United States v. McGinnis*, 26 F. 1090, 1091 (D. N.J. 1866) (Noting that criminal provisions of internal revenue act apply to “persons” which is defined to include corporations.). *But see Insurance Co. v. New Orleans*, 13 f. Cs. 67, 67-68 (C.C. D. La. 1870) (Woods, J.) (Corporations not protected by the Fourteenth Amendment.).

⁸¹ 13 F. at 747.

⁸² 13 F. at 746-47.

⁸³ 13 F. at 747. State courts, primarily, interpreting state statutes, in fact, almost universally had concluded that the term “person” included corporations.

New York: *New York v. The Utica Insurance Co.*, 15 Johns. 358, [15], 8 Am. Dec 243 (1818). (Court was “unable to discover any possible grounds on which [corporations] can claim an exemption from the prohibitions contained in [an] [] act” . . . declar[ing] that no *person* “could engage in certain banking-related activities.” (italics in original)). (N.B.- Where page number is in brackets, West Law print of case lacks original page numbers; citation refers to page of printed hard copy.); *The British Comm. Life Ins. Co. v. City and County of New York*, 1865 WL 3890 at *12 (N.Y. 1864) (Holding that “[g]enerally, under “persons” as used in the laws providing for taxation, corporations have been included. . . .” (citations omitted)). *See also Ontario Bank v. Brunnell*, 10 Wend. 186 [at 4-5] (N.Y. S.Ct. 1833) (Noting that “upon the authority of the cases which included corporations within the term inhabitants” the court previously held “persons” to include corporations); *People ex rel. Bank of Watertown v. Assessors*, 1 Hill 616, 620-21, 1841 N.Y. LEXIS 141 **8-10 (N.Y. S.Ct. 1841) (Corporation aggregate is artificial person capable of transacting business like a natural person.); *Bailey v. City of New York*, 1 N.Y. Leg. Obs. 163, 3 Hill 531, 38 Am. Dec. 669 [6] (N.Y. S.Ct. 1842) (municipal corporation “stands on same footing as would any individual or body of persons.”); *Indiana v. Woram*, 6 Hill 3, [at 3-4] (N.Y. S.Ct. 1843) (statute regarding enforcement of promissory notes; “[i]t did not require the aid of the legislature to prove that the word *person* . . . shall be construed to extend to every

corporation....”) (italics in original)); *Brower v. Mayor*, 3 Barb. 254 [3] (N.Y. S.Ct. 1848) (municipal corporation owning lands bound by same obligation as a private person); *Milhaw v. Sharp*, 15 Barb. 193 [12] (N.Y. S.Ct. 1853) (“Whether they be a corporation or individuals” the law treats them “merely as persons dealing with property without legal authority.” (internal quotations omitted)).

Massachusetts: had come to the same conclusion a few years earlier. See *Maine Bank v. Butts*, 9 Mass. 49, 1812 WL 882 **3-4 (Mass. 1812) (Holding that, although corporations were not named, statute applicable to persons, applied to corporations); *Portsmouth Livery Co. v. Watson*, 10 Mass. 91, 92 1813 Mass. LEXIS 58 *3 (Mass. 1813) (“Corporations are artificial persons . . .”). See also *Greene Foundation v. Boston*, 66 Mass. 54, 59-61, 1853 WL 5106 *4 (Mass. 1853) (By statute, the word “person” includes corporations); *Otis Co. v. Ware*, 8 Gray 509, 74 Mass. 509, 1857 WL 5914 *2 (Mass. 1857) (Statutes uniformly construed so that “all the varied forms of expression, ‘inhabitants,’ ‘persons’ or ‘individuals’ apply equally to corporations and individuals.”).

Virginia: *Stribbling v. Bank of the Valley*, 5 Rand 132, 26 Va. 132, 1827 WL 1994 at *5, 6 (Va. 1827) (Opinion of Carr, J.) (“Some pretty strong cases to . . . the effect [that corporations are persons] were cited at the bar;” it is “clear, therefore, that corporations, generally, are within the usury law”); *id.* at *10 (Opinion of Green, J.) (“Corporations are, in their nature, bound as individuals are by the general laws regulating contracts....”); *id.* at *30 (Opinion by Cabell, J.) (“The term ‘person,’ used in the law, is unquestionably sufficiently comprehensive to embrace corporations....”). But see *id.* at *24 (Opinion by Coalter, J.) (“It seems to me, however, that a corporation is not a *person* who can be punished under the . . . Act....”) (emphasis in original); *Crafford v. Board of Supervisors*, 12 S.E. 147, 148, 149 (Va. 1890). (“In the Code of 1849 (chapter 16, §17, p. 101)” it is provided that the word “persons” in a statute “[m]ay extend to and be applied to bodies politic and corporate”; “The omission of the word “corporation” does not exclude them, for this act uses a word “persons,” which may include them, and which must include them, unless it was the manifest intention of the legislature to exclude them from the operation of the act.”). See also *Bank of Marietta v. Pindall*, 2 Rand. 465, 23 Va. 465, 1824 WL 1213 *5 (Va. 1824) (Equating natural and artificial persons.); *Bank of the United States v. Merchants Bank*, 40 Va. 573, 1843 WL 2778 *10 (Va. 1843). (“The circumstances in which [corporations] [] are placed by our act are identical with those of the natural person.”); *Balt. & Ohio R.R. Co. v. Gallahue’s Adm’rs.*, 12 Gratt. 655, 53 Va. 655, 1855 WL 3512 *5 (Va. 1855) (Under the common law and by statute “[w]hen the word person is used in a statute, corporations as well as natural persons are included for civil purposes.”).

Pennsylvania: *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & Rawls 173, 1827 WL 2649 at *4 (Pa. 1827) (“When the word *persons* is used in a statute, corporations as well as individuals are included.”) (italics in original).

Connecticut: *Knox v. The Protection Ins. Co.*, 9 Conn. 430, 1833 WL 50 at *4 (Ct. 1833) (“The word *person* is, indeed, used in the statute. . . . But a corporation is a person,” citing “*People v. Utica Ins. Co.*, 15 Johns Rep. 358, 382, and *Rex v. Gardner*, Coup. 79 and Coke, 2 Inst. 703.”).

Maryland, New Hampshire, Illinois, Alabama and Kentucky: See *Maryland v. Bank of Maryland*, 6 G&J 205, 220-221, 1834 Md. LEXIS 16 **24-26 (Md. 1834); *Hodgon v. Port. Stage Co.*, 9 NH 394, 1838 WL 1260 *2 (N.H. 1838). *County of Richland v. County of Lawrence*, 12 Ill. 1, 1850 WL 4304 at *8 (Ill. 1850); *City of Louisville v. University of Louisville*, 15 B. Mon. 642, 54 Ky. 642, 1855 WL 4186 at *16-17 (Ky. Ct. App. 1855). *Planters’ and Merchants Bank v. Andrews*, 8 Port. 404, 1839 WL 1496 at *11 (Al. 1839) (“[I]t is well settled, that the term “*person*” in a statute, embraces not only *natural*, but *artificial* persons. . . .” (emphasis in original)).

Mississippi: *Commercial Bank of Manchester v. Nolan*, 7 How. (Miss.) 508, 8 Miss. 508, 1843 WL 3217 at *10 (Miss. Err. & App. 1843). (“[T]he cases, . . . all hold that corporations are included in the word persons in a general statute.”); *Grand Gulf Bank v. Archer*, 8 Smedes & M 151, 16 Miss. 151, 1847 WL 2649 at *7, *14 (Miss. Err. & App. 1847). (“[I]t is not now to be doubted, that corporations are subject to the general laws of the land, so far as applicable to them.”).

Georgia: *South Carolina R.R. Co. v. McDonald*, 5 Ga. 531, 1848 WL 1585 at *3 (Ga. 1848). ([W]here the law-making power uses the word *person* . . . it is to be presumed that the *legal* meaning is intended, and not the social or

codes, and in revised statutes” have concluded that “the term ‘person’ includes, or may include, corporations . . . whenever it is necessary for the protection of contract or property.”⁸⁴

ordinary meaning.) (emphasis in original) *See also id.* at *4 (“[C]orporations for commercial . . . purposes were [in 1799] [] known to the law, and to all intelligent legislators . . . who could not have been ignorant or unobservant of these facts;” “[O]ne rule of statutory construction recognized in England, and by the Supreme Court of the United States which is conclusive . . . is this [:] Corporations are to be deemed and considered as *persons*, when the circumstances in which they are placed are identical with those of natural persons, expressly included in a Statute.”) (emphasis in original); *South-Western R.R. Co. v. Paulk*, 24 Ga. 356, 9 1858 WL 2210 at *5 (Ga. 1858). (“The word person, both in civil and penal statutes, applies to *artificial* as well as *natural* persons.”) (emphasis in original). New Jersey: *United States v. McGinnis*, 1 Abb. U.S. 120, 26 F.Cas. 1090, 1091 (D. N.J. 1866) (Criminal provision of internal revenue statute (13 Stat. 229 § 15) defines person to include partnerships, firms, associations, and corporations). Because such statutes are strictly construed, including corporations within “persons” reflects that such meaning was both customary and near universal. *But see Ohio v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611, 614, 1874 WL 19 at *2 (Ohio 1874) (“Person” in criminal statutes means natural persons only.).

California: *Douglas v. Pacific Mail Steamship Co.*, 4 Cal. 304, 306, 1854 WL 730 at *2 (Cal. 1854). (“[T]he word ‘person,’ in its legal significance, is a generic term, and was intended to include artificial as well as natural persons.”). *See also People v. Board of Supervisors*, 21 Cal. 668, 695, 1863 WL 521 at *21 (Cal. 1863) (Field, C. J.) (“[T]he vital question is not one of names, but of persons—is the same individual, whether natural or artificial, in existence?”); *Pimental v. City of San Francisco*, 21 Cal. 351, 362, 1863 WL 484 at *8 (Cal. 1863) (Obligation “to do justice . . . rests upon all persons whether natural or artificial.”); *Argenti v. City of San Francisco*, 16 Cal. 255, 266, 1860 WL 947 at *6 (Corporations on same footing as natural persons), *on reh.*, 16 Cal. at 282, 1860 WL 947 at *18 (Cal. 1860) (Field, C. J.) (same); *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453, 467-68, 1858 WL 820 at *13-15 (Cal. 1858) (Statute makes no distinction between rules “applicable to natural persons and those applicable to artificial persons;” same pleading rules apply to “corporations as with individuals.”) (Field, J.); *Hunt v. City of San Francisco*, 11 Cal. 250, 258, 1858 WL 737 at *7 (Cal. 1858) (same) (Field, J. concurring); *Touchard v. Touchard*, 5 Cal. 306, 307, 1855 WL 749 *2 (Cal. 1855) ([A] corporation, both by the civil and common law, is a person, an artificial person . . . treated as a private person, and its contracts construed in the same manner and with like effect as those of natural persons.”).

State cases decided after the Fourteenth Amendment was drafted but around, and just after, the time that the *San Mateo* and *Santa Clara* cases were making their way to the Supreme Court continued to hold that “persons” included corporations. *See, e.g., City of Detroit v. Det. & Howell Plank-Road Co.*, 43 Mich. 140, 147-48, 5 N.W. 275, 280 (Mich. 1880). (Cooley, J.). *See also Chicago & Alton R.R. Co. v. People ex rel. Koerner*, 67 Ill. 11, 16 AM. REP. 599 1873 WL 8118 *7 (Ill. 1873) (Holding that constitutional provisions forbidding deprivation of life, liberty or property without due process of law and which guarantee the right of trial by jury are designed to apply only to natural persons, but may also be invoked by artificial persons to protect their property.). *Dickie v. Boston and Albany R.R. Co.*, 131 Mass. 516, 1881 WL 11353 at *2 (Mass. 1881) person “includes corporations and applies to the defendant.” *quoting*, “Gen. Sts. c. 3, § 7, cl. 13.”) *See also Brookhouse v. Union Rwy. Co.*, 132 Mass. 178, 1882 WL 14634 at *2 (Mass. 1882). *Shockley v. Fisher*, 75 Mo. 498, 1882 WL 9267 at *2 (Mo. 1882). (“[W]hether we go by the common law rule or by the statutory provision . . . , there is no doubt that section 354 [relating to assignments by debtors], will apply as well to a corporation as to a person.”) *See also Loring v. Maysville Creamery Assoc.*, 70 Mo. App. 54, 1897 WL 2060 at *2 (Mo. 1897) (Applying statutory definitions of persons to “bodies corporate as well as individuals”). *Albion Nat. Bank v. Montgomery*, 74 N.W. 1102, 1102 (Neb. 1898). Rejecting the argument that, because “the statute under consideration was penal in nature” the term “persons” should be strictly construed to apply only to natural persons.

⁸⁴ 13 F. at 747-48. In statutes adopted in the late middle of the nineteenth century, at about the same time as the Fourteenth Amendment, Congress often expressly defined the term “person” to include corporations. These statutes were written by many of those who drafted the Fourteenth Amendment and their contemporaries. They would,

The universal use of “person” to include a corporation made it obvious to Field that “[a]ll the guaranties [*sic*] and safeguards of the constitution for the protection of property possessed by

therefore, seem to offer first hand insight into the meaning the Fourteenth Amendment’s drafters—if asked—would have given the term “persons.”

In 1867, for example, the Thirty-Ninth Congress adopted “An Act to establish a uniform System of Bankruptcy throughout the United States. Act of Mar. 2, 1867, 14 Stat. 517, C. CLXXVI § 48 (1867). *See also* 1 Rev. Stat. 967 § 5013 (1878). Section 48, “Meaning of Terms” provided that, as used in the Act, “the word ‘person’ shall also include ‘corporation.’” Act of Mar. 2, 1867, 14 Stat. 540, C. CLXXVI § 48 (1867). One year later, in 1868, the Fortieth Congress adopted a series of statutes that provided “[t]hat where not otherwise distinctly expressed or manifestly incompatible with the intent thereof, the word ‘person’, as used in this act, shall be construed to mean and include a firm, partnership, association, company, or corporation, as well as a natural person....” Act of July 20, 1868 § 104, 15 Stat 166 § 104 (1868).

Unlike earlier legislation which tended to provide *ad hoc* definitions, in 1871, the Forty-First Congress adopted generally applicable rules in the “Dictionary Act,” “prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof.” Act of Feb. 25, 1871, 16 Stat 431 C. LXXI. The Act provided: “That in all acts hereafter passed ... the word ‘person’ may extend and be applied to bodies politic and corporate.” Act of Feb. 25, 1871 16 Stat 431 § 2.

In 1872, a proposal was made to revise and simplify the United States Statutes. Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose: In Two Volumes as Bound for Examination by the Committee of the House of Representatives of the Forty-Second Congress, on the Revision of the Laws (1872) (hereafter “Revision of the United States Statutes”). That proposal suggested that the Dictionary Act be revised to delete “body politic” from the definition of “person,” so that the Act would read “the word ‘person’ may extend and be applied to partnerships and corporations.” *Id.* Ch. III § 22. The proposal also recommended removal of the definition of person “in section 48 of the Act of 1867” regarding bankruptcy because the “substance of [the definition] [] is sufficiently embraced in the Title General Provisions.” *Id.* p. 13 vol. 2. The proposal was adopted in 1873. Act of Dec. 1, 1873, 1 Rev. Stat. 1 § 1 (1873). *Compare* Act of Mar. 2, 1867 C. 176 §48 14 Stat. 540 (1867). Similarly, the proposed revision recommended that the general internal revenue laws be amended to provide that “[t]he word ‘person,’ as used in this Title, shall be construed to mean and include a firm, partnership, association, company, or corporation, as well as a natural person except where it is manifestly incompatible with the intent of the provisions in which that word is used.” 2 Revision of the United States Statutes, Title XXXVIII, “Internal Revenue,” Ch. I, § 1. *See also* 1 Rev. Stat 974 § 5013 (1875) (as adopted).

On April 27, 1876, Congress passed an act incorporating the Mutual Protection Fire Insurance Company of the District of Columbia. Act of April 27, 1876, 19 Stat. 38 (1876). Section 5 of the act provides “the word ‘person’ as used in this act shall be held to include corporations also.” *Id.* at § 5. The Forty-Fourth Congress, in 1877, revised the Statutes at Large to provide that, “where not otherwise distinctly expressed or manifestly incompatible with the intent thereof the word ‘person,’ as used in this title, shall be construed to mean and include a partnership, association, company, or corporation, as well as a natural person.” Act of Feb. 27, 1877, 19 Stat.248 (1877). Finally, in 1890, the Fifty-First Congress adopted the Sherman Anti-Trust Act. Act of July 2, 1890, 26 Stat 209 (1890). Section 8 of the Act provided “[t]hat the word ‘person,’ or ‘persons,’ wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.” *Id.* at §8.

“Persons” is even defined in the statutes of the Confederate States to include corporations. *See* 1864 The Statutes at Large of the Provisional Government of the Confederate States of America 1861-1862, Stat. III, Ch. LXI § 18 (“[T]he word ‘person’ in this law [relating to seizing of property] includes all private corporations.”).

individuals may, therefore, be invoked for the protection of the property of corporations.”⁸⁵

Summing up, Field reiterated that, in order to affect that protection, “courts will look through the ideal entity and name of the corporation to the persons who composed it, and protect them”⁸⁶

2. Round Two: *Santa Clara* in the Circuit

As had been intended, *San Mateo* made its way to the Supreme Court and was argued before the Court in August 1882.⁸⁷ However, while *San Mateo* remained undecided, Justice Field, again sitting as Circuit Justice, on September 17, 1883, decided a second railroad tax case, *County of Santa Clara v. Southern Pacific Railroad Company*.⁸⁸ As expected, Field again held that the

⁸⁵ 13 F. at 748.

⁸⁶ 13 F. at 748. Although Field had followed, in substance, but without attribution, the outlines of the argument for the defendant Railroad made by his friend and confidant, Hastings law professor J.N. Pomeroy, his Circuit colleague Judge Sawyer quoted at length from, and expressly adopted, whole portions of Pomeroy’s argument in his separate opinion. 13 F. at 758 (Sawyer, J. concurring, *quoting* Pomeroy’s argument wholesale).

Paul Kens has suggested that there is reason to believe that Field and Professor Pomeroy collaborated to shape the railroad’s arguments in *San Mateo*. See, Kens, *supra* Note—at 239-40). Professor Kens further asserts that “[w]hether the two simply shared information or actively planned a strategy, they undoubtedly cooperated in the cases.” *Id.* Professor Pomeroy was representing the railroads as a result of suggestions made to corporate officials by Justice Field. See *Four Letters* at 1106. Following the suggestion, Pomeroy was retained for four months at \$10,000 per year by the railroad. See *Innocent Abroad*, *supra* note ____ at 183. By way of comparison, associate justices of the Supreme Court were paid \$10,000 per year at the time. See Magrath, *supra*, note at 253. Notably, when Justice Field told Professor Pomeroy about the recommendation, he also reported that he had advised the railroad officials of the Professor’s “special study of questions in which the Railway was interested.” *Four Letters*, *supra* at 1102-03. Field’s specific reference is not known, but seems obvious. Pomeroy’s son described the relationship between Field and Pomeroy as “‘a warm and devoted friendship’ between the two men, [and] an intellectual sympathy at almost every point.” See Milton S. Gould, *A CAST OF HAWKS: A ROWDY TALE OF SCANDAL AND POWER POLITICS IN EARLY SAN FRANCISCO* 160 (Copeley Books 1985).

There is no question that Pomeroy provided the jurisprudential underpinning for Field’s opinion. See *Innocent Abroad*, *supra* note ____ at 182 (Pomeroy’s argument was most forceful and certainly the key argument.) Compare 18 F. at 745-47 with Brief of J. Norton Pomeroy at 2-24 *San Mateo* Transcript of Record, *supra* note ____. See also, *Innocent Abroad*, *supra* note ____ at 185; Krannick, *supra* note ____ at 78. It was, for example, Pomeroy’s corporate theory—that the rights of the corporators would be lost if those of the corporation were not protected—that provided the foundation for Field’s Circuit opinion. See Mark, *supra* note ____ at 1461.

⁸⁷ See, *infra*, note ____.

⁸⁸ 18 F. 385 (C.C.D. Cal. 1883). As in *San Mateo*, Judge Sawyer concurred and wrote separately.

California taxes, as imposed on railroads, violated the Equal Protection Clause of the Fourteenth Amendment.

Because Justice Field had addressed the issue in a lengthy opinion only one year earlier, the Court might have ruled based on the authority of *San Mateo*, but that was not to be.⁸⁹ Instead, Justice Field issued a second, even more detailed opinion.

Justice Field—in a departure from *San Mateo*—opens with an attention-grabbing statement highlighting a critical difference between the *San Mateo* and *Santa Clara* cases: in *Santa Clara* the defendant railroad argued that the taxes had been imposed in violation of state law. Although that distinction would play a pivotal role later in the Supreme Court, Field “[did] not . . . deem it important to pass upon these or other objections to the assessment, arising from an alleged disregard of the laws of the state.”⁹⁰ Thus, notwithstanding the settled rule, that a “court should

⁸⁹ Compare the Supreme Court’s disposition of the companion cases to *Santa Clara*. The Court disposed of the cases by referring back to the *Santa Clara* opinion without further discussion of the merits. See, e.g., *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417 (1886).

The reasons that Justice Field fully explained his rationale a second time are matters of speculation. One of Field’s few surviving letters suggests, however, that Field was reacting to significant discomfort among his Supreme Court brethren (likely exacerbated by Field’s relationships with railroad magnates) with inconsistencies and inaccuracies in both his *San Mateo* opinion and in the record. See *Four Letters*, *supra* note. ___ at 116. See also, *infra* note ___ (detailing factual inconsistencies); *infra* note ___ (Discussing concerns about Field’s behavior). The history of *San Mateo* at the Supreme Court—being advanced on the docket ahead of cases pending for years, thereafter languishing undecided and ultimately being dismissed in somewhat strange circumstances, circumstantially corroborates the inference that, at least some, members of the Supreme Court were uncomfortable with the state of the *San Mateo* record. See *Innocent Abroad*, *supra* note ___ at 191 (Field requested to hear additional cases and evidence because inaccuracies came to the attention of other members of the Court.); *id.* at 192-93 (Discussing external publicity given *San Mateo* Circuit decision; including commentary that facts regarding railroad mortgages were wrong.).

⁹⁰ 18 F. at 390 (Field, J.); *id.* at 444 (Sawyer, J. concurring) (“As there must be judgment for the defendant upon the points arising under the national constitution, it is unnecessary . . . to extend these opinions by examining the questions arising alone under the state laws and constitution . . .”).

The *Santa Clara* Complaint, in three paragraphs, alleges that the railroad owed \$8,065.11 in unpaid county taxes and \$5,301.42 in delinquent state taxes for tax year 1882 on the county’s pro rata share of the railroad’s “real and personal property, to wit, the franchise railway, road-bed, rails, and rolling stock . . .” See Complaint, *Santa Clara* Transcript of Record, *supra* note ___. The Complaint also alleges that the aggregate state-wide assessment imposed on the railroad was \$2,412,600 based on a total of 160.84 miles of track, including 59.3 miles in *Santa Clara* County. The assessed per mile value is said to be \$15,000, or a total of \$889,500 in the county.

not decide [constitutional questions], unless their determination is essential to the disposal of the case in which they arise,”⁹¹ Field had no intention of avoiding the constitutional question.

Field’s *Santa Clara* Circuit holding that the Fourteenth Amendment applied to corporations as well as natural persons has three principal components. Field begins by arguing that it is essentially immoral to treat corporations differently than natural persons. Next, Field argues that the authors of the Fourteenth Amendment necessarily intended the Amendment to

The Answer is, in many respects, similar to the *San Mateo* Answer, *see supra* note ___ at ____, but there are significant substantive and stylistic differences. For one thing, no claim that the railroad was denied the right to be heard is made. Instead, the Answer focuses on the state’s allegedly “unequal” and discriminatory treatment of the railroad. Whereas the *San Mateo* Answer had embedded allegations that the taxes had been imposed illegally on fences abutting the right of way, which were not the property of the railroad, in a lengthy paragraph making other, related claims, *see, supra* note ____, the fence allegation now is contained in its own, not to be missed, prominent paragraph. *See* Complaint, *Santa Clara* Transcript of Record, *supra* note ___ at 16. Moreover, that paragraph clearly alleged that the County imposed the tax in violation of state law. *Id.*

In addition, the *San Mateo* allegation, albeit inaccurate, that the railroad mortgages were approximately \$3,000 per mile has disappeared. *See, supra* note ____. Instead, unlike *San Mateo*, the Answer contains a detailed, and presumably more accurate, description of the mortgages, and goes on to describe the mortgaged property and the aggregate amount of California taxes paid by the defendant railroad. The Answer states that, as of April 1, 1875, the railroad was indebted to “divers persons” for “large sums of money advanced to construct and equip the railroad hereinbefore described.” *See* Complaint, *Santa Clara* Transcript of Record, *supra* note ___ at 8. According to the Answer, the mortgage was secured by the railroad’s “franchises and all rolling stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million acres . . . in the State of California.” *Id. California v. Central Pac. R. Co.*, 127 U.S. 1, 27-28 (1888). In what seems like a remarkable admission, the Answer – unlike the *San Mateo* Answer – further alleges that such “indebtedness amounts to the sum of forty-six million dollars, and no part thereof has ever been paid except the accruing interest. . . . *Id.* Further, the Answer states that such lands “are not, and never have been, in any way, connected with the railroad business of the defendant,” and that the railroad paid state, county and municipal taxes thereon of \$92,442.49. *Id.*

In contrast to the Complaint’s allegation that Defendant operated 160.84 miles of track in the aggregate, the Answer claims that the railroad operated 711.51 miles as of March 1880. *Id.* at 5. Using 711 miles, the mortgage per mile was approximately \$64,700 compared to the assessed value of \$15,000. (If the county’s 160 aggregate miles figure is used, the mortgage per mile is \$287,500.)

The detail with respect to the amount of the mortgages, the assessed value of the railroad’s property and the total amount of state, county and municipal taxes paid correlates directly with, and appears to be a response, to Justice Field’s March 28, 1883 letter to Professor Pomeroy. That letter advised Pomeroy—who represented the railroads in the Circuit—that the Supreme Court had held *San Mateo* over and expressed Justice Field’s “hope” that future tax cases would present “all the facts relating to the mortgage upon the property of the Railroad . . . and also the extent to which its property has been subjected to taxation throughout the State.” *Four Letters, supra* note ___ at 116. Inasmuch as the *Santa Clara* Answer was filed less than two months after Field’s letter to Pomeroy, there can be little doubt that Field and Pomeroy were, at least in this respect, working together to frame the next test case.

⁹¹ *See, e.g., County of Santa Clara v. Southern Pac. R. Co.*, 118 U.S. 394, 410 (1886); *California v. Central Pac. R. Co.*, 127 U.S. 1, 27-28 (1888).

apply to corporations and that such intent is confirmed by textual analysis.⁹² Finally, Field elaborates on the principal point made in his *San Mateo* opinion—that natural persons who associate in corporate form continue to possess property rights which courts must protect.

Field starts by asserting fundamental unfairness of the state’s treatment of the corporate defendant: “[t]he discrimination is made against the company, for no other reason than its ownership.”⁹³ Field then made the discrimination both personal and generic: “[t]he principle which justifies such discrimination . . . where one of the owners is a railroad corporation and the other a natural person, would also sustain it where both owners are natural persons.”⁹⁴ Seemingly exasperated, Field explains:

Strangely, indeed, 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 or by old men, and not deducted if owned by black men or by young men; deducted if owned by landmen, not deducted if owned by sailors; deducted if owned by married men, not deducted if owned by bachelors; deducted if owned by men doing business alone, not deducted if owned by men doing business in partnerships or other associations; deducted if owned by trading corporations, not

⁹² This new approach may have reflected the fact that the *San Mateo* Supreme Court briefs and arguments focused heavily on the framers’ intent, utilizing, among other things, textual analysis—especially the juxtaposition of the terms “citizen” and “person”—to demonstrate such intent. *See* _____. Moreover, at least one of the railroad’s lawyers, former Senator George F. Edmunds was a highly respected constitutional lawyer who had helped shepherd the Amendment through the Senate. Senator Edmunds’ oral argument in the Supreme Court focused heavily on the framers’ intent. *See* Argument of George F. Edmunds of Counsel for Defendant In Error, *County of San Mateo v. Southern Pac. R. Co.*, No. 1063 4-8 (1882) (hereafter “Edmunds’ Argument”).

⁹³ 18 F. at 394-95.

⁹⁴ 18 F. at 396.

deducted if owned by churches or universities; and so on, making a discrimination whenever there was any difference in the character or pursuit or condition of the owner.⁹⁵

Emphasizing the moral imperative, Field concludes that the discriminatory state taxes are “the very essence of tyranny, [that] has never been done except by bad governments in evil times, exercising arbitrary and despotic power.”⁹⁶

As he had done in *San Mateo*, Field, quoted Chief Justice John Marshall’s *dicta* in *Dartmouth College*, and held that the framers’ actual understandings of the Fourteenth Amendment do not limit the scope of its application:

It is not enough to say that this particular case was not in the mind of the [drafters] when the article was framed, nor of the American people when it was adopted. . . .⁹⁷

⁹⁵ 18 F. at 396. Compare Edmunds Argument, *supra* note ___ at 7 (Congress adopted Amendment not because Freedmen “had black skins,” but “because they were men, [Congress] said every man should have equal rights and due process of law. . . .”).

The irony was probably lost on Field, and at least one half of his readers, that “persons” seemed to include every adult human being other than women.

⁹⁶ 18 F. at 397. Compare Edmunds’ Argument, *supra* note ___ at 12 (same).

Field’s almost religious rhetoric was typical of his apocalyptic vision in many of the cases that came before the Court. To a degree even greater than most nineteenth century conservatives, Field was “ideologically programmed” to see in many disputes a class-based dialectic materialism that, if unchecked, would destroy the social and political fabric. Cf. Manuel Cachán, *Justice Stephen Field and “Free Soil, Free Labor Constitutionalism:” Reconsidering Revisionism*, 20 LAW & HIST. REV. 541, 546 (2002) (hereafter “Cachán”). Indeed,

[a] mystic faith in right and rights, somehow established otherwise than by human power, with sanctions somehow higher than those of human use and benefit, was all but universal in a generation indoctrinated not only with the Declaration of Independence but also with the Word of God. To set up an *interest* even of mankind, against a *right* of man, had a connotation of timeserving. To contradict the majestic nonsense of Field’s abstract conceptions would have been heresy which no pragmatic faith was yet confident enough to hazard.

Charles E. Clark, *Carl Brent Swisher, Stephen J. Field: Craftsman of the Law*, 40 YALE L.J. 998, 1007 (April 1931) (book review).

Field goes on to say that the application of a constitutional provision is not restricted to the “existing wrong” that led to the provision’s adoption if “[t]he case [is] within the words of the rule” unless such application is “obviously absurd or . . . mischievous, or repugnant to the general spirit of the instrument.”⁹⁸ Field, as had Marshall in *Dartmouth College*, and as Professor Pomeroy did before the Circuit, argues that constitutional provisions necessarily have broad application to “new needs . . . [that] have arisen or shall arise which the framers in their forebodings never saw, and—wrongs which shall be righted by the words they established. . . .”⁹⁹

Field nevertheless asserts that, of course, the authors of the Fourteenth Amendment did intend the Amendment to have broad application to persons and entities other than the newly emancipated former slaves. Field arrives at this conclusion by turning the “African race” theory of the *Slaughter-House* cases inside out.

According to Field, the threat of special legislation directed at the new citizens was an ominous warning that the rights of all were threatened. Thus, “the framers of the amendment [were moved] to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure to all men, at all times, and at all places, due process of law, and the equal protection of the laws. . . .”¹⁰⁰ In other words, Field concludes that a specific problem

⁹⁷ 18 F. at 397 quoting, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 644 (1819).

⁹⁸ 18 F. at 397, quoting *Dartmouth College* at 644-45.

⁹⁹ 18 F. at 400. Compare Argument for the Defendant by John Norton Pomeroy at 24-25, *San Mateo* Transcript of Record, *supra* note ___ (hereafter “Pomeroy Argument”) and Edmunds’ Argument, *supra* note ___ at 5-6. See also Edmunds’ Argument, *supra* note ___ at 6-7 (History shows that “the simplest grievance . . . to one man . . . by legislative or executive power . . . is the moving and sole cause that leads the [legislature] . . . to make a general law” to address any other possible related injury.).

¹⁰⁰ 18 F. at 398. Field kept an annotated copy of Senator Edmunds’ argument in the Circuit file. See Howard Jay Graham, *An Innocent Abroad: The Constitutional Corporate Person* 2 U.C.L.A. L. REV. 155, 196n.173 (1954-1955).

experienced by one discreet group because of unique characteristics and circumstances caused Congress to adopt a broad rule of general application.

Field found evidence of the framer's intent in the *San Mateo* Supreme Court argument of Senator Edmunds. Field stated:

In the argument of the *San Mateo* Case in the supreme court, Mr. Edmunds, who was a member of the senate when the amendment was discussed and adopted by that body, speaking of its broad and catholic spirit, said: 'There is no word in it that did not undergo the complete scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered.' And the purpose of this long and anxious consideration was that protection against injustice and oppression should be made forever secure—to use his language—'secure, not according to the passion of Vermont, or of Rhode Island, or of California, depending upon their local tribunals for its efficient exercise, but secure as the right of a Roman was secure, in every province and in every place, and secure by the judicial power, the legislative power, and the executive power of the whole body of the states and the whole body of the people.'¹⁰¹

¹⁰¹ 18 F. at 398.

Again relying on the corporation aggregate approach, on which he had based his *San Mateo* opinion, Field states “[t]his protection attends everyone everywhere, whatever his position in society or his association with others, either for profit, improvement, or pleasure.”¹⁰²

Field dismisses opposing arguments as nonsensical, “involving doctrines which sound strangely to those who have always supposed that constitutional guaranties [*sic*] extend to all persons, whatever their relations. . . .”¹⁰³ Field then reasserts the first of two predicates on which his corporation aggregate-based reasoning rests:

private corporations consist of an association of individuals united for some lawful purpose, and permitted to use a common name in their business and have succession of membership without dissolution. . . . But the members do not, because of such association lose their rights to protection, and equality of protection.

Judge Sawyer also quotes at length “the forcible and accurate language of Mr. Edmunds [before the Supreme Court in *San Mateo*] which I cannot improve . . .” 18 F. at 429-430. Senator Edmunds was the Senate manager of the bill that became the Civil Rights Act of 1871 which includes what is now 42 U.S.C. § 1983. During debate on the meaning of the term “persons”, as used in the Act, Edmunds asserted that “it is merely carrying out the principles of the civil rights bill [of 1866] which have since become part of the Constitution” and that “[Section 1 is] so very simple and really re-enacts[s] the Constitution.” *Monell v. Dept. Soc. Srv.*, 436 U.S. 685, 657-58 (1977), quoting Cong. Globe App. at 568-569. Cf. *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. 393, 393-94 (C.C.N.D. Ill. 1873) (Corporations are persons protected by Civil Rights Act of 1871.) Edmunds went on to state that the term “persons” was intended to be given a broad reading and that it “secure[d] the rights of white men as much as of colored men.” *Monell*, 436 U.S. at 657-58, quoting Cong. Globe App. at 696. Opponents agreed. See *id.* at 686, citing Cong. Globe App. at 216-17 (emphasis in original), quoting remarks of Senator Thurman that “[T]here is no limitation whatsoever upon the terms that are employed [in the bill], and they are as comprehensive as can be used.” Thus, in *Monell*, the Court held that, a Congress that included many of the same legislators who had drafted and approved the Fourteenth Amendment, intended the term “person” when used in legislation implementing the Amendment to include corporations, albeit municipal corporations. 436 U.S. at 690.

¹⁰² 18 F. at 398. Field also contended that congressional re-adoption of the Civil Rights Act supported his argument regarding the author’s intent. However, Field uses the re-adoption of the Act “after adoption of the Fourteenth Amendment” to support his view that the Amendment applied to discriminatory taxation, not its application to corporate persons. 18 F. at 399-400. Field appears to be mixing the two points in a purposeful effort to conflate two different aspects of legislative intent into support for his principal concern—application of the Fourteenth Amendment to protect corporate persons.

¹⁰³ 18 F. at 402. See Edmunds’ Argument, *supra* note ___ at 5 (Addressing same question and asking “What sort of logic is that?”).

They continue, notwithstanding, to possess the same right to life and liberty as before, and also to their property, except as they may have stipulated otherwise.¹⁰⁴

Moving to his second premise, Field holds that corporate property is, in reality, the property of the persons who form the corporation. According to Field, “[w]hatever affects the property of the corporation—that is, of all the members united by the common name—necessarily affects their interests.”¹⁰⁵ According to Field, “[w]hatever confiscates or imposes burdens on [the corporation’s] property, confiscates or imposes burdens on their property, otherwise nobody would be injured”¹⁰⁶ Although largely ignored, because, as will be seen, the Supreme Court declined to address the question, the Circuit opinions in *San Mateo* and *Santa Clara* are the only appellate decisions explaining the reasons why a corporate person can assert the rights of a natural person.¹⁰⁷

¹⁰⁴ 18 F. at 402. *Accord* Pomeroy Argument at 10-16, *San Mateo* Transcript of Record, *supra* note ____.

¹⁰⁵ 18 F. at 403. *Accord* Pomeroy Argument at 12 (Arguing that statutes violating the Fourteenth Amendment “in dealing with corporations must necessarily infringe the rights of . . . the natural persons who compose them.”), *San Mateo* Transcript of Record, *supra* note ____.

¹⁰⁶ 18 F. at 403. *Accord* Pomeroy Argument at 15-16 (Arguing that “[u]nless the corporators, the natural person has been deprived of his private property, within the meaning of the constitutional inhibition, then nobody has lost any property. . . . [N]obody suffers a loss.”). *San Mateo* Transcript of Record, *supra* note _____. *But see* John Norton Pomeroy, *An INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES* § 304 (1868) (“[T]he property of a corporation is entirely distinct from the property of its stockholders. No member of a corporation, by virtue of his ownership of a number of shares, owns any portion of the lands, moneys, securities or other property belonging to the institution; he is simply possessed of a right to participate in the project while the business is carried on....”).

¹⁰⁷ Howard Jay Graham goes farther and asserts that: “The Field-Sawyer opinions thus today stand as the highest—indeed in most respects the only—authoritative judicial statement and justification of the corporate constitutional ‘person.’” *See Innocent Abroad*, *supra* note _____ at 160. *See also Nashville, C. & St. L. Ry. v. Taylor*, 86 F. 168, 179-180 (C.C.M.D. Tn. 1898) (*San Mateo* and *Santa Clara* circuit opinions “must be regarded as of the highest authority which any case decided at the circuit can possess.”). *See also Russel v. Croy*, 164 Mo. 69, 63 SW 849, 84, 856 (1901) (Expressing doubt regarding whether Supreme Court resolved question of constitutional corporate person and concluding that the Circuit “opinion of Mr. Justice Field . . . seems to furnish a conclusive answer . . . and we are satisfied with . . . the correctness of its conclusion.”); *Singer Mfg. Co. v. Wright*, 33 F. 121, 125-26 (C.C.N.D. Ga. 1887) (Noting that Supreme Court did not decide constitutional question, leaving authority of *San Mateo* and *Santa Clara* Circuit decisions in doubt).

3. Round Three: *San Mateo* in the Supreme Court

The most noteworthy aspect of most Supreme Court cases is the decision. In contrast, *San Mateo* is noteworthy: (1) because the railroad's arguments led to wide-spread belief that robber baron conspirators had secretly inserted protection for corporations into the Fourteenth Amendment; and (2) because, despite the parties' investments and the Court's recognition and treatment of *San Mateo* as a test case of singular importance, it was dismissed from the docket after argument without decision.

a. The Conspiracy Theory of the Fourteenth Amendment

San Mateo was argued for three days in the Supreme Court by a highly paid team of handpicked attorneys. The team included two former senators, both of whom had been in office when the Fourteenth Amendment was drafted, one of whom—former Senator Roscoe Conkling—had been among the draftsmen, two former judges, including the former Chief Justice of the California Supreme Court, as well as an eminent law professor whom Justice Field had advised the railroads to retain.¹⁰⁸

Note that the corporate person issue was addressed in related contexts in other circuit decisions, albeit far less comprehensively. See, e.g., *Indiana ex rel. Wolf v. Pullman Palace Car Co.*, 16 F. 193, 198-200 (C.C.D. In. 1883) (Treating corporations and persons as equivalent for Commerce Clause purposes); *Spring Valley Water-Works v. Bartlett*, 16 F. 615 621-22 (C.C.D. Cal. 1883.) (No distinction natural versus artificial persons per California constitution.). *Northwestern Fertilizing Co. v. Hyde Park*, 18 F. Cas. 393, 393-94 (C.C.N.D. Ill. 1873) (Analyzing use of term “persons” in Civil Rights Act of 1871; holding that term includes natural persons and corporations); *Live-Stock Dealers & Brokers' Ass'n v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 15 F. 649, 651-54 (C.C.D. La. 1870) (Bradley, Cir. J.) (Applying Civil Rights Act of 1866, treating corporations as citizen possessing protected privileges and immunities.).

¹⁰⁸ In the Supreme Court, the case was argued from Tuesday, December 19, 1882 through Thursday, December 21, 1882. See *infra* note _____. The railroads were represented by former Senators Roscoe Conkling and George F. Edmunds, as well as former California Supreme Court Judge S.W. Sanderson, all friends of Justice Field. See *San Mateo* Docket *supra* at _____. Conkling had been a member of the Congressional committee that had drafted the Amendment. 1. See Donald Barr Chidsey, *THE GENTLEMAN FROM NEW YORK: A LIFE OF ROSCOE CONKLING* 368-69 (New Haven: Yale University Press 1935). (Noting Conkling's membership and that “he himself had consistently voted against the section in question, the first.”). _____. Senator Edmunds, a key member of the Judiciary Committee, had been the Senate manager of the Civil Rights Act adopted to implement the Amendment and was one of the most well respected Constitutional lawyers of the day. See ____ *supra* at ____; see Schwartz, *supra* note ____ at 177.

In the early twentieth century, the theory was popularized by respected New Deal and Progressive Age historians—and widely accepted—that the drafters of the Fourteenth Amendment had hoodwinked their congressional colleagues as well as the states who had ratified the Amendment, by secretly slipping protection for corporations into the Constitution.¹⁰⁹ According to the conspiracy theory, the framers of the Amendment had included several notable railroad corporate lawyers, including Mr. Conkling. These corporate lawyers, while ostensibly acting to secure the rights of the Freedmen, supposedly secretly wrote protection for corporations into the Constitution.¹¹⁰ Almost twenty years after the Amendment was drafted, Roscoe Conkling’s argument on behalf of the Railroad in the *San Mateo* case before a Supreme Court allegedly sympathetic to railroad interests supposedly was the final, penultimate act of the “conspiracy” among the framers of the Fourteenth Amendment.¹¹¹

¹⁰⁹ See Beards *supra* note ___ at 111-113; Swisher, *supra* note ___ at 415-16 (Characterizing Charles and Mary Beard as “thorough students of history” who were “convinced that [Conkling’s] interpretation was correct” and quoting another contemporary historian asserting that the Amendment was intended to increase Federal power, “but to do so in a way that the people would not understand the great changes . . . in the fundamental law of the land.”).

See also Richard L. Aynes, *Unintended Consequences of the Fourteenth Amendment and What They Tell Us About its Interpretation*, 39 AKRON L. REV. 289, 307 (2006); (hereafter “Aynes”); Mayer, *supra* note ___ at 641; *Constitutional Rights* at 1657; James Willard Hurst, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780-1970* at 66-69 (1970) (hereafter “Hurst”).

¹¹⁰ See, e.g., Goldman, *supra* note ___ at 864 (describing conspiracy theory).

¹¹¹ It must be remembered that, despite the importance that conspiracy theorists attach to Conkling’s argument, Conkling was only one of several attorneys arguing on behalf of the Railroad. Prior to the argument, on the motion of the county, the Court had “ordered that in the argument of the cause each side be allowed three hours additional time and that three counsel be allowed to argue the same orally.” Counsel for the county opened the argument on Tuesday. The Court reconvened at noon Wednesday, after the county concluded, and Roscoe Conkling opened for the railroads. Counsel for the county commenced replying on Wednesday, carrying over to Thursday when the Court again reconvened at noon. Senator Edmunds and, S.W. Sanderson followed, arguing for the railroad. Prior to argument, the Court granted counsel for the railroad leave “to file a certified copy of the *Journal* entry of the Legislature of the State of California.” Justice Field, despite having decided the case in the Ninth Circuit, was on the bench throughout the argument. See *San Mateo* Minutes for Dec. 19, 1882 - Dec. 21, 1882. At the time “Supreme Court justices, after having given decisions in cases in the circuit courts, often sat in the Supreme Court to hear appeals from decisions which they had given in the lower courts.” Swisher, *supra* note ___ at 247.

Howard Jay Graham, in his definitive two-part article “‘*The Conspiracy Theory*’ of the *Fourteenth Amendment*” echoes many others when he calls Conkling’s argument “one of the landmarks in American constitutional history, an important turning point in our social and economic development.”¹¹² Graham sees the argument as marking the end of the “African race” theory of the Fourteenth Amendment espoused in the *Slaughter-House Cases* as well as the beginning of the modern development of the Equal Protection and Due Process Clauses and the corresponding expansion of the power of the courts over social and economic legislation.¹¹³

It is easy to understand why some would perceive that Conkling’s credentials, and his involvement at the Amendment’s conception, may have gilded his argument with authority.¹¹⁴

Conkling was a former congressman and senator from New York and had been a member of the

¹¹² *Conspiracy Theory* (Part One), *supra* note ___ at 372. Conkling’s *San Mateo* argument also has been described as “powerful,” of “telling effect,” “ingenious” and one of the “first rank” historical events that “distinctly [mark] the point at which the Supreme Court ceased to interpret Section 1 of the Fourteenth Amendment as having reference almost wholly to negroes, and began to interpret it as having a much broader application.” *Journal supra* note ___ at 22, 36, 28 and 34. One of Conkling’s biographers states that:

The significance [of the argument] . . . cannot possibly be overestimated. . . . The case itself was dismissed as having become moot, but Conkling had shown the way. . . . [G]reat corporation lawyers . . . all owe Roscoe Conkling a debt of incalculable value. They followed him hammering at his point until it was definitively established. . . . Roscoe Conkling . . . was easily the most important of the early champions of the trusts. He did more than any other man to establish this doctrine [that corporations were persons entitled to constitutional protection].”

Donald Barr Chidsey, *THE GENTLEMAN FROM NEW YORK: A LIFE OF ROSCOE CONKLING* at 368-370 (1935) (hereafter “Chidsey”). *See also* Gaffney, *supra* note ___ at 225 n. 103 (1975-76) (Describing Conkling as “[o]ne of the individuals principally responsible for the Court adopting this position” and discussing argument.); Hurst, *supra* note ___ at 67 (Conspiracy Theory of Fourteenth Amendment born of innuendo in Conkling’s argument); *EVERYMAN’S CONSTITUTION*, *supra* note ___ at 18-19 (Quoting the “Brahman historian and the scholar in politics” Senator Henry Cabot Lodge who “authoritatively assembled and certified the Conkling canon” to which “[i]t was owing . . . , undoubtedly, that the Court extended it [i.e., the Fourteenth Amendment] to corporations.”); *Innocent Abroad*, *supra* note ___ at 155. (That Conkling added little substance to the debate is not the measure of the argument’s importance because three years later the Court agreed); Ernest Sutherland Bates, *THE STORY OF THE SUPREME COURT 208* (Charter ed. 1963) (1936) (Court adopted argument and “transmogrified” the Amendment).

¹¹³ *Conspiracy Theory* (Part Two), *supra* note ___ at 193-94.

¹¹⁴ *See Conspiracy Theory* (Part One), *supra* note _____ at 371.

Joint Congressional Committee which drafted the Fourteenth Amendment.¹¹⁵ He had twice declined a seat on the Supreme Court, once in 1873 as Chief Justice, and later in 1882 as Associate Justice.¹¹⁶

Conkling's argument also relied upon, what he asserted was, the previously secret *Journal* of the Joint Committee that had drafted the Amendment.¹¹⁷ Conkling's brief in *San Mateo* and his oral argument in the Supreme Court marked the first—and, as far as been discovered, the only—use of this *Journal* as evidence of the intent of the Fourteenth Amendment's framers with respect

¹¹⁵ Chidsey, *supra* note ____ at 368-69.

¹¹⁶ Magrath, *supra* note _____, at 6, 16, 270. Notably, the sitting Chief Justice, Morrison R. Waite, had been appointed after Conkling or declined the seat. *Id.*

¹¹⁷ Brief of Defendant at 9-17, *San Mateo* Transcript of Record *supra* note ____ (hereafter "Conkling Brief") (Asserting that "a journal . . . was made from day to day by an experienced recorder . . . [which] was kept in confidence . . . [and] never been printed, or publicly referred to." and discussing contents.); Oral Argument on behalf of Defendant by Roscoe Conkling at 14-25, *id.* (hereafter "Conkling Argument") (same).

Conkling's implication that the *Journal* was the product of a standardized process designed to record or digest the Joint Committee's deliberations is false. Benjamin B. Kendrick who discovered the *Journal* in 1908 states that the handwritten "journal is one made up from the notes kept by the clerk of the committee at its various sessions" and includes "several loose sheets," also handwritten, containing various propositions. Benjamin B. Kendrick, Ph.D., *THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION: 39TH CONGRESS, 1865-1867* 20 (New York 1914), *reprinted by*, The Lawbook Exchange (2006).

Dr. Kendrick, Ph.D., the historian who also edited and published the *JOURNAL*, also argues that Conkling's argument marked a turning point in American law, resulting in the Court moving away from the "African race" theory of the Fourteenth Amendment. Dr. Kendrick states that the "dramatic episode which occurred in the argument of the *San Mateo* case when Roscoe Conkling, a member of the committee which drafted the fourteenth amendment, produced in the court room a copy of the journal of his committee and revealed for the first time what purported to be the real intention of those who framed the fourteenth amendment" was of "first rank" importance in the "legal revolution" that ensued. According to Dr. Kendrick, Conkling's argument was of supreme importance because "the Court seems to have been unusually prone to take into consideration the intention of the framers of [the fourteenth] amendment. Since Conkling was a member of the committee which drafted the fourteenth amendment, he may have been presumed to have been in an excellent position to interpret the intentions of himself and his colleagues. . . . He occupied a still stronger strategic position in that he was armed with the very journal of the committee, and with it proceeded to show that the committee did not expect that the operation of the amendment would be confined merely to the protection of the freedmen." *Id.* at 29-31.

The Conkling argument has been cited in only one decision, but for a proposition completely unrelated to the existence of the constitutional corporate person. In *Hopwood v. Texas*, 861 F.Supp. 551 (W.D. Tx. 1994), the argument was cited, ironically, in support of the conclusion that a law school's admission process engaged in unconstitutional race-based discrimination. *Id.* at 584 n.91. The District Court decision later was reversed in part (without mentioning the argument) *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

to corporations. In fact, although the Senate ordered 6,000 copies of the *Journal* printed little more than a year after Conkling's argument, the copies were never distributed and the single remaining copy of the *Journal* did not re-surface in public until 1914, more than thirty years later.¹¹⁸

Conkling argued that the drafters had two distinct purposes in mind: first, to protect the Freedmen and loyal citizens in the South in the exercise of their civil rights; second, to secure constitutional protection for the rights of all "persons," corporate as well as natural.¹¹⁹ This, according to Conkling was evident because the Committee had treated the equal protection clause (*i.e.*, that relating to persons) as distinct from the Privilege and Immunities clause, dealing with political rights (*i.e.*, those relating to citizens).

Conkling, however, blatantly falsified the record of the Fourteenth Amendment's drafting. Conkling claimed that the word "persons" had been inserted in lieu of "citizens" at the last moment to provide that corporations, no less than natural persons, were entitled to due process and equal protection of the laws.¹²⁰ The inference was that the drafters had done so purposefully to include corporations.¹²¹ In fact, "persons" had been used in the Equal Protection and Due Process Clauses from the beginning and no substitution ever took place.

¹¹⁸ Donald Barr Chidsey, "THE GENTLEMAN FROM NEW YORK: A LIFE OF ROSCOE CONKLING" 9 (New Haven: Yale University Press 1935). See Kendrick, *supra* note ___ at 19.

¹¹⁹ See *Conspiracy Theory* (Part One), *supra* note ___ at 375-385 for a thorough discussion of the flaws in the argument.

¹²⁰ See, *e.g.*, *Conspiracy Theory* (Part One), *supra* note --- at 377-78, 381-84; Chidsey, *supra* note ___ at 368-370.

¹²¹ See Oral Argument on behalf of Defendant by Roscoe Conkling at 15 (addressing clause regarding political rights), 16, 18, 20 (asserting that equal protection guaranteed to "persons" was "a thing substantive, separate, independent."). Hurst *supra*, note ___ at 66-68. The strength of Conkling's contention that "persons" included corporations is further weakened by the fact that Conkling used "persons" to mean natural persons in a resolution relating to another article. As Mr. Graham has pointed out, it is hard to believe, in view of the fact that the assertion was twice repeated and underscored, that the misquotation was not intentional.

Conkling’s argument further fails to address a critical point: one of the principal purposes of the Amendment was to overturn the *Dred Scott* decision. Justice Taney’s opinion for the *Dred Scott* Court had emphatically stated that Africans could never be “citizens”, but also acknowledged that they were “persons”.¹²² Thus, “persons” was the only term which the drafters could have used to assure that the Freedmen were included within the protections afforded by the Amendment.¹²³

The definitive, virtually dispositive, impact some accord Conkling’s argument is the last surviving vestige of the “long since discredited” conspiracy theory of the Fourteenth Amendment.¹²⁴ Yet, despite the influence ascribed to the argument by Progressive Age and New Deal scholars and others, Conkling’s *Journal*-based argument was little noticed at the time. Indeed, if Conkling’s lengthy written and oratorical references to the *Journal* (in total, the references covered twenty printed pages, seventeen of which include almost nothing but quotations from the *Journal*)¹²⁵ were so important, it is difficult to understand the failure of the County’s attorneys to respond to Conkling. Further, suggesting that Conkling’s argument had any impact whatsoever is rank speculation because *San Mateo* was never decided by the Supreme

Conkling’s argument is analyzed in depth, and with great care and insight, in Howard Jay Graham, *The Conspiracy Theory of the Fourteenth Amendment*, 47 YALE L. J. 371 (Part 1) (1938) and 48 YALE L. J. 171 (Part 2) (1938) on which this discussion relies.

¹²² 60 U.S. 393, 407-08 (1856).

¹²³ In addition to Taney’s use of “persons” in *Dred Scott*, the Constitution used the term “person” to refer to slaves. Art. I, § 2, Par. 3; Art. IV, § 2, par. 3. The Amendment refuted Taney in two ways: First, the Amendment declared that all persons born or naturalized in the United States were citizens. Second, the Amendment provided broadly that all persons were entitled to Equal Protection and Due Process. See generally *Conspiracy Theory*, supra note ___ at 376.

¹²⁴ See Aynes, supra note ___ at 310. (Noting 1920’s view that corporation lawyers had secretly slipped protection in to Amendment has been discredited).

¹²⁵ See Oral Argument on behalf of Defendant by Roscoe Conkling at 14-25, *San Mateo* Transcript of Record, supra note ___; Conkling’s Brief for Defendant at 9-7, *id.*

Court. Moreover, Conkling was not involved and neither the argument nor the *Journal* were even mentioned by counsel when the corporate person issue was raised before the Supreme Court a second time in 1886.¹²⁶

The treatment of Conkling’s argument by his contemporaries—colleagues and adversaries— suggests that it became far more significant in hindsight when seen through the “retrospectoscope.” Quite accurately then, and in contrast to the vast majority of authors, Professor Peter C. Magrath, states “[n]othing, however, came of Conkling’s argument, except, of course, for the now exploded conspiracy theory of the Fourteenth Amendment.”¹²⁷

Indeed, there is no evidence that Conkling’s argument influenced the Supreme Court or any other court. In contrast, the arguments of Senator Edmunds and Professor Pomeroy were extensively relied upon in the *Santa Clara* Circuit decision, but Conkling’s argument largely was ignored by contemporaries.¹²⁸ Moreover, that the 6,000 copies of the *Journal* printed at the order of the Senate were never distributed and seemingly disappeared, that Conkling’s opponents neither replied to the argument nor utilized the actual text of the *Journal* to support their own position and that Conkling played no part when *Santa Clara*, the second corporate person case, was heard by the Supreme Court certainly are substantial bases to question whether Conkling’s argument was quickly recognized for the fraud it was. Further, rather than the penultimate act of a successful conspiracy, it is reasonable to wonder—especially in light of later developments—whether Senator Conkling’s fraudulent argument was a source of deep concern to at least some members of

¹²⁶ See, *infra* at ____.

¹²⁷ Magrath, *supra* note ____ at 221.

¹²⁸ It appears that Conkling’s argument has been mentioned in a footnote in one court decision. That case involved a challenge to a state university’s affirmative action program, not the existence of the corporate person. See *Hopwood v. Texas*, 861 F. Supp. 551, 584 n.91(W.D. Tx. 1994), *reversed* 78 F. 3d 982 (5th Cir. 1996).

the Court and ultimately contributed to the Supreme Court's refusal to decide the corporate person question.

b. The Supreme Court Punts

The effect of Conkling's oratory (of which the examples above are merely illustrative and not nearly exhaustive) is not apparent because the *San Mateo* case was never decided by the Court. The Court's failure to decide *San Mateo* is noteworthy and strongly suggests that the court was either deeply divided or deeply troubled by the case.¹²⁹

¹²⁹ The suggestion is reinforced by the Court's handling of an unrelated case that also raised the corporate person issue, and in which counsel vigorously attacked Field's Circuit decisions as erroneous and unprincipled. The case was argued five months after *Santa Clara* and, initially, was affirmed by an equally divided Court without opinion. However, it remained on the Court's docket and was re-argued and decided against the corporation on other grounds four years later, after Waite's death, in 1890. See *Home Insurance Co. v. New York*, 119 U.S. 129 (1886) (Argued within months of *San Mateo*, also raised the corporate person question; Court evenly divided), *on re-argument*, 134 U.S. 594 (1890).

There is also reason to believe that the Court may have been uncomfortable with the *San Mateo* case because of significant shortcomings in the record. Field's decision below, for example, stated that the railroad's mortgages were in the neighborhood of \$3,000 per mile when, in fact, as the *Santa Clara* record and circuit opinion made clear, they exceeded \$43,000 per mile. This inaccuracy had extreme practical implications. Contrary to the impression given by the *San Mateo* Circuit opinion, a decision in favor of the railroad would have absolved it of *any* tax liability. See *supra* note _____. See also Magrath *supra* note ____ at 221 (Noting that the Court apparently suspected the accuracy of certain statistics submitted by the railroads and postponed decision"); Howard Jay Graham, AN INNOCENT ABROAD: THE CONSTITUTIONAL CORPORATE PERSON, 2 U.C.L.A. L. Rev. 155, 191 (1954-1955).

The delay also may have reflected Chief Justice Wait's sensitivity to, and desire to avoid, criticism of the Court, see Donald G. Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DEN.U.L.REV. 449, 479 (2003-04) (hereafter "Stephenson"), and the fact that Field's well known associations with, and perceived zeal to protect, the railroad barons, made him a "magnet for criticism." See Paul Kens, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE, 274 (1997) (hereafter "Kens."); Stephenson, *supra* note ____ at 523-24. Field's relationships and pro railroad bias had been well known for a long time before *San Mateo* was advanced for argument in the Supreme Court. See, e.g., ____ D. Grier Stephenson, Jr., "THE CHIEF JUSTICE AS LEADER: THE CASE OF MORRISON REMICK WAITE," 14 WILLIAM AND MARY L. REV. 890, 908 (1972-73) (Noting that Field had been viewed as pro-railroads since his days on the California Supreme Court.). Likewise, that the Circuit decision grossly misstated the facts regarding the value of the railroad's property and the amount of the mortgages also was well-known. See *Innocent Abroad*, *supra* note ____ at 191-194 (Discussing widespread press coverage). It seems equally likely that the Court's reticence to discuss the issue was triggered by something new which, perhaps in conjunction with past occurrences, gave the Court pause. There would appear to be several possibilities.

First, it could not have escaped notice that the railroad was represented in the Supreme Court by a coterie of Field's friends. In this highly politicized case and with a notoriously flawed record, the Court may have understandably been concerned about public reaction to an expedited affirmance of Field's Circuit decision which would have effectively absolved Field's railroad friends from the obligation to pay taxes based on arguments made by Field's lawyer friends. Second, several members—including the Chief Justice—of the Court may have been concerned that the principal argument for the existence of the constitutional person was made by Roscoe Conkling and, at least to some extent,

Because of the explosive growth in the Supreme Court's docket in the period,¹³⁰ delays of two to three years before a case was heard were common. *San Mateo*, however, had been accelerated by the Court and was argued two *months* after docketing.¹³¹ After argument, however, the case languished, inactive and undecided for thirty-six months.¹³² Despite the investment of

was dependent on Conkling's credibility. Conkling not only was one of the so-called conspirators who had drafted the Fourteenth Amendment, he had earned a reputation for self-aggrandizement and self-interested political duplicity. See Howard Jay Graham, THE WAITE COURT AND THE FOURTEENTH AMENDMENT, 17 VAND. L. REV. 525, 526-27 (1963-1964) ("Waite saw through Roscoe Conkling . . . mistrusting and dismissing him as an unsavory boss and a henchman.") Magrath, *supra* note ___ at 270 (Discussing Waite's dislike of Conkling and discomfiture that Conkling had been nominated for the Supreme Court and view that Conkling, "the New York spoilsman", was an unsavory henchman); *id* at 262 (Harlan asked Waite not to assign him any cases argued by Harlan because of the personal enmity between the two.). See also Tinsley E. Yarbough, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN 109, 113-14 (New York 1995) (Discussing Conkling's opposition to Harlan's Supreme Court nomination, noting that "Conkling could be counted on to seek to embarrass" Harlan; discussing Conkling's effort to have Senate reconsider vote confirming Harlan.). *Innocent Abroad*, *supra* note ___ at 538 (Noting that "Harlan, Waite, Matthews, and perhaps others, had little or no respect for Conkling.").

Third, at the conclusion of the *San Mateo* arguments, Field attended a dinner given by Leland Stanford, one of the owners of the defendant railroad, for the lawyers who had represented the Southern Pacific before the Supreme Court. See Magrath, *supra* note at 221-22. Field's conduct clearly concerned the Chief Justice who saved a newspaper cartoon in his personal papers that castigated Field for having done so. *Id.*

Standing alone, any of these facts would have justified concern, taken together in light of what already was on the record, the Court would have been well-advised to proceed with caution, as it apparently did when *San Mateo* was dismissed. Indeed, the Court was in no hurry to decide the constitutional corporate person question when the issue was raised a second time. Unlike *San Mateo* which had initially been expedited by the Court, *Santa Clara* was argued and decided in the normal course more than two years after it was decided in the circuit.

¹³⁰ Ten years prior to 1882, when *San Mateo* found its way to the Supreme Court, the Court decided a total of 157 cases; in 1882, the Court decided 267 and, in 1885, when *San Mateo* was dismissed, the Court decided 280 cases. See Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, and Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions and Developments* 238 (4th ed. 2007). Moreover, the number of cases backlogged and pending review was increasing almost geometrically. In 1876, there were 606 cases awaiting decision. In 1880, 1,212 cases were pending. In 1884, the number had grown to 1,315 cases and to almost 1,400 in 1886. _____, "Morrison Waite's Court", *Sup. Ct. Hist. Soc'y Ybk.* (1980). D. Grier Stephenson, Jr., "The Chief Justice as Leader: The Case of Morrison Remick Waite", 14 WILLIAM AND MARY L. REV. 890, _____ (1972-73).

¹³¹ At the time it was common for cases to take three years from docketing until argument. Pursuant to Supreme Court Rule 26 allowing for acceleration of "special and peculiar" cases, *San Mateo* was argued approximately three months after decision in the Circuit and only two months after docketing. See *County of San Mateo v. Southern Pac. R. Co.*, Docket at October 13, 1882 and December 19-21, 1882 (Copy, thanks to the generous assistance of the Supreme Court Librarian, in possession of author).

¹³² *San Mateo* was decided in the circuit on September 25, 1882. The case was docketed in the Supreme Court on October 13, 1882, argued on December 19-21, 1882, and ultimately dismissed three years later, on December 21, 1885. See entries for those dates in *San Mateo* Docket, *supra* note ___ and *San Mateo* Supreme Court Minutes (Copy in possession of author thanks to generous assistance of the Supreme Court Librarian.). Three years without a decision is remarkable because, at the time, opinions were generally issued approximately two to three *weeks* after

time, talent and money, not to mention the high stakes, the case was stayed by stipulation on October 15, 1883, just short of one year after it had been argued, about one month after Justice Field decided the second railroad tax case, *County of Santa Clara v. Southern Pacific Railroad, Co.*,¹³³ in the Circuit.¹³⁴

Two years later on November 18, 1885 and about two months before *Santa Clara* was to be argued before the Supreme Court, the railroad and the County notified the Court that the tax had been paid. The County moved that the Writ of Error be dismissed without a decision.¹³⁵

Thereafter, the County Attorney—not the County’s counsel of record in the Supreme Court—filed

argument. The Court’s standard practice was to vote on cases at the Saturday conference following the argument and assign the opinion with the expectation that the draft opinion (or a summary) would be read to the Court by the author within two to three weeks during a Saturday conference and then delivered orally from the bench the following Monday. See G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U.P.A. L. REV. 1463, 1486 (2006) (hereafter “White Chief Justice”); see also Charles Fairman, RECONSTRUCTION AND REUNION, 1864-88, PART ONE 69-70 (*The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, vol. VI, Paul A. Freund ed., 1971) (hereafter “Fairman Part One”). See also Swisher, *supra* note ____ at 257 (*San Mateo* was “hurried on to the Supreme Court.”); Charles Fairman, RECONSTRUCTION AND REUNION, 1864-88, PART TWO at 725 (*The Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, vol. 7, Paul A. Freund ed., 1971 (hereafter “Fairman Part Two.”) (Discussing *San Mateo*’s advancement for argument.)

¹³³ 18 F. 385 (C.C. D. Cal. 1883).

¹³⁴ See *San Mateo* Docket, *supra* at ____ (Oct. 15, 1883). After the successful effort to expedite the case, that the case was stayed by stipulation exacerbates suspicion that the parties or the Court, or both, had serious concerns about the case.

¹³⁵ See *San Mateo* Docket, *supra* at ____ (Nov. 18, 1885). At the conclusion of the Supreme Court’s October, 1882 Term, *San Mateo* had been continued and held over. See *San Mateo* Docket, *supra* note ____, at 1882, Oct. Term. Several months later, shortly after the new term opened, and about one month after the Circuit decision in *Santa Clara*, the notation “Stipulation to postpone further consideration of case until hearing of other cases involving same question filed & so ordered.” was entered on the Supreme Court docket. See *San Mateo* Docket, *supra* note ____ (Oct. 15, 1883). No reason was given for the stipulation, but from other papers filed later, it appears that the parties might have contemplated further development of the factual record in *Santa Clara*. See Answer to Motion to Dismiss of Plaintiff in Error, *County of San Mateo v. Southern Pac. R. Co.*, No. 106 at 5 (U.S. Dec. 17, 1885) (Stating that, when Circuit Court lifted stay and heard *Santa Clara* that “it may have been thought . . . that further light might be thrown on the Federal questions involved. . .”). This suggestion is consistent with statements made by Justice Field in correspondence to the railroad’s counsel, John Norton Pomeroy. In that correspondence, Field noted that *San Mateo* would not be decided until next term and that he previously had sent Professor Pomeroy “certain memoranda which had been handed me by two of the Judges . . . which, of course, were intended only for [Professor Pomeroy’s] eye.” Thereafter, Field states his “hope in whatever case is tried all the facts relating to the mortgage upon the property of the Railroad will be shown and also the extent to which its property has been subjected to taxation throughout the State.” *Four Letters*, *supra* note ____ at 1106.

a letter with the Court, asserting that the case was moot and should be dismissed from the docket. This suggestion of mootness was filed over the vehement objection, and was opposed by, the County's Supreme Court counsel.¹³⁶ The County's attorneys, with the support of the State's Attorney General, argued that *San Mateo* was a test case, raising only the constitutional question, and must be decided.¹³⁷ The railroad, however, had nothing to say.

The Court dismissed the case. Yet, it did so in a way that raised questions, especially in light of later events. In an opinion accompanying the order dismissing *San Mateo*, Chief Justice Waite acknowledged that the case was a test case.¹³⁸ The Chief Justice, however, then appears to assure the parties that the dismissal would not prejudice them or preclude them from obtaining a

¹³⁶ See Answer to Motion to Dismiss, Further Answer to Motion to Dismiss and Supplemental Answer to Motion to Dismiss, *San Mateo* Transcript of Record, *supra* at _____. Although the Court treated the request as a motion to dismiss, the county actually filed a "stipulation for dismissal of writ between County Board & L.D. McKisick." See *San Mateo* Docket, *supra* at _____ (Nov. 18, 1885). Mr. McKisick, who, according to the Supreme Court docket, had not entered an appearance in the Supreme Court on behalf of the defendant railroad, see *San Mateo* Docket, *supra* note _____ at _____ (Oct. 13, 1882), was the attorney who signed the railroad's Answer in the Circuit Court. See Answer, *San Mateo* Transcript of Record, *supra* note at 15. Mr. McKisick, however, is not listed among counsel for the defendants in the report of the Circuit decision. See 13 F. at 727.

The "stipulation for dismissal" was followed by a blizzard of other filings. A letter to counsel of record, Messrs. A.L. Rhodes and Alfred Barstow, from the County, requested that the writ be dismissed. Rhodes and Barstow replied, refusing to comply with their client's wishes. Thereafter, the County filed a "resolution of Supervisors of *San Mateo* County, revoking appointment of Rhodes and Barstow as counsel and substituting Jno. W. Ross . . ." The motion was briefed by Mr. Ross for the County and by Rhodes and Barstow in opposition. See *San Mateo* Docket, *supra* note _____ (Nov. 18 – Dec. 18, 1885). The County's brief made the simple point that the tax had been paid, so the fight was over. See County's Brief in Behalf of Motion to Dismiss, *San Mateo* Transcript of Record, *supra* note _____ (filed Dec. 14, 1885). Rhodes and Barstow argued that: (1) as counsel of record, they alone were authorized to speak for the County; (2) that the parties had cooperated to set up "the pleadings in this cause in such a form that they would present the Federal questions only," even to the point of making "[a]rrangements" so that the County had "the use of money equal to the amount of the . . . taxes" during pendency of the suit; and (3) dismissal would deny them payment of their attorneys' fees. See Answer to Motion to Dismiss, *San Mateo* Transcript of Record, *supra* note _____ at 2, 4-8. Reflecting the fact that, because the state's constitutionally authorized tax methodology was at issue and, therefore, the state was the real party in interest, not the county, Rhodes and Barstow were supported by written submissions from the Attorney General, the Governor and the state Controller, all confirming their appointment as Counsel for plaintiff. See *id.* at 10-11; Further Answer to Motion to Dismiss at 5, *id.*

¹³⁷ See Answer to the Motion to Dismiss, *San Mateo* Transcript of Record, *supra* note _____ at 7, 10.

¹³⁸ 116 U.S. at 319. The Court's minutes merely recite that the case was dismissed "per Mr. Chief Justice Waite," making no reference to the pending *Santa Clara* case, to the issues raised by that case or describing *San Mateo* as a test case. See *San Mateo* Minutes *supra* note _____ (Dec. 21, 1885).

ruling on the constitutional issue because the *Santa Clara* case, which, by then had percolated up from the Circuit, was soon to be argued, raised the same constitutional issue.¹³⁹

4. Round Four: *Santa Clara* in the Supreme Court

Three years after the *San Mateo* argument, the railroad was again before the Supreme Court. Arguments in *Santa Clara* began on January 26, 1886, a little more than one month after the *San Mateo* case was dismissed.

Notwithstanding the Chief Justice's suggestion that *San Mateo* and *Santa Clara* were essentially mirror images, there were notable differences. For one thing, although all other railroad counsel who had previously appeared in *San Mateo* were present, Roscoe Conkling—who had delivered the lead argument for the Railroad in *San Mateo* and also had filed a separate brief—was missing from the team of railroad lawyers.¹⁴⁰ Also missing from the briefs was any reference to the *Journal of the Joint Committee*.

In light of the Court's seeming assurance that it would decide the constitutional question, it is not surprising that the Railroad's *Santa Clara* briefs focused exclusively on the meaning of

¹³⁹ 116 U.S. at 319. (“As to the objection that this was by agreement of parties made a test case, and many others are depending on its adjudication, it is sufficient to say that both sides agree that the suit of the County of *Santa Clara* against the same company presents all the questions that are in this case, and that the parties have stipulated this need not be taken up for decision until that is heard. The interests of the state, therefore, will be as well protected by determination of that case as of this.”) The likelihood that the constitutional corporate person question would be addressed must have seemed beyond peradventure.

¹⁴⁰ See *Santa Clara* Docket, (Copy in possession of author thanks to the kindness of the Supreme Court Librarian.). The Supreme Court's Minutes from January 26-29, 1886 indicate that the case was argued over four days by D. M. Delmas, S. W. Sanderson, former Senator George F. Edmunds, A. L. Rhodes, California Senator William M. Evarts and E. G. Marshall. The Minutes also state that leave was granted Senator Edmunds to file an additional brief and to the plaintiffs in error to file a reply. See *County of Santa Clara v. Southern Pac. R. Co.*, No. 464 Supreme Court Minutes for January 26-29, 1886. (The minutes are maintained in the Supreme Court Library; thanks to the generous assistance of the Librarian, a copy is in the possession of author.) (hereafter “*Santa Clara* Minutes”).

“person,” as used in the Fourteenth Amendment.¹⁴¹ However, in what proved a prophetic insight, the County’s *Santa Clara* brief stated:

In deciding these cases the Circuit Court gave no attention to the questions which are denominated *State* questions, as contra-distinguished from the important questions in this litigation, the Federal questions. And when the first one of this class of cases was being prepared for trial in the Circuit Court, counsel for the respective parties framed the pleadings in one case—the *San Mateo* case—as a test case, so that all the Federal questions and only those questions might be determined by that Court and afterwards by this Court. The argument of that case, both in the Circuit Court and this Court, was confined to those questions, and that, too, with manifest propriety.

But when the *Santa Clara* group of cases was presented to the Circuit Court, the defendants presented several State questions, and it may be assumed that they will be reviewed here. . . .¹⁴²

¹⁴¹ 118 U.S. at 396.

¹⁴² See Brief for Plaintiff in Error at 56-57; *id.* at 56-59 (“State Questions”), *Santa Clara* Transcript of Record, *supra* note _____. See also Argument of D.M. Delmas, Esq. at 47 et seq., *Santa Clara* Transcript of Record, *supra* note ____; *County of San Bernardino v. Southern Pacific Railroad Co.*, Brief for Defendant at 26 (filed Jan. 16, 2886), *Santa Clara* Transcript of Record, *supra* note _____. (Discussing defendant’s argument that the fences are not taxable under state law).

Nevertheless, until the case was called for argument, the constitutional corporate person's existence seemed, if not the only issue, the dispositive issue in *Santa Clara*. The case was, however, to take a puzzling turn.

Just prior to argument, Mr. Chief Justice Waite apparently took the constitutional issue off the table, stating, at least according to the Court Reporter, that:

The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any persons within its jurisdiction the equal protection of the laws, applies to these Corporations. We are all of the opinion that it does.¹⁴³

Thus, the question—one of “epic importance” in constitutional law and one of “incalculable value to the business community”—seemingly was settled “off handedly” from the bench without written opinion.¹⁴⁴ This despite that *San Mateo*—which raised only the constitutional corporate person question—had, contrary to the Court's usual practice, languished undecided for years.

But was it settled? The opinion of the Court, written by Justice Harlan, alluded to “the grave questions of constitutional law upon which the case was determined below”, but does so

¹⁴³ 118 U.S. at 396. If the statement was literally true, it was a remarkable reversal for among others, Justice Samuel Miller. Only fourteen years previously, Justice Miller in the *Slaughter-House Cases*, stated on behalf of five other justices, that the Court strongly doubted that the Fourteenth Amendment protected anyone other than the Freedmen. 16 U.S. at 36, 72 (1872). One wonders what occurred to overcome those strong doubts. It is true, of course, that Justice Miller was addressing the privileges and immunities clause of the Amendment and not the equal protection or due process clauses, but the sweeping limitations that his opinion imposed appeared to apply to the Amendment as a whole and not just to the privileges and immunities clause. *But see* Kendrick, *supra* note ___ at 35 (Quoting Miller during *San Mateo* argument to effect that no judge ever held that Amendment was “supposed to be limited to the negro race”).

¹⁴⁴ *See* McCloskey, *supra* note ___ at 88.

only in the context of explaining that the Court was *not* deciding the constitutional issue.¹⁴⁵ The Court was able to avoid the constitutional question because, according to Justice Harlan’s opinion for the Court, the tax was illegal under state law.¹⁴⁶ In short, California’s taxing authorities had levied the tax on fences erected along the railroad right-of-way in addition to other railroad property. According to the Court, California law did not authorize a tax on the fences. Because the Court claimed that the portion of the tax illegally imposed on the fences could not be segregated from the portion legally imposed, the entire tax was illegal.¹⁴⁷

5. The Supreme Court Reporter’s Mulligan: The Erroneous Headnote That Became Law

¹⁴⁵ 118 U.S. at 410-11, 416-17. See also Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASH. L.J. 635, 662 (2010-2011) (Noting that the Court’s opinion does not refer to corporate personhood and that the Court “decided that it did not want to address the matter.”). But see *Fire Ass’n of Philadelphia v. People*, 119 U.S. 110, 120 (1886) (Harlan, J. dissenting) (Quoting comments attributed to the Chief Justice in *Santa Clara* “last term” that a corporation is a person within the meaning of the Fourteenth Amendment). However, the *Fire Association* majority never reached the Fourteenth Amendment question. Instead, the Court applied the long-standing rule of *Paul v. Virginia* and held that a foreign corporation’s right to operate in a state is dependent entirely on comity and that a state is permitted to discriminate between domestic and foreign corporations. 119 U.S. at 118.

¹⁴⁶ 118 U.S. at 411.

¹⁴⁷ Justice Harlan held that the entire tax was illegal because the illegal portion of the assessment could not be separated from the legal assessment. Yet, Justice Harlan’s assertion that the tax on the fences could not be separately determined and subtracted from the aggregate tax due is contradicted by the record. The County’s Supreme Court brief states that:

The amount at which the fences were valued is \$300 per mile. If the inclusion of the value of the fences was improper, it can readily be deducted from the total valuation apportioned to the county.

See Brief for Plaintiff in Error at 57, 60, *Santa Clara* Transcript of Record, *supra* note ____ . Thus, the record not only shows that the tax attributable to the fences was separately identifiable, the precise amount to be deducted from the total assessment, if necessary, is provided.

Had Justice Harlan, rather than declaring the entire tax illegal, acknowledged that the amount of the tax easily could be adjusted to account for the value assigned the fences, the Court would have been forced to address the constitutional question. It is hard to see the Court’s claim that the tax on fences precluded addressing the constitutional issue as anything other than an excuse to avoid the issue. Whether the fences were or were not taxed, every taxpayer—other than the railroads—was entitled to offset the amount of any mortgage against the value of the taxable property before calculation of the tax due. Thus, the railroads were subject to differential treatment with or without the tax on fences. The tax on fences simply had no bearing on the existence of the constitutional question and clearly was not a barrier to addressing it.

The case would take yet another unexpected turn. On May 26, 1886, sixteen days after the *Santa Clara* decision was announced, and four months after argument was completed, Supreme Court Reporter, J.C. Bancroft Davis wrote to Chief Justice Waite saying:

I have a memorandum in the California cases

Santa Clara County

v.

Southern Pacific &c &c

as follows:

In opening the Court states that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the judges were of the opinion that it does.

Please let me know whether I correctly caught your words and oblige.

The Chief Justice replied five days later, on May 31, 1886:

I think your mem[orandum] in the California Rail Road Tax Cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decisions.¹⁴⁸

¹⁴⁸ The Waite-Davis correspondence was unknown for many years until discovered in the Chief Justice's papers in the Library of Congress, is quoted in Magrath, *supra* note _____ at 223-24.

Even leaving aside that it is universally known and accepted that statements made by judges during oral argument do not constitute law,¹⁴⁹ the Chief Justice's response, although veiled in the non-confrontational kindness for which Waite was known,¹⁵⁰ would have been crystal clear to a lawyer, such as the Reporter: the constitutional corporate person question was *not* decided in *Santa Clara*. Nonetheless, the Reporter included the comments as a kind of preface in the official report of the decision immediately before the Court's opinion.¹⁵¹ However, Mr. Davis did more.

¹⁴⁹ For example, during oral argument Justice Miller interrupted counsel stating that he had "never heard it said in this Court or by any judge of it that these articles [i.e., the fourteenth amendment] were supposed to be limited to the negro race. The purport of the general discussion in the Slaughter-House cases . . . was nothing more than the common declaration that when you . . . construe any act of Congress, you must consider the evil which was to be remedied in order to understand . . . what the purpose of the remedial act was." See Benjamin B. Kendrick, Ph.D., ed., "THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION, 39TH CONG. 1865-1867 35 (Columbia Univ. 1914). In contrast to all that has been made of the comments attributed to the Chief Justice, no one has suggested that Justice Miller's comments modified his opinion in the *Slaughter-House Cases*.

¹⁵⁰ See, e.g., Magrath, *supra* note ___ at 257-266, 303-05; Donald Grier Stephenson, Jr., *The Waite Court at the Bar of History*, 81 DENVER U.L. REV. 449, 481-82 (2003-2004) (Quoting letter from Justice Miller complaining that Waite was "sadly wanting" in "firmness and courage" and "anxious to be popular as an amiable kind hearted man (which he is) . . .").

¹⁵¹ That the Reporter chose to include a discussion of his perception of the issues addressed and a comment made from the bench, despite the Chief Justice's caution, itself raises questions. J. Bancroft Davis was a former president of the Newburgh and New York Railway Company and, like Field, may have been sympathetic to the position of the railroads before the Court. Although it is unlikely that a definitive answer can be reached, some scholars suggest, without evidence, that perhaps Justice Field may have encouraged the Reporter to include the remarks. See, e.g., Krannich, *supra* at note ___ at 78; *Waite Court*, *supra* note ___ at 541.

Yet it is hard to imagine Reporter Davis including the comments at the behest of Justice Field against the wishes of Chief Justice Waite. The two were long-time professional colleagues and close personal friends. Waite and Davis had served together on the commission that negotiated the settlement of the *Alabama* claims with Great Britain following the Civil War. As lawyers and as diplomats, Waite and Davis both should have been sensitive to the need for precise language in formal documents, such as a court opinion. Davis, at that time Assistant Secretary of State, was one of Waite's leading proponents when Waite was mentioned as a candidate for the Court, urging President Grant to appoint him. Waite lived in Davis' house during the first year of his tenure on the Court. Moreover, Waite's persistent efforts were responsible for Mr. Davis' appointment as Supreme Court Reporter. See generally Magrath, *supra* note at 14-15, 253-57, 297.

Justice Field's relationship with Davis' friend, Chief Justice Waite, was nowhere near sanguine. In addition to his normally prickly personality, Field leveled a bitter personal attack on Waite for supposedly slighting him in assigning responsibility for writing an opinion of the Court. See *id.* at 99-100, 258-260. In fact, then-Professor Felix Frankfurter has characterized Waite's term on the Court as a "duel between him and Field." See Felix Frankfurter, *THE COMMERCE CLAUSE UNDER MARSHALL, TANEY AND WHITE*, 110 (1964). See also Magrath, *supra* note ___ at 209 (Describing Field as "Waite's great antagonist"). Moreover, although the dispute erupted some years later, Field and Davis quarreled so bitterly that the Chief Justice was required to intervene and did so on Davis' behalf. See, Alan Westin, *Stephen Field and the Headnote to O'Neill v. Belmont*, 67 YALE L.J. 363 (1943).

First, in the official, published version of the Court’s decision, the Reporter presents the comments as if the exact words of the Chief Justice are being quoted. Yet, comparison of the Waite-Davis correspondence with the *United States Reports* makes clear that, however accurate the substance of the quotation may be, the Reporter’s note to the Chief Justice did not purport to *quote* what had been said in court. Instead, the Reporter’s letter *describes* what he believed had been said *four months* earlier. In turn, the Chief Justice’s response confirms, not the precise wording, but only the general substance of the Reporter’s commentary with no hint of the importance that the parties and, indeed, the Court previously had attached to the issue. Given his explicit statement that the question had been “avoided”, it is reasonable to assume that the Chief Justice responded generally because he rightly believed that his response both made clear that the issue had *not* been resolved and precluded any suggestion in the official reports that it had.

Second, the text of the quotation appearing in the official volume of the *United States Reports* differs from the language the Reporter presented to the Chief Justice. The language submitted to the Chief Justice merely states that the Court did not wish “to hear argument on the question whether the provision in the Fourteenth Amendment” applies to corporations. The language included in the *United States Reports* states that the Court declined argument on “whether the provision in the Fourteenth Amendment to the Constitution which forbids a state to deny *to any persons* within its jurisdiction the equal protection of the laws, applies to these Corporations.” Thus, it was the Reporter, not the Chief Justice, however his words are viewed, who stated expressly that the term “persons” as used in the Fourteenth Amendment specifically

It seems more likely that Davis included the discussion on his own initiative. Davis’ service as Reporter was characterized by, at best, questionable decisions about what should and should not be included when the decision was published. *See infra* at ____.

guaranteed corporations due process and equal protection of the laws.¹⁵² One might speculate that the Chief Justice may have agreed, but it was for the Chief Justice—indeed, for the Court—to expressly so state and declare the legal question resolved.

Third, just before purporting to quote the Chief Justice, the Reporter includes in the *United States Reports* a description of the constitutional issue and characterizes the arguments and briefing as focusing almost exclusively on that issue. Notwithstanding the Reporter’s acknowledgment that the Court had “passed by” the constitutional question,¹⁵³ the juxtaposition of this written description of issues and arguments just prior to the statement attributed to the Chief Justice gives the inaccurate appearance that the Chief Justice is announcing a decision rendered, after deliberate and full consideration, in response to those arguments. Indeed, it is hard to imagine that most readers would understand the statement attributed to the Chief Justice as anything other than a determination of the constitutional question—or that the Reporter did not intend to convey that impression. The Reporter’s approach bears a striking similarity to Conkling’s argument, in that, rather than stating its conclusion expressly, both rely on “hints, intimations and distinctions made throughout”¹⁵⁴ to mislead the reader.

Finally, any doubt that the Reporter intended to mislead readers to believe that the Court had decided the corporate person issue is eliminated by the Reporter’s inclusion of a headnote to

¹⁵² Whether the Amendment applied to corporations is a different question than whether corporations are “persons” as that term is used in the Amendment. For example, counsel for the County conceded that corporations were “persons” but emphatically denied that the Amendment applied to protect corporations inasmuch as corporations were created by the State and, therefore, could be given, or denied, such rights as the State saw fit. *See, e.g., County of Santa Clara v. Southern Pacific Railroad Co.*, Brief for Plaintiff in Error at 43-47 *Santa Clara* Transcript of Record, *supra* note _____. *See also, id.* Argument of D.M. Delmas, Esq. at 21-37. In addition, the Supreme Court, at the time, repeatedly had decided whether state regulations denied corporations due process or equal protection without reference to corporate personhood on the basis that the Amendment had no application. *See cases collected infra* note ____ and discussion *infra* at pp. ____.

¹⁵³ 118 U.S. at 396.

¹⁵⁴ *Conspiracy Theory*, *supra* note ____ at 377-78.]

the decision stating that the issue *had* been decided. Headnotes—which are written by the Reporter *after* an opinion is issued and do not bear the imprimatur of the Court—have one purpose: to summarize the Reporter’s view of the holdings of the Court for the convenience of readers.¹⁵⁵ The first headnote in the official *United States Reports* appears immediately following the *Santa Clara* case caption and states explicitly that the Court held that corporations were persons within the meaning of the Fourteenth Amendment.¹⁵⁶

Nothing that the Reporter said in his note to the Chief Justice provided any warning that the Reporter intended to include a headnote asserting that the issue had been decided. Whatever scope the Chief Justice’s letter may have allowed the Reporter with respect to commentary on the Court’s decision, the Chief Justice’s statement that “we avoided meeting the constitutional question in the decision” clearly precluded the Reporter’s assertion that the Court had decided that

¹⁵⁵ See *United States v. Detroit Timber and Lumber Co.*, 200 U.S. 321, 337 (1905) (Commenting on another of Mr. Davis’ headnotes, stating that the “headnote is not the work of the Court, nor does it state its decision” and that “[i]t is simply the work of the reporter, gives his understanding of the decision . . . for the convenience of the profession”; the Court also stated that the headnote upon which counsel had relied “is a misinterpretation of the . . . decision.”) See also Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASH. L.J. 635, 662 (2010-2011) (“Because Davis was exercising his own discretion as to what the Court’s opinion stated, his headnote had no precedential value, and it did not reflect a change in constitutional doctrine.”).

Notably, and of no great surprise to anyone who has read the Court’s opinion, as issued by the Court, *i.e.*, without the reporter’s commentary, it is patent that the corporate person question was *not* decided. Thus, for example, the West Publishing version of the *Santa Clara* decision does not include any such headnote, although it does include the reporter’s pre-opinion commentary and the statement attributed to the Chief Justice. See 6 S.Ct. 1132. The Lawyers’ Edition version includes a similar headnote, but it is last of four headnotes. See 30 L. Ed. 118, 119 (1886).

¹⁵⁶ 118 U.S. at 394. This was not an isolated error. The Reporter, J. Bancroft Davis, misstated the Court’s holding in other instances. In *United States v. Detroit Timber and Lumber Co.*, 200 U.S. 321 (1905), for example, Justice Brewer, for the Court, stated that the reporter’s “headnote on *Hawley v. Diller*, 178 U.S. 476 (1899) . . . “is a misinterpretation of . . . the decision.” *Id.* at 337. See also Frank D. Wagner, *The Role of the Supreme Court Reporter in History*, 26 Journal of Supreme Court History 9 (2001) (Noting that “inaccuracies in syllabuses have led to real problems” referring to Mr. Davis’ headnote in *Hawley*.). After his death, the Reporter was severely criticized for both incomplete and inaccurate headnotes. See _____, *J. C. Bancroft Davis as a Reporter*, 11 Law Notes (Edward Thompson Co.) 201, 202 (1908) (“As to the quality of the headnotes, . . . many of them entirely fail to show what the court decided. . . .”). Cf. Alan F. Westin, *Stephen J. Field and the Headnote to O’Neil v. Vermont*” *A Snapshot of the Fuller Court at Work*, 67 YALE L. J. 363 (1958) (Chronicling acrimonious dispute between Davis and Field regarding accuracy of headnote.) (hereafter “Westin”).

corporations were persons within the meaning of the Fourteenth Amendment. Yet, that headnote—and its supporting commentary—has been cited repeatedly for the proposition that the *Santa Clara* court held that “corporations are persons within the meaning of the Fourteenth Amendment.”¹⁵⁷

Even more to the point, despite the constitutional question having been the basis for the decision in the Circuit, and despite that the Fourteenth Amendment question—in the Reporter’s words—was “[t]he main-almost the only-question[]” argued,¹⁵⁸ Justice Harlan’s opinion for the unanimous Court expressly reiterates what the Chief Justice told the Reporter: that the Court had “no occasion to consider the grave questions of constitutional law upon which the case was determined below.”¹⁵⁹

Moreover, Justice Field, a vigorous proponent of the constitutional corporate person issued a concurring opinion that condemns the Court for failing to decide the question. Field’s opinion, which was issued contemporaneously with Harlan’s and before publication of the headnote and commentary in the *United States Reports* leaves no doubt that the issue had not been decided.¹⁶⁰ Field—the author of the Circuit decision being reviewed and the Justice with the most personal

¹⁵⁷ See, e.g., *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 n.15 (1978) (Powell, J., opinion of the Court (citing headnote); *id.* at 822 (Rehnquist, J. dissenting) (citing commentary). See also Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundations of Modern Political Economy*, 50 WASH. L.J. 635, 662 (2010-2011).

¹⁵⁸ 118 U.S. at 396.

¹⁵⁹ 118 U.S. at 411. *But see Fire Association v. New York*, 119 U.S. 110, 120-21 (1886) (Harlan, J. dissenting) (Arguing that “last term” *Santa Clara* court decided that corporations were constitutional corporate persons based on comments attributed to Chief Justice Waite by the reporter.). It is hard to know what to make of this opinion in light of Harlan’s *Santa Clara* opinion. On the one hand, “there is some evidence that [Harlan] was reluctant to write opinions for the Court that did not entirely square with his personal views. . . .” Yarbrough, *supra* note ___ at 125. At the same time, Harlan is reputed, when challenged about apparent contradictions in his positions, to have replied “Let it be said that I am right rather than consistent.” *Id.* at 77.

¹⁶⁰ *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417 (1886). *San Bernardino* was a companion case argued and decided at the same time as *Santa Clara*.

investment in the question—concurred in the judgment, stating his “regret that [the court]has . . . deemed [avoiding the question] consistent with its duty to decide the important constitutional questions involved, and particularly the one which was fully considered in the circuit court, and elaborately argued here. . . .”¹⁶¹

Within less than two years of *Santa Clara*, a fourth justice, Waite’s ally and principal collaborator on the Court,¹⁶² Justice Bradley, would agree in an opinion for the Court in *The California Railroad Tax Cases*. In that case—which Justice Bradley characterized as “substantially similar to . . . *Santa Clara Co. v. Railroad Co.*, reported in 118 U.S. 394”—Bradley wrote that the corporate person question remained undecided.¹⁶³ Astoundingly, the Reporter’s

¹⁶¹ *County of San Bernardino v. Southern P. R. Co.*, 118 U.S. 417, 422 (1886) (Field, J., concurring in judgment). This is a remarkable opinion that has received little attention. First, Field had nothing to say on the record in *Santa Clara*, the lead case. Reading the *United States Reports*, for all that appears in the record, Field was just one member of the unanimous Court. Because Field was the author of the opinion below which the Court was reviewing, one might wonder if Justice Field had recused himself in *Santa Clara*. That, however, was not the case. The Supreme Court’s minutes from January 26 through January 29, 1886, the days the *Santa Clara* case was argued, show that Field was on the bench for all of the arguments. See *Santa Clara Minutes*, *supra* note ___ at January 26-29, 1886. To be sure, standards regarding the circumstances in which judges ought recuse themselves in the late nineteenth century were different from those currently in place, see Steven G. Calabresi and David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1397-98 (2005-06) (noting that, following the Justices’ usual practice, Chief Justice Marshall recused himself from sitting on Supreme Court cases which he had decided as Circuit Justice, but noting that practice was not uniform) (hereafter “Calabresi and Presser”). Compare *Ames v. Union Pac. Ry.*, 64 F. 165 (C.C. D. Neb. 1894) with *Smyth v. Ames*, 169 U.S. 466 (1898) (Justice Brewer writes circuit opinion and sits on case in Supreme Court.).

Field’s concurrence also is a window on the Justice’s thought processes. Without question, as Harlan’s opinion states, the rule was that constitutional questions would be decided as a last resort, and only when a case could be decided on no other basis. Field, however, set the rule aside in the Circuit, 18 F. at 390, and would have had the Court do likewise, 118 U.S. at 422-23, because of the self-perceived importance of the question. But every constitutional question is important. The fact that Field believed that settled, clearly applicable rules could be set aside when he denominated an issue as important says much about his self-image. The fact that he thought the rest of the Court would go along with him, says even more.

¹⁶² *Magrath*, *supra* note ___ at 298-99.

¹⁶³ *California R. Tax Cases*, 127 U.S. 1, 28 (1888). (Stating that if cases can be decided on state law grounds it is unnecessary to decide application of Fourteenth Amendment questions which “are so numerous and embarrassing, and require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them.”). *But see Stockton v. Balt. & N.Y.R. Co.*, 32 F.9 (C.C.D. N.J. 1887) (Bradley, Cir. J.) (Asserting a few months prior to *The California Railroad Tax Cases* that *Santa Clara* had held that corporations were “persons” protected by the Fourteenth Amendment.

headnotes in *The California Railroad Tax Cases* directly contradicted the *Santa Clara* headnote, asserting that the issue had *not* been decided in *Santa Clara*.¹⁶⁴ In sum, four of the Court’s justices—including the Chief Justice to whom the holding was attributed, Justice Harlan, the author of the Court’s opinion and Justice Field, the author of two Circuit decisions deciding the question, including the *Santa Clara* opinion reviewed by the Supreme Court—expressly stated, contrary to the Reporter’s *Santa Clara* commentary and headnote, that the corporate person issue was not decided by the *Santa Clara* Court.

Seen without the Reporter’s gloss, and in the context of the give and take of courtroom dynamics, there would seem to be a strong possibility that the Chief Justice was directing counsel to focus on the issues of interest to the Court. For example, the Court may have believed that it did not need reargument of the corporate person question,¹⁶⁵ because the Court was thoroughly familiar with the constitutional issue having received extensive written briefs twice in *San Mateo* and *Santa Clara* and having heard days of argument in *San Mateo*.¹⁶⁶ In addition, the constitutional corporate person questions had been briefed and argued in several other cases heard by the Court before *Santa Clara*.¹⁶⁷

¹⁶⁴ 127 U.S. at 2 (The cases “all involved the constitutionality of tax laws of the State of California, in many respects the same constitutional questions being presented as those which were argued (and not decided) in *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394.”).

¹⁶⁵ This, of course, was not the only time the Court advised counsel that it did not wish to hear argument on an issue a second time. The Court issued such an instruction in a railroad case similar to *Santa Clara*, for example. See Fairman Part Two, *supra* note ___ at 727 (Noting that Minutes in companion case to *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885) state: “The argument of these cases was commenced by Mr. A.B. Browne of counsel for the plaintiff in error. The Court announced that it did not desire to hear further argument in these cases.”). *Humes*, an opinion written by Field, held that the Fourteenth Amendment had no application to the corporation’s claims.

¹⁶⁶ Fairman Part Two, *supra* note ___ at 727.

¹⁶⁷ See, e.g., *Railroad Co. v. Richmond*, 96 U.S. 521, 526-27 (1877) (Argument of Conway Robinson for plaintiff in error); *Chicago Life Insurance Co. v. Needles*, 113 U.S. 574, 583 (1884); *Home Insurance Co. v. New York*, 119 U.S. 129, 141-42 (1886) (Argument of Benjamin H. Bristow for plaintiff in error); *Kentucky Railroad Tax Cases*, 115 U.S. 321, 328-330 (1885) (Argument of C.B. Simrall for plaintiff in error).

The “microscopic” state law questions, in contrast, had not been addressed in *San Mateo* and, although raised in the *Santa Clara* answer, “on the trial, the point was not discussed by counsel . . . and thus the minor point was left undetermined.”¹⁶⁸ Directing counsel to focus on the non-constitutional question was tantamount to asking that the record on the other issues be developed to allow the Court to determine whether alternate grounds existed to dispose of the case.

Moreover, then, as now, the Supreme Court does not issue unexplained oral orders deciding notorious and strongly controverted constitutional issues without explanation. Indeed, it is inconceivable that Chief Justice Morrison Waite would countenance, let alone be the mouthpiece for rendering such a bold and far reaching holding. Waite was self-restrained, cautious and careful and saw the judicial function as “properly a limited one” to be exercised “modestly.”¹⁶⁹ Waite once advised a district judge that “the fault of Judges sometimes is to try and make too much law at once” when they should “feel the way, and not be afraid to draw back if the ground will not hold you up.”¹⁷⁰ Waite also jealously guarded his reputation and that of the Court.¹⁷¹

At a time when the railroads were not well regarded, when the record and arguments (as well as Justice Field’s behavior in *San Mateo*) had raised serious questions of the extent to which

¹⁶⁸ *County of San Bernardino v. Southern Pacific Railroad Co.*, 118 U.S. 417, 423 (1886) (Field, J. concurring).

¹⁶⁹ Magrath, *supra* note at 209; *see also id.* at 314 (noting that Waite court was characterized by caution and respect for precedent). Waite once advised a district judge that “the fault of Judges sometimes is to try and make too much law at once” when they should “feel the way, and not be afraid to draw back if the ground will not hold you up.”

¹⁷⁰ *Id.*, quoting letter from Waite to Robert W. Hughes, March 25, 1879.

¹⁷¹ Magrath, *supra* note ___ at 281-82 (Noting duty to make his name as honorable as his predecessors); *id.* at 97-98, 129-30, 152, 155, 159-60, 164 (Discussing Waite’s concerns with public perception of his work and that of the Court.); *id.* at 279 (Quoting Waite: “The effort of all should be to encourage the respect of everyone for the courts of the nation. Anything that can by any possibility have a tendency in the opposite direction should be avoided.”)

the railroads would go to achieve their ends¹⁷² and with the presence of a known apologist for the railroads on the Supreme Court bench,¹⁷³ it is extraordinarily unlikely that Chief Justice Waite would have delivered the gift of the constitutional corporate person in such perfunctory fashion. Waite's sensitivity to the impact and reception of the Court's decisions as well as his careful and

¹⁷² See, e.g., Paul Kens, *The Credit Mobilier Scandal and the Supreme Court: Corporate Power, Corporate Person, and Government Control in the Mid-nineteenth Century*, 34-2 J. OF SUP. CT. HISTORY 170 (2009).

¹⁷³ Field had been recommended to President Lincoln for the Supreme Court by, among others, his close friend, Leland Stanford. Gould, *supra* note ___ at 44. The two had first become friends in 1862 when Stanford was governor and Field was on the California Supreme Court bench and Stanford became Field's patron. *Id.* at 162. Field was a frequent guest at Stanford's house in San Francisco, was a Trustee of Stanford's university and, following Stanford's death, advised Stanford's wife on legal and other matters. *Id.* at 165. Field was also friendly with other prominent California railroad barons, including Messrs. Huntingdon, Hopkins and Crocker and so close was his relationship that questions regarding Field's integrity were raised even before his appointment to the Court. *Id.* at 154. Field's behavior undoubtedly contributed to those questions. Field recommended his good friend, J. N. Pomeroy, to the railroads as counsel and he was retained, arguing both *San Mateo* and *Santa Clara* in the Circuit. There were also repeated assertions and rumors that Field discussed pending cases, including yet undisclosed outcomes, outside the Court with interested parties. Despite Field's denials, there is evidence that he did so. In private letters to Pomeroy, Field advised that *San Mateo* was held over and that he had given Pomeroy memoranda which Field had received from other Supreme Court justices. See *Four Letters*, *supra* note ___ at 1106. There was also reason to believe that he may have been willing to discuss other, undecided cases outside the Court. In *Cummings v. Missouri*, 71 U.S. 277 (1866), Field's brother, David Dudley Field, represented the plaintiff, along with another well known lawyer, Reverdy Johnson. *Id.* at 282. Field did not recuse himself and, indeed, wrote the opinion for the Court. (Field sat on other Supreme Court cases argued by his brother, *Ex Parte Milligan*, 4 Wall. 2 (1866) and *Ex parte Garland*, 4 Wall. 333 (1867)). The case was argued in the spring of 1866, but not decided until December of that year. In the summer of 1866, Reverdy Johnson told acquaintances in Missouri that he had been given information that judgment for the plaintiff was forthcoming. Field was believed to be the source. A. F. House, *Mr. Justice Field and Attorney General Garland*, 3 ARK.L.REV. 266, 270-72 (1848-49); Kens, *Lochner*, *supra* note ___ at 109-114. If true, such conduct would not have been new for Field. While on the California Supreme Court, Field was known to hold *ex parte* meetings with litigants. See Kens, *supra* note ___ at 104-105.

Without purporting to excuse Field's behavior it is well to remember that standards of conduct expected of judges were very different. In large measures these differences are due to differences in the role of judges today that are attributable to the current ascendance of legal realism versus the then-current notion of judges as "legal savants" whose "conception [was] that 'law' was that of a body of fixed principles "derived from authoritative sources, such as the Constitution. See G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781 791-98 (1999-2000). Because of this perception, "it did not really matter whether a judge helped cases come to the docket of his court." *Id.* at 792. Thus, Marshall-era justices, including both Marshall and Story instigated litigation in which they were interested. In Marshall's case, he wrote the writ of error petition in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816). Justice Washington granted the petition "knowing that Marshall, who was a member of the land syndicate which was one of the litigants in the case, had drafted it." *Id.* at 784 n. 14.

detailed analyses and explanations of the holdings in other, significant cases is compelling evidence that Waite did not intend to resolve the corporate person question in *Santa Clara*.¹⁷⁴

Avoiding the constitutional question and deciding *Santa Clara*—a second test case and one in which the Court virtually had guaranteed would resolve the constitutional issue—on the basis of a state law question that Field had refused to address in the Circuit, and which the Court could easily have side-stepped, not only was consistent with Waite’s judicial approach, it may have been a veiled message that Field—and his compatriots—could not, at least overtly, rule by personal predilection. Chief Justice Waite, for example, had a history of using the assignment of opinions to avoid the appearance that the Court was the captive of any interest group so that, for example, writing responsibility for significant pro-railroad opinions would be assigned to justices who were not viewed as aligned with business interests.¹⁷⁵ That John Marshall Harlan—a known, vehement critic of C. Hollis Huntington, a founder of the defendant Central Pacific Railroad, and of corporations generally,¹⁷⁶ as well as no friend of Conkling—was assigned the *Santa Clara* opinion could hardly have been an accident, but, instead, seems a calculated statement about the conduct of the *San Mateo* and *Santa Clara* cases and the railroad’s attempt to invoke the Court’s aid.

¹⁷⁴ In *Munn v. Illinois*, 94 U.S. 113 (1876), for example, the Chief Justice went to great lengths to explain and justify the holding that states might, consistently with due process, regulate prices charged by businesses “affected with the public interest.” Waite conducted searching research and consulted extensively with Justice Bradley while preparing the opinion and relied on English Common Law authorities pre-dating the Constitution. See Kens, Paul. *The Supreme Court During the Chief Justiceship of Morrison R. Waite*.

¹⁷⁵ Paul Kens, *THE SUPREME COURT UNDER MORRISON R. WAITE, 1874-1888* 101-102 (University of South Carolina 2010) (Discussing refusal to assign pro-railroad opinion to Field); Magrath, *supra* note ___ at 258-260 (“Waite’s strategy . . . brings to mind Chief Justice Hughes’ practice, whenever possible, of assigning liberal justices to write conservative opinions and conservative justices to write liberal opinions in order to preserve the Court’s image of impartiality.”).

¹⁷⁶ Linda Przybyszewski, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 173 (North Carolina 1999)

Finally, the Court, as a whole, clearly had concerns about the implications of a broad-based ruling favoring the railroads.¹⁷⁷ During Supreme Court argument in one of the companion cases to *Santa Clara*, counsel for the County ominously made the reasons for concern explicit, urging the Court

“to decline the exercise of an unnecessary jurisdiction . . . in the present exasperated state of public feeling” and to refuse “to pronounce a merely irritating decree, not needed for the protection of the substantial rights of anyone . . . declaring that the Constitution

¹⁷⁷ *The California R. Tax Cases*, 127 U.S. 1, 27-28 (1888). Referring to the “numerous and embarrassing” questions arising under the Amendment which “require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them. . . . By proceeding step by step, and only deciding what is necessary to decide, light will gradually open upon the whole subject, and lead the way to a satisfactory solution of the problems that belong to it. We prefer not to anticipate these problems when they are not necessarily involved.”) *See also Home Ins. Co. v. New York*, 119 U.S. 129 (1886), *on reargument*, 134 U.S. 594 (1890) (Constitutional person question argued five months after *Santa Clara* argument in which Field’s circuit opinions are attacked as unprincipled; Court equally divided).

Even Justice Field seemed to be concerned. *See San Mateo*, 13 F. 722, 730 (C.C.D. Cal. 1882) (Field noting that issues were examined “with a painful anxiety to reach a right conclusion, aware as the Court is of the opinion prevailing throughout the community that the railroad corporations of the state, by means of their great wealth and the numbers in their employ, have become so powerful as to be disturbing influences in the administration of the laws; an opinion which will be materially strengthened by a decision temporarily relieving any one of them from its just proportion of the public burdens.”); *Santa Clara*, 18 F. 385, 414-15 (C.C.D. Cal. 1883) (Noting “misapprehensions that have largely prevailed in the community since the trial of the *San Mateo* case” which also involved a decision against the right of the state “to subject railroad property to its just proportion of the public burdens . . . ,” and making suggestions how to enforce such demands without violating the Constitution.

Note that just two years earlier, the Supreme Court had refused to adopt Field’s *San Mateo* corporate person theory and upheld an amendment to California’s incorporation statute permitting the state to regulate prices charged by corporations formed under a version of the statute that did not permit price regulation. *See Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884). In dissent, Field quotes at length from his *San Mateo* circuit opinion arguing that the regulation infringed the rights of those who had formed the corporate plaintiff. *Id.* at 36q-373 (Field, J., dissenting). While attempting to avoid reading too much into the apparent disagreement, it ought to be noted that *Spring Valley* was decided while *San Mateo* was being held by the Court. It is possible that the different treatment of the two cases reflected the Court’s discomfort. With the potential breadth of a ruling in favor of corporate rights along the lines proposed by Field.

of this sovereign State is void where your decision is an assumption
of authority, uncalled for by the merits of the case¹⁷⁸

This argument was an appeal to the Jacksonian federalism in which all of the Justices were grounded¹⁷⁹ and, perhaps more to the point, a reminder of the public enmity toward railroads caused by the well-known fact that the railroads were generating substantial profits for their owners despite the mortgages carried because, in part, the railroads had not paid anything other than interest on the mortgages.¹⁸⁰ Indeed, if Field, who professed to be immune to public criticism, was concerned enough to expressly attempt to defuse public hostility over the issue in his Circuit opinions, almost apologizing for the ruling and providing advice regarding how the state might adopt a legal tax, other Justices – especially the Chief Justice – more attuned to criticism must have been seriously concerned.

By holding the California tax illegal on the narrow ground that it was imposed on property that state law did not authorize to be taxed, *i.e.*, the fences, the Court gave all the parties something of a victory. The Court invalidated the tax without holding that the provisions of California’s constitution were unconstitutional and without establishing a general rule that would have rendered similar taxes on railroads illegal. Because the Court strictly limited its holding, it had little, if any, precedential value and California could, if it wished, fix the problem and tax the

¹⁷⁸ See *County of San Bernardino v. Southern Pacific Railroad Co.*, Argument on Behalf of Plaintiff in Error at 41, (quoting Circuit argument) *Santa Clara* Transcript of Record, *supra* note ____.

¹⁷⁹ See, e.g., Paul Kens, *THE SUPREME COURT UNDER MORRISON R. WAITE* 7, 168, 172 (University of South Carolina 2010); Linda Przybyszewski, *THE REPUBLIC ACCORDING TO JOHN MARSHALL HARLAN* 11-12, 150-51 (University of North Carolina 1999).

¹⁸⁰ See Answer at 8, ¶ XIV, *Santa Clara* Transcript of Record, *supra* at _____. (Mortgage equals \$46,000,000 “and no part thereof has ever been paid except the accruing interest.”). Remarkably, railroad counsel had made the brazen and startling argument that “in so far as the railroad performs services for public interests and for public benefits, instead of its being an occasion of burden of taxation, it ought to be a reason for limiting or reducing its taxation. See Oral Argument of Mr. Evarts, for Defendants in Error at 17, *Santa Clara* Transcript of Record, *supra* note ____.

railroads. That the ruling denied Field and his railroad baron friends the far reaching precedent they had hoped to obtain by manipulating the record and the judicial process in two test cases must have seemed a bonus.

C. The Constitutional Person After *San Mateo* and *Santa Clara*: Field *Ipse Dixit* Embeds the Corporate Person in the Constitution

The evidence clearly contradicts the notion that railroads and other corporations through their retainers slipped protection for corporations into the Fourteenth Amendment *sub silencio* and without anyone noticing.¹⁸¹ However, in contrast to the conspiratorial, smoke-filled, back-room Gilded Age imagery conjured by the early twentieth century Fourteenth Amendment conspiracy theorists, when the issue is traced through the Supreme Court's nineteenth century post-*Santa Clara* decisions, a pattern emerges which supports the conclusion that there was, indeed, a systematic and determined effort to assure constitutional protection for corporations. Rather than being perpetrated in secret, the maneuvering to secure constitutional protections for corporations occurred, in the open, at the Supreme Court, masterminded by Justice Stephen J. Field.¹⁸² Indeed,

¹⁸¹ Typical of most modern authorities, J. Willard Hurst, characterizing the conspiracy theory as ill-defined melodrama, states that no evidence supports, and the indirect evidence contradicts, the theory. Hurst, *supra* note _____ at 67.

¹⁸² The evidence—in Supreme Court cases, state cases and statutes and federal statutes—makes tolerably clear that any mid- or late nineteenth century lawyer would have understood “persons,” as used in the Amendment, to include corporations, notwithstanding whatever its authors may have consciously intended and notwithstanding what Justice Field may, or may not, have done. See, *supra* at _____. Thus, without meaning to denigrate the role played by Justice Field in midwifing the result, there may have been a certain inevitability about interpreting “person” to extend constitutional protections to corporations. See, e.g., Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W.VA. L. REV. 173 (1985-86); Schwartz *History*, *supra* note ____ at 169 (stating that the role of corporations in the economy made the use of Fourteenth Amendment to protect such persons natural, whatever the framers’ intent); Mark, *supra* note ____ at 1447, 1463 (Noting that, until the end of the nineteenth century, corporate personhood was assumed, serving as a standard convention and shorthand surrogate for addressing the corporators and the property they brought into the corporation and arguing that historians unduly see *Santa Clara* as innovative); Hurst, *supra* note ____ at 62 (Noting that the roots of corporate personhood “ran deep”); Aynes, *supra* note ____ at 10 (Stating that, at the time the Fourteenth Amendment was adopted, corporations were commonly understood to be persons); Gaffney, *supra* note ____ at 227 (Arguing that Field could not have persuaded a Court to whom his views were antithetical); Peritz, *supra* note __ at 55-56, 74 (Noting that corporate personality was well established and that large businesses were treated as individual enterprises e.g., “Carnegie Steel, Rockefeller’s Standard Oil, etc.). Thus, and not surprisingly, according corporations Fourteenth Amendment protection did not generate significant

the conspiracy theorists' focus on Conkling's role, on Robber Barons and on secret journals diverted attention from what was hidden in plain view.

Many authors and scholars accord Steven J. Field "great" or "near great" status because it was he "who was largely responsible for the expansion of substantive due process that became the major theme of constitutional jurisprudence during the Gilded Age," which "set the tone for constitutional law for half a century."¹⁸³ However, relatively few recognize that it was Field who assured constitutional protection for corporate persons and that it was protection for the corporate person that gave significance to, and triggered the development of, substantive due process.¹⁸⁴

contemporary controversy. See Hurst, *supra* note ____ at 68-69. Cf. *Nashville C. & St. L. R. Co. v. Browning*, 310 U.S. 362, 369 (1940) Frankfurter, J. ("It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written in the statute books, and to disregard the gloss which life has written upon it. Settled . . . practice . . . can establish what is . . . law. The Equal Protection clause did not write an empty formalism into the Constitution. Deeply embedded traditional ways of carrying out . . . policy . . . are often tougher and truer laws than the dead words of the written text.").

That a corporation is a constitutional person answers only one-half of the question, however. The penultimate question is whether corporate personhood means that a corporation has the same (or similar) rights as a natural person. For example, one scholar has argued that even "Justice Field would have denied to the corporations many of the rights enjoyed by natural persons. . . ." See Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundation of Modern Political Economy*, 50 WASH. L.J. 635, 663 (2010-2011). See also, Argument for Plaintiffs in Error by J.M. Wilson in *The California Railroad Tax Cases*, 127 U.S. 1, 21-22 (1887) (Even assuming constitutional corporate person was resolved by the Chief Justice in *Santa Clara*, "the question still remains whether they are to be considered as standing on precisely the same footing as natural persons.").

¹⁸³ See Bernard Schwartz, *Supreme Court Superstars: The Ten Greatest Justices*, 31 TULSA L.J. 93, 108, 114 (1995-96) (hereafter "Schwartz").

¹⁸⁴ Howard Jay Graham, for example, states: "[i]t has been overlooked that the later *Pembina* [125 U.S. 181 (1881)] and *Beckwith* [129 U.S. 26 (1889)] *dicta* clinching the doctrine . . . were written by Field." *Innocent Abroad*, *supra* note ____ at 206 n. 216. Some have even denigrated the importance and significance of Field's role, albeit wrongly, with respect to constitutional corporate personhood. Paul Kens probably takes the most extreme view:

The impact of Field's opinions on constitutional doctrine, however, was limited. . . . Ultimately, the full Court did confirm the result of Field's circuit court ruling but it did so on the basis of a peculiarly in the California law, ignoring the sweeping constitutional theories upon which Field had based his circuit court opinions.

Field's theory of corporate equal protection was a grand experiment that failed. The Supreme Court ignored it, and Field himself soon abandoned it. Never again did he attempt to employ the equal protection clause to invalidate a tax on corporations.

One without the other had little value to corporate interests. On the other hand, the protections which both doctrines together provided corporations were priceless, serving as a catalyst of the growth that was transforming the American economy and culture.

Field's effort to see that corporations were constitutional persons came to fruition, in the roughly ten and one-half years between the May 10, 1886 decision in *Santa Clara* and his December 1, 1897 retirement from the Supreme Court. In that period, the Supreme Court decided eleven cases in which the existence of the constitutional corporate person was addressed expressly in the opinion for the Court. Steven Field wrote for the Court in the first seven cases. Six of those opinions were announced in a period of slightly more than ten months, between March 19, 1888 and January 7, 1889.¹⁸⁵ In each case, resolution of the corporate person issue was unnecessary, but Field explicitly and definitively asserted, with, at best, cursory discussion, that the Court already had decided conclusively that corporations were persons within the meaning of the Fourteenth Amendment.

Kens, *supra* note ___ at 246. Professor Kens' statement illustrates that literal truth, can conceal broader reality. *See, infra* at ___.

The significance of Field's opinions, of course, lies not in whether Field applied the theory to invalidate a state tax on corporations, but, more generally, in assuring that Section One of the Fourteenth Amendment protected artificial persons. Focusing on the substantive result of Field's future equal protection (and due process) cases obscures Field's ingenuity in using cases holding that constitutional protections were *not* denied to embed the corporate person into the Constitution. *See, infra* at _____. Moreover, Field can hardly be said to have "failed" given the subsequent and continuing reliance by both courts and scholars on *Santa Clara* and its progeny as definitively establishing that corporations are persons within the meaning of the Fourteenth Amendment. *See, e.g., First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 780 (1978) (Citing *Santa Clara* for proposition that [i]t has been settled for almost a century that corporations are persons within the meaning of the Fourteenth Amendment."); *see also, id* at 822 (1978) (Rehnquist, J. dissenting) (Citing *Santa Clara* for the proposition that a corporation is a 'person' entitled to protection of the Equal Protection Clause of the Fourteenth Amendment.)"

¹⁸⁵ Inasmuch as Chief Justice Waite is viewed by many as having curbed Field's ability to write his expansive views into law, it ought not go unnoticed that Field's seven opinions were announced in a period that begins with Waite's incapacitation and ultimate death on March 23, 1888. Moreover, from February 1887 until just prior to his death, Waite "worked . . . incessantly" on preparation of the opinion in the *Telephone Cases*, 126 U.S. 1 (1888), a case which consumes more than 500 pages and an entire volume of the *United States Reports*. Paul Kens, *THE SUPREME COURT UNDER MORRISON R. WAITE 1874-1888* 167 (University of South Carolina Press 2010). *See generally* Stephenson, *supra* note ___ at 449.

In four of the opinions which he wrote for the Court, Field cites the Supreme Court's *Santa Clara* ruling as authority. However, Field's citation refers, not to the Court's opinion, but to either the first page of the case (on which the erroneous headnote appears) or to the Reporter's description of the pre-argument commentary of Chief Justice Waite. As each new opinion issues, Field builds a cross-corroborating web of alleged Supreme Court authority for the constitutional corporate person by citing, in addition to *Santa Clara*, one or more of his prior decisions which had asserted, as a fact, that the issue had been previously settled.

In contrast, the question of constitutional corporate personhood was implicit, but not expressly addressed, in several other cases decided between May 1886 and December 1897. Two things are striking about those cases. First, Stephen Field wrote none of the opinions. Second, despite that the constitutional corporate person issue arguably *was* critical to some of those decisions, none of the opinions expressly addresses the point or cites *Santa Clara* or any other case addressing the issue.¹⁸⁶

¹⁸⁶ The contrast between these cases and Fields' decisions asserting that the constitutional corporate person issue had been resolved is striking. The analytic model in every case—adjudication of the corporation's substantive due process or equal protection claims is identical with the analytic approach used in all of Field's corporate persons decisions—with one exception: Field's decisions, unlike those of every other justice, expressly assert that a corporation is a constitutional person. See *Noble v. Union River Logging R. R. Co.*, 147 U.S. 165 (1893), written by Justice Brown, treating a corporation as a person protected by the Fifth Amendment. See also Mayer, *supra* note _____ at 582. Yet, despite holding that the corporate plaintiff was deprived of its property without due process of law, the Court never mentions the constitutional corporate person question. 147 U.S. at 176-77. See also *Norfolk & W. R. R. Co. v. Pennsylvania*, 136 U.S. 114, 118 (1890). (Lamer, J.) (Assuming application of Amendment to corporations, but denying relief); *New York v. Roberts*, 17 U.S. 658, 662 (1898) (Shiras, J.) (Same); *Chicago Burlington & Q. R. R. v. Chicago*, 166 U.S. 226, 241, 257, (1897) (Harlan, J.) (same); *Adams Express Co. v. Ohio State Auditor*, 165 U.S. 194, 228 (1890) (Fuller, C.J.) (same); *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (Gray, J.) (Taking of private property of a person or corporation without consent for private use violates due process of law.). *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232 (1889) (Bradley, J.) (Finding no discrimination versus "any persons or corporation", but assuming Fourteenth Amendment protects corporation.).

In the years immediately before the Supreme Court decided *Santa Clara*, the Court several times had rejected claims that corporations had been denied due process and equal protection in violation of the Fourteenth Amendment. Significantly, without expressly addressing the corporate person issue, the Court, as it would after *Santa Clara*, generally decides the case on the merits of the due process and equal protection questions. These cases may reflect the view that, person or not, the Amendment had no application to the regulation at issue or to corporations.

Just short of two years after the Supreme Court's *Santa Clara* decision was issued, Field, writing for the Court, asserted for the first time that the constitutional corporate person question was settled. This, of course, was exactly what, eighteen months earlier in his *County of San Bernardino* concurrence, Field had complained that the *Santa Clara* Court did not do.¹⁸⁷

In *Pembina Consolidated Silver Mining & Milling Company v. Pennsylvania*,¹⁸⁸ a Colorado corporation argued that a license fee imposed by Pennsylvania denied it equal protection of the laws because a similar fee was not imposed on Pennsylvania corporations.¹⁸⁹ Although the Court

In *Chicago Life Insurance Co. v. Needles*, 113 U.S. 574 (1884) plaintiff claimed that its constitutional rights were violated by regulations imposed by Illinois. After analyzing the application of the regulations, the Court held “[t]here is no denial . . . of the equal protection of the laws; nor any deprivation of property without due process of law. . . .” 113 U.S. 583. In the *Kentucky Railroad Tax Cases*, 115 U.S. 321 (1885) counsel argued that “[c]orporations are persons within the purview of § 1 [of the] Fourteenth Amendment.” 115 U.S. at 328. After analyzing the application of the Kentucky statutes, the Court held that equal protection had not been denied. 115 U.S. at 336. In *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512 (1885) counsel argued that “[a] railway company is a citizen and a person” protected by the Fourteenth Amendment. *Id.* at 516. The Court, speaking through Justice Field, found the due process and equal protection claims “untenable” because there was no discrimination against the railroad. *Id.* at 523. Finally, in *Stone v. Farmer’s Loan & Trust Co.*, 116 U.S. 307 (1886), decided just days before arguments began in *Santa Clara*, the Court rejected a challenge to Mississippi’s regulation of railroad rates. In doing so, without addressing the corporate person question, Chief Justice Waite stated that the power to regulate could not “amount[] to a taking of private property without just compensation, or without due process of law” . . . within the meaning of the fourteenth amendment . . . , nor take away from the corporation the equal protection of the laws.” *Id.* at 332, 347.

¹⁸⁷ 118 U.S. 417, 422 (1886) (Field, J. concurring).

¹⁸⁸ 125 U.S. 181 (1888).

The issue arose in other cases (albeit not directly addressed by the Court) between the *Santa Clara* and *Pembina* decisions.

In 1887 the Court re-examined its holding in *Home Insurance Co. v. Morse*, 20 Wall. 445 (1874), discussed *supra* at _____. *Morse* had equated the rights of a corporation to remove a case to federal court with the right of a “natural citizen.” *Id.* at 455. In *Barron v. Burnside*, 121 U.S. 186 (1887), Iowa argued that a foreign corporation was not a Fourteenth Amendment “person.” *Id.* at 195. The Court reaffirmed *Morse* equating a corporation’s removal right with those of “any individual citizen.” *Id.* at 200. The Court never mentions the constitutional corporate person or *Santa Clara*, which had been decided only ten months earlier.

In *Fire Association v. New York*, a Pennsylvania insurance company claimed that it was denied equal protection in violation of the Fourteenth Amendment because New York taxed the company in a manner different than New York corporations. 119 U.S. 110, 111-13, 117 (1886). Applying *Paul v. Virginia*, 8 Wall. 168 (1868), the Court held that, because corporations were creatures of state law, other states were not even required to recognize the existence of foreign corporations. *Id.* at 118-19. Thus, because New York was not obliged to recognize the plaintiff corporation at all, it was not required to treat it as a constitutional person. *Id.* In dissent, Justice Harlan, ironically enough, the author of *Santa Clara*, began what was to become a mantra-like incantation of his and of Justice Field: *Santa Clara*

found no impermissible discrimination and denied relief, Field, albeit in *dicta*, peremptorily declared that a corporation was a person:

Under the designation of person there is no doubt that a private corporation is included. Such corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution. As said by Chief Justice Marshall, ‘the great object of a corporation is to bestow the character and properties of individuality on a collective and changing body of men.’

Providence Bank v. Billings, 4 Pet. 514, 562.¹⁹⁰

As if to reinforce the claim that the issue was no longer open to discussion, Field cites no other authority for his assertion and, despite the fact that Field’s *San Mateo* and *Santa Clara* Circuit opinions cover a total of eighty-nine pages in the *Federal Reporter*, offers no further analysis.

No other analysis was needed because, person or not, the plaintiff corporation was an out of state corporation and, therefore, according to the Court’s long settled jurisprudence, in a

had decided that corporations were constitutional persons entitled to Fourteenth Amendment protection, in this case, whether foreign or native. *Id.* at 120-21.

Fire Association may represent the Gilded Age Court at its schizophrenic best. It seems more likely, however, that at least some of the Justices may not have appreciated the implications of or uses to which *Santa Clara* was being put. *Norfolk & W.R.R. Co. v. Pennsylvania*, 136 U.S. 114, 118 (1890) (Lamar, J.) (Deciding that corporation was not denied equal protection without mentioning corporate persons.); *Chicago, Mwke. & St. Paul Ry. Co. v. Minnesota*, 134 U.S. 418, 452 (1890) (Blatchford, J.) (Finding potential deprivation of property without due process and denial of equal protection without mentioning corporate person questions.).

¹⁸⁹ 125 U.S. at 182-83.

¹⁹⁰ 125 U.S. at 189. This discussion is a precis of the rationale for the constitutional corporate person that Field developed at length in his Circuit opinions in *San Mateo* and *Santa Clara*. See 13F.722, 738-48 (C.C.D. (1882) and 18 F.385, 398-403 (C.C.D. 1883).

different class than a Pennsylvania corporation *vis a vis* state regulation. In other words, despite his assertion that the plaintiff was a constitutional corporate person, in this case it did not matter.

Field swept away the argument that the corporation had been denied equal protection, holding that “[t]he application of the Fourteenth Amendment of the Constitution to the statute imposing the license tax . . . is not . . . apparent.”¹⁹¹ Applying long settled principles, Field held:

The plaintiff in error is not a corporation within the jurisdiction of Pennsylvania. . . . The State is not prohibited from discriminating in the privileges it may grant to foreign corporations as a condition of their doing business or hiring offices within its limit. . . .

The states may, therefore, require for the admission within their limits of the corporations of other States, or any number of them, such conditions as they may choose without acting in conflict with the concluding provision of the first section of the Fourteenth Amendment.¹⁹²

Perhaps, because the *Santa Clara* Court’s refusal to decide the constitutional corporate person question—and his noisy objection thereto—might have been still in the minds of his Supreme Court colleagues and Court observers, or because Justice Bradley’s opinion in *The California Railroad Tax Cases*, issued virtually the same time that *Pembina* was issued, stated expressly that Santa Clara had not decided the question,¹⁹³ Field never mentions the *Santa Clara* decision in his

¹⁹¹ 125 U.S. at 188.

¹⁹² 125 U.S. at 189. *See also Fire Association v. New York*, 119 U.S. 110 (1886) (Applying same rule of law over Justice Harlan’s *Santa Clara*-based dissent.).

¹⁹³ *Pembina* was issued on March 19, 1888; *The California Railroad Tax Cases* had been argued January 11 to 13, 1888 and the opinion was issued April 30, 1888.

Pembina opinion.¹⁹⁴ Curiously, however, Field cites an 1887 circuit opinion written by Justice Bradley which, although disagreeing with *Pembina* on the merits, concluded that in *Santa Clara* “the doctrine that corporations are not citizens or persons, within the protective language of the constitution, was unanimously disapproved, and the court expressly held that [corporations] are entitled, as well as individuals, to equal protection of the laws, under the fourteenth amendment of the constitution.”¹⁹⁵

About one month after *Pembina*, the Supreme Court decided *Missouri Pacific Railway Company v. Mackey*.¹⁹⁶ Once again, Field wrote the opinion for the Court.

In *Missouri Pacific*, Field’s overreaching is more blatant. The case challenged a Kansas statute abrogating the fellow-servant rule, making “[e]very railroad company organized or doing business in this state” liable for damages suffered by one employee as the result of the negligence of another employee.¹⁹⁷

As in *Pembina*, Field first dismissed out of hand the contention that the Fourteenth Amendment applied:

Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies

¹⁹⁴ Written by Field, and decided twenty years earlier in the same year that the Fourteenth Amendment was ratified, *Paul v. Virginia* 75 U.S. 158 (1868), never mentions the corporate person issue, but comes to the same conclusion as *Pembina*. *Paul* reinforces that Field overreached to address the corporate person issue in *Pembina*. See also *Fire Association*, 119 U.S. at 118-19 (Applying *Paul*, upholding differential state regulation of foreign corporation.).

¹⁹⁵ 125 U.S. at 186, citing *Stockton v. Balt. & N.Y. R. Co.*, 32 F.9, 14 (1887). Justice Bradley “was not present at the argument” “and took no part in [the *Pembina*] decision.” 125 U.S. at 190.

¹⁹⁶ 127 U.S. 205 (1888).

¹⁹⁷ *Id.* at 206.

or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions.¹⁹⁸

After holding that the Fourteenth Amendment did not apply to the type of state legislation at issue, Field drops a single, unnecessary and logically disconnected sentence, stating: “It is conceded that corporations are persons within the meaning of the amendment.”¹⁹⁹

In *Mackey*, Field begins construction of a cross-corroborating web of Supreme Court authority asserting that a corporation is a constitutional person. In *Mackey*, Field cites both *Santa Clara* and *Pembina* as authority for his “concession” that corporations are persons protected by the Fourteenth Amendment. Field rests his “concession,” not on a reference to the *Santa Clara* Court’s opinion, but on citation to the page of *United States Reports* on which the inaccurate headnote appears.²⁰⁰ Thereafter, Field picks up where he had left off, again asserting that the Fourteenth Amendment did not apply because “the business of operating a railway would seem to call for special legislation . . . having for its object the protection of their employees as well as the safety of the public.”²⁰¹ The constitutional corporate person “concession,” thus, was classic *obiter dicta*.

¹⁹⁸ *Id.* at 209.

¹⁹⁹ *Id.* at 209-210.

²⁰⁰ Field’s citation reads “*Santa Clara County v. Southern Pacific Railroad Company*, 1180 U.S. 394. . . .”

²⁰¹ 127 U.S. at 210. A companion case was decided the same day on the authority of *Missouri Pacific*. See *Minneapolis and St. Louis Railroad Co. v. Herrick*, 127 U.S. 210 (1888). Although *Herrick* contains no additional analysis, merely referring back to *Missouri Pacific*, Justice David Brewer, Field’s nephew, later cites *Herrick* as one of several authorities settling the corporate person question. See *Gulf, Col. & Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 154 (1896). For this reason, *Herrick* is counted among Field’s corporate person decisions.

The corporate person question next arose in a Contract Clause challenge, rather than in a Fourteenth Amendment case. Once again, Field inserted unnecessary *dicta* describing corporations as vested with the attributes of a natural person.

In *Georgia Railroad and Banking Co. v. Smith*,²⁰² the railroad argued that the charter conferred on it by Georgia permitted it to charge certain rates.²⁰³ However, after the charter was issued, Georgia adopted a new Constitution which authorized the legislature to set railroad tariffs.²⁰⁴ The company claimed that such rate regulation was an illegal impairment of contract, *i.e.*, its charter.

Despite that the constitutional prohibition on state impairment of contracts does not hinge on whether the contract was held by an individual or a corporation, Field went out of his way to inextricably intertwine the two:

The incorporation of the company, . . . [permits] numerous parties . . . to act as a single body for the purposes of its creation, or as Chief Justice Marshall expresses it, by which ‘the character and properties of individuality’ are bestowed ‘on a collective and changing body of men,’ *Providence Bank v. Bellings*, 4 Pet. 514, 562. . . .²⁰⁵

Field’s corporate person commentary was a gratuitous précis of the basis for the corporate person theory that he had espoused in his *San Mateo* and *Santa Clara* Circuit opinions.

²⁰² 128 U.S. 174 (1888).

²⁰³ *Id.* at 177.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 179.

As he had in *Pembina* and in *Mackey*, Field held that, person or not, the railroad’s charter contained no language authorizing it to set rates on its own, free of state regulation.²⁰⁶ Thus, Field’s assertion that the charter conferred the “properties of individuality” was *dicta* and, as was the case in *Pembina* and *Missouri Pacific*, would have attracted little notice because Field inserted the *dicta* in a ruling denying a corporation’s plea for constitutional protection.

Field’s next opportunity to address the constitutional corporate person came two months later, in *Minneapolis and St. Louis Railway Co v. Beckwith*.²⁰⁷ In *Beckwith*, the plaintiff challenged, on both Fourteenth Amendment due process and equal protection grounds, an Iowa law providing double damages for injuries caused by a railroad in certain circumstances.²⁰⁸

Field begins his analysis by once again asserting the unquestionable existence of the constitutional corporate person: “It is contended by counsel [] as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of [section one of the Fourteenth Amendment].”²⁰⁹ With several decisions asserting the existence of a constitutional corporate person behind him, Field now expressly asserts that the *Santa Clara* Court did precisely what he had contemporaneously complained it did not do²¹⁰ – decided that a corporation was a person within the meaning of the Fourteenth Amendment. According to Field:

It was so held in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394, 396, and the doctrine was reasserted in *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 189. We admit also . . .

²⁰⁶ *Id.* at 182.

²⁰⁷ 129 U.S. 26 (1889).

²⁰⁸ 129 U.S. at 28, 34-35.

²⁰⁹ 129 U.S. at 28.

²¹⁰ *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 422-25 (1886) (Field, J., concurring).

that corporations can invoke the benefits of provisions of the Constitution and laws which guarantee to persons the enjoyment of property, or afford to them the means for its protection, or prohibit legislation injuriously affecting it.²¹¹

Field now explicitly rests his claim that the issue had been decided, not on a general reference to the first page of the *Santa Clara* case (where the headnote appears) as he had in *Mackey*, but on a specific reference to the page containing the Reporter's notes and commentary.²¹² Moreover, Field's *dicta* for the first time expands the concept of the constitutional corporate person beyond the protections afforded by the Fourteenth Amendment and asserts that corporations are entitled to the protection of any constitutional or legal provision "guarantee[ing] . . . persons the enjoyment of property".²¹³

In *Beckwith*, Field, again upheld the validity of a state statute in a way that marginalized the constitutional corporate person:

[T]he clause does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The State can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interest and prosperity. [W]hen the calling or profession or business

²¹¹ 129 U.S. at 28.

²¹² *Id.* at 28. Field's *Santa Clara* citation in *Beckwith* reads as follows: "118 U.S. 394, 396." In the *United States Reports*, the Court's opinion in *Santa Clara* begins one page after the page cited by Field, i.e., on page 397. Page 394 contains the inaccurate headnote. Page 396 contains only the statement attributed by the Reporter to Chief Justice Waite and a portion of the Reporter's description of counsels' arguments. Field could do so without fear of contradiction because Chief Justice Waite had been dead for about ten months at the time *Beckwith* was issued.

²¹³ *Id.* at 28.

is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished. Such has been the ruling of this Court in numerous instances where that clause has been invoked against legislation supposed to be in conflict with it.²¹⁴

Thus, the legislation was valid, whether applied to a corporate person or to a natural person, and Field's commentary on the issue is, yet again, *dicta*.²¹⁵ For the fifth consecutive time, Field's corporate person appears in a ruling denying a corporation relief for alleged constitutional violations.

The Court next addressed the constitutional corporate person expressly the following term. Once again, Justice Field spoke for the Court. In *Home Insurance Co. v. New York*,²¹⁶ the Court upheld a state statute imposing taxes on corporations against a variety of constitutional challenges, including an attack based on the Fourteenth Amendment.

²¹⁴ *Id.* at 29.

²¹⁵ Any question that Field's corporate person discussion is pure surplusage is resolved by the following: In 1885—one year *prior* to the Supreme Court's *Santa Clara* decision, but *after* the *San Mateo* case was argued and *after* Field's *Santa Clara* decision in the Circuit—Field decided a nearly identical Fourteenth Amendment challenge by a corporation without ever mentioning the constitutional corporate person. See *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885). Comparison of Field's opinions in *Beckwith* and *Humes* – especially the *ratio decidendi* – confirms the extent of Field's post-*Santa Clara* overreaching.

²¹⁶ 134 U.S. 594 (1889).

Field first held that the legislature’s “action in this matter is not the subject of judicial inquiry in a federal tribunal.”²¹⁷ Thereafter, Field also held that the Fourteenth Amendment “does not prevent the classification of property for taxation . . . [n]or does the amendment prohibit special legislation . . . [so long as] all . . . are treated alike under similar circumstances and conditions”²¹⁸ Because the New York statute subjected all entities “of the same kind . . . to the same tax . . . [,] [t]here is no discrimination in favor of one against another of the same class.”²¹⁹

As he had done in a growing list of cases ruling against corporate claims, Field confirmed the existence of the constitutional corporate person. Immediately after characterizing the corporation’s constitutional claims as untenable, Field nonetheless states “[i]t is conceded that corporations are persons within the meaning of this Amendment. It has been so decided by this court.”²²⁰ This time Field eschews reliance on *Santa Clara*. Instead, Field predicates his assertion that the issue “has been so decided” solely on his *Pembina* decision.²²¹

²¹⁷ *Id.* at 600.

²¹⁸ *Id.* at 606.

²¹⁹ *Id.* at 607. Field also cites five of his previous decisions in support of the proposition that the statute is not discriminatory. Three of the decisions are pre *Santa Clara* decisions, only one of which involves a corporation. That case, *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885) held that there was no discrimination without addressing the application of the Fourteenth Amendment to corporations. The other two cases were also decisions that Field had written. Both asserted that corporations are persons protected by the Fourteenth Amendment. The citations read: *Missouri Pacific Railway v. Mackey*, 127 U.S. 205, 209; [and] *Minneapolis Railway Co. v. Beckwith*, 129 U.S. 26, 32.” The *Mackey* reference is to a portion of the opinion finding no discrimination that has nothing to do with the corporate person. The *Beckwith* reference cites a page addressing both issues.

²²⁰ *Id.* at 606.

²²¹ The reason for this is not clear. However, the history of *Home Insurance* raises intriguing questions. *Home Insurance* was originally argued five months after *Santa Clara* was decided. The constitutional corporate person issue was one of several pivotal issues emphasized by the parties. In fact, the Attorney General of New York directly challenged the correctness of Field’s *San Mateo* Circuit decision, arguing that “the broad scope given to the first section of the Fourteenth Amendment, by this [*San Mateo*] decision is not sustainable on principle or reason.” 119 U.S. at 146. That counsel attacked Field’s circuit decision—and not the Supreme Court’s decision—months after *Santa Clara* was decided, is yet another indication that the *Santa Clara* court was not viewed by the contemporary Bar as having decided the issue.

In an 1892 case, *Charlotte, Columbia and Augusta v. Gibbes*,²²² Field again asserted that corporations had been conclusively determined to be persons within the meaning of the Fourteenth Amendment when it was unnecessary to do so. *Gibbes*, as had several of Field's earlier constitutional corporate person decisions, involved a tax levied upon a railroad which it claimed violated the Fourteenth Amendment. As he had in the other decisions, Field dismissed the substantive constitutional objection on the merits:

That the state has the power to prescribe the regulations mentioned there can be no question. Though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public. They are formed for the convenience of the public in the transportation of persons and merchandise and are invested for that purpose with special privileges. . . . Being the recipients of special privileges from the State, to be exercised in the interest of the public, and assuming the obligations thus mentioned, their business is deemed affected with a

The issue was never addressed in 1886, however. The Court split evenly, four to four, and, thus, affirmed, without opinion, the state court decision. *Id.* at 148. The issues on which the Court split, whether the nature of the tax, the even handedness of its application, or the corporate person, were not revealed. The “decided, not decided” handling of the corporate person issue in *Santa Clara*, *see supra* at ____, its subsequent equivocal treatment by relatively contemporaneous cases, *see supra* at ____, the contemporaneous confusion about the significance of the ruling in the lower courts at the time, *see supra* at ____, and the clear statement, two years later, in *California v. Cent. Pac. R.R. Co.*, 127 U.S. 1, 28 (1888) (Bradley, J. asserting “unnecessary for us to decide the question raised under the Fourteenth Amendment.), leave much room to wonder what, if any, role the corporate person played in the split. In any event, the Court granted re-argument on February 7, 1887 and the case was reheard by a full bench on March 18 and 19, 1890 and the opinion issued on April 7, 1890.

²²² 142 U.S. 386 (1892).

public use, and to the extent of that use is subject to legislative regulation. . . .²²³

Moreover, Field found that, whether the plaintiff was an artificial or a natural person, “[t]he rule of equality” had not been violated because “[a]ll railroad corporations in the state are treated alike”²²⁴

Despite the fact that defendant’s “public” character and the equality of treatment rendered it unnecessary to decide whether corporations were constitutional persons,²²⁵ Field again elected to explicitly confirm the existence of the constitutional corporate person. Field stated: “Private corporations are persons within the meaning of the [fourteenth] amendment”²²⁶ According to Field: “[i]t has been so held in several cases by this court. *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U.S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181, 189; *Minneapolis & St. Louis Railroad Co. v. Beckwith*, 129 U.S. 26.”²²⁷ Thus, Field, in this, his seventh consecutive opinion on the subject in less than four years, asserted that the question whether a corporation was a person was settled not only in *Santa Clara* (which he knew contained no such holding), but by misleading, if not wholly inaccurate, *dicta* in two other decisions that he had written.

Field would serve on the Court just short of six more years. His legacy in this respect was, however, secure. The question whether a corporation was a constitutional person now appeared to

²²³ *Id.* at 393.

²²⁴ *Id.* at 394.

²²⁵ Compare *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885).

²²⁶ 142 U.S. at 391.

²²⁷ *Id.*

have been at least affirmed, if not decided, in seven opinions written by Field, and, in a revisionist gilding added by Field, to *Santa Clara*.

One of the remarkable aspects in Field's campaign to establish a constitutional corporate person is that he did so in a line of forgettable cases, all of which ruled *against* the corporate plaintiff. Doing so arguably allowed Field to avoid the scrutiny that asserting the existence of the constitutional corporate person in a case rendering judgment for a corporation would have engendered due to his well-earned pro-railroad reputation. Likewise, by affirming constitutional corporate personhood only in cases where the question was irrelevant, Field avoided the attention given rulings that were necessary predicates for a holding of the Court.

Field's approach allowed him to accomplish in plain view what Conkling, and the best lawyers the railroads could hire, had been unable to deliver. By shifting the focus of the discussion from the text of the Amendment and the intent of the authors and doing so in cursory, innocuous, conclusory and unnecessary assertions in run-of-the-mill decisions, Field affirmed the conclusion—without providing any rationale—of his Circuit opinions in *San Mateo* and *Santa Clara*. Thus, a cornerstone of American constitutional law was laid on a foundation of historical myth. Others would build on Field's foundation.

D. With a Little Help From His Friends

After *Gibbes*, Field never again addressed the question of the constitutional corporate person. There were, however, four decisions between 1896 and 1898 (which were argued, if not decided before Field's retirement) in which the Supreme Court expressly addressed the question of whether a corporation was a person for Fourteenth Amendment purposes. Three of the decisions,

were written by Justice Harlan.²²⁸ The fourth decision was written by Justice David Brewer.²²⁹

Justice Brewer, perhaps coincidentally, perhaps not, was the nephew of Justice Field.²³⁰

All of the opinions assert that the question of the constitutional corporate person was decided in *Santa Clara*. Although one of the decisions cites the first page of the *Santa Clara* case, the other three refer to the page containing the Reporter's commentary. All of the cases cite Field's decisions as authority, asserting, as a given, that the question of the constitutional corporate person had been settled. In contrast to Field's opinions, all of which ruled against the railroad and business interests, the Court now began to use the constitutional corporate person to render decisions in favor of corporations.²³¹

The issue was addressed by the Court in December 1896, one year before Field retired.²³² The Court's opinion demonstrates that Field had transformed the inaccurate headnote and the

²²⁸ *Covington and Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578 (1896); *Blake v. McClung*, 172 U.S. 239 (1898); *Smyth v. Ames*, 169 U.S. 466 (1898).

²²⁹ *Gulf, Colorado and Santa Fe Railway Co. v. Ellis*, 165 U.S. 150 (1897).

²³⁰ Rehnquist at 107.

²³¹ See, e.g., *Smyth v. Ames*, 169 U.S. 466 (1898); *Gulf, Colorado*, 165 U.S. 150 (1897); *Covington and Lexington*, 164 U.S. 578 (1896).

²³² By this time, Justice Field's active participation in the life of the Court had declined significantly on account of physical and mental impairments. See William H. Rehnquist, *THE SUPREME COURT* at 98 (Vintage Books 2002) (noting that "[d]uring the winter of 1896-97 [Field's] condition worsened and his questions in the courtroom indicated that he had no idea of the issues being presented by counsel."); Swisher, *supra* note ___ at 442 (noting that during the winter of 1896-97, Field became noticeably feeble, failed to follow arguments, and forgot having voted on cases). See also Walter Wellman, *Supreme Court Opens*, Chi. Times-Herald 12 (Oct. 12, 1897); *id.*, *Justice Field to Rest* 1 (Oct. 13, 1897); *id.*, *Field Will Quit Dec. 1* 5 (Oct. 15, 1897) and *id.*, *Story of Justice Field* 6 (Oct. 16, 1897) (collectively, describing Field's decline, inability to ambulate without assistance and failing memory). Field's decline is reflected by the fact that, between 1870 and 1892, it was common for Field to write between twenty to thirty opinions a year (for the Court, concurring and dissenting) in 1896, by contrast, Field was the author of only eleven total opinions, of which only two were for the Court and six were dissents. Chief Justice Mellville W. Fuller's biographer states that, by early 1896, the Chief Justice would no longer assign Field majority opinions. James W. Ely, *THE CHIEF JUSTICESHIP OF MELLVILLE W. FULLER, 1888-1910* 48 (1995). Field resigned effective December 1, 1897. See Rehnquist at 98. See also Owen M. Fiss, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910* 28-29 (The Oliver Wendell Holmes Devise History of the Supreme Court Vol. VII, Stanley N. Katz ed., 2006) (Describing Field's last years as a member of the Court.).

commentary attributed to Chief Justice Waite into the law of the land. In *Covington and Lexington Turnpike Road Co. v. Sanford*,²³³ the Court held that “[i]t is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law as well as a denial of the equal protection of the laws.”²³⁴ The Court rested its conclusion on *Santa Clara* as well as Field’s *Pembina*,²³⁵ *Beckwith*,²³⁶ and *Gibbes*²³⁷ decisions.

The *Covington* opinion was written by Justice Harlan. Harlan, of course, was the author of *Santa Clara*, in which he had stated, and forcefully, that the Court was *not* addressing the question whether a corporation was a person within the meaning of the Fourteenth Amendment.²³⁸ Moreover, Harlan did so in the face of a concurrence by Field condemning the Court and therefore, Harlan, for refusing to decide the question.²³⁹

²³³ 164 U.S. 578 (1896).

²³⁴ *Id.* at 592.

²³⁵ 124 U.S. 181 (1888).

²³⁶ 129 U.S. 26 (1889).

²³⁷ 142 U.S. 386 (1891).

²³⁸ 118 U.S. at 410, 411, 416. *Cf. Santa Clara*, 18 F. 385, 389-90 (C.C.D. Cal. 1883) (Field, Cir. J.) (Refusing to consider state law issues because of importance of constitutional questions); *id.* at 444-45 (Sawyer, J.) (same).

This may explain Justice Harlan’s failure in *Covington*, his first opinion for the Court on the issue, to cite a specific page of the *Santa Clara* opinion in support of his position, and his referring, instead, only to the first page of the published decision (which contained the erroneous headnote). Recall that, in his first opinion post-*Santa Clara*, Field also failed to cite to a specific page. *See supra* at _____. Notably, Justice Harlan did cite to specific *Santa Clara* pages in two of the other three cases which he decided. *See infra* at _____.

²³⁹ *County of San Bernardino v. Southern Pac. R. Co.*, 118 U.S. 417, 422 (1886) (Field, J. concurring); *But see Fire Ass’n of Philadelphia v. People*, 119 U.S. 110, 120 (1886) (Harlan, J. dissenting) (Asserting that issue was decided based on comments attributed to the Chief Justice by the Reporter).

The Court next addressed the corporate person question in *Gulf, Colorado and Santa Fe Railway Co. v. Ellis*,²⁴⁰ in which the Court states: “[i]t is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States.”²⁴¹ In addition to *Santa Clara*, the *Ellis* court—speaking through Justice Field’s nephew, David Brewer—rests its decision on five opinions, all written by Justice Field.²⁴² Notably, although without explicit reference to the circuit opinions, the *Gulf Colorado* Court seems to invoke on the corporation aggregate reasoning first articulated by Field in the circuit decisions in *San Mateo* and *Santa Clara* and touched upon in *Pembina*—that, in protecting a corporation’s rights, a court is actually protecting the rights of the individuals who are members of the corporation.²⁴³

Two additional cases addressing the corporate person issue were argued prior to Field’s retirement, but not decided until shortly afterward. In *Smyth v. Ames*,²⁴⁴ and *Blake v. McClung*²⁴⁵ the Court, again speaking through Mr. Justice Harlan, affirmed that settled law held that corporations were persons within the meaning of the Fourteenth Amendment.

²⁴⁰ 165 U.S. 150 (1897). Cf. *United States v. Northwestern Express, Stage & Transportation Co.*, 164 U.S. 686 (1897) (Holding that statute conferring jurisdiction on Court of Claims includes corporations within the term “citizens of the United States” because to hold otherwise would deny relief to stockholders who are citizens of the United States.).

²⁴¹ 165 U.S. at 154.

²⁴² The opinion also cites Justice Harlan’s *Covington* opinion.

²⁴³ 165 U.S. at 154 (“[T]he rights and securities guaranteed to persons by [the Constitution] cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.”). This is the last of the decisions issued prior to Field’s retirement from the Court and the only one to suggest a rationale. One might wonder whether Justice Field’s continued presence, albeit in a limited capacity, or that the author was Field’s nephew and intellectual disciple, played any role.

²⁴⁴ 169 U.S. 466 (1898). *Smyth* was argued April 5 and 6, 1897.

²⁴⁵ 172 U.S. 239 (1898). *Blake* was argued November 8, 1897.

In *Smyth*, citing the Reporter’s commentary in *Santa Clara* and two of Field’s decisions, Justice Harlan stated: “That corporations are persons within the meaning of this [Fourteenth] Amendment is now settled.”²⁴⁶ In *Blake*, the Court was equally conclusory, assuming that “a corporation is a ‘person’ within the meaning of the Fourteenth Amendment.”²⁴⁷ Justice Harlan rested his *Blake* conclusion also on citation of the page containing the Reporter’s commentary in the official report of the *Santa Clara* decision.²⁴⁸

Justices Harlan and Brewer consolidated and confirmed Field’s work. No one would challenge the existence of a constitutional corporate person for another forty years.²⁴⁹ Moreover, although that challenge provoked commentary and analysis of the historical record,²⁵⁰ it was given little credence and even the challengers were inconsistent, questioning the existence of the constitutional corporate person.²⁵¹ Still, although a corporation may be a legal person, the Court never has articulated what such status means.

E. At the End of the Day

Viewed from this prospective, it might be argued that Charles and Mary Beard’s claim that the corporate person was surreptitiously inserted into the Fourteenth Amendment was both right and wrong. The Beards were wrong to focus so heavily, almost exclusively, on the Fourteenth

²⁴⁶ 169 U.S. at 522, citing “*Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394, 396; *Charlotte, Columbia & Augusta v. Gibbes*, 142 U.S. 386, 391; *Gulf, Colorado and Santa Fe Railway v. Ellis*, 165 U.S. 150, 154.”

²⁴⁷ 172 U.S. at 259.

²⁴⁸ 172 U.S. at 259, citing “*Santa Clara County v. Southern Pacific Co.*, 118 U.S. 394, 396,” *i.e.*, the page on which the statement attributed to Chief Justice Waite appears. Harlan also cites the opinion in “*Smyth v. Ames*, 169 U.S. 466, 522.” 172 U.S. at 259. *Smyth*, of course, also rested on citation of the Reporter’s commentary.

²⁴⁹ *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938) (Black, J. dissenting). *See also Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576 (1949) (Douglas, J. dissenting).

²⁵⁰ *See, e.g., McLaughlin*, *supra* note ____ at ____.

²⁵¹ *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 576, 574, 575 (Jackson, J. writing separately).

Amendment’s authors and on the role of railroad and corporate retainers such as Roscoe Conkling. The search for the framers’ intent and the focus on the railroad’s efforts to obtain protection against the states under the Fourteenth Amendment probably obscured the pre-existing federal and state case law, the common usage of the term in federal and state statutes as well as the post *Santa Clara* decisions of Justices Field, Harlan and Brewer.²⁵²

The Beards were right in the sense that, whatever the framers of the Amendment may have intended, there was indeed a concerted effort to manipulate the Supreme Court’s processes and assure constitutional protection for corporate interns. The Beards failed to recognize, however, that it was not Roscoe Conkling, but Stephen J. Field, who, in a campaign over the course of forty-six months, blatantly and knowingly misstated the *Santa Clara* holding in an ultimately successful effort to eliminate all question that the Fourteenth Amendment protected corporations. The Reporter’s headnote and the commentary which he attributed to the Chief Justice allowed Field to seize victory from the jaws of his *Santa Clara* defeat and establish a critical legal principle. Even if it is overstatement to characterize Field, Harlan and Brewer as participants in a conspiracy to embed the corporate person in the Fourteenth Amendment, they clearly—like Conkling—were participants in a determined, driven and overreaching effort that knowingly transformed a Supreme Court Reporter’s preface and an erroneous headnote born of a “ludicrous exchange” into one of the great, settled propositions in American law.²⁵³

²⁵² See Mark, *supra* note ____ at 1463.

²⁵³ *Waite Court, supra* note ____ at 532. Howard Jay Graham describes the *Santa Clara* dictum as the “outstanding ‘holding’ of the Waite era.” *Id.* at 530. Yet, Graham also argues that the words attributed to the Chief Justice by the reporter are “emphatically not the words . . . a Chief Justice of the United States [would] use if he has in mind what he and his associates . . . intend[] to be a formally adjudicated, announced, unanimous rule prospectively applicable to corporations generally.” *Id.* Graham sees Waite’s recollection of what was said, as recorded in his correspondence with reporter Davis as “conditional, . . . minor, informal, case limited” in the nature of a “judge directing oral argument” to issues of concern to the Court. *Id.* at 532. In fact, the Court had done exactly that in a similar case during the prior term. See, Fairman, Part Two, *supra* note ____ at 727. At the very most, “[b]ecause court reporters,

III. What Now?

As the eight confused and conflicting opinions in *Hobby Lobby* and *Conestoga Wood* illustrate, the manner in which Field inserted the constitutional corporate person into American law has practical implications for the current debate regarding what, if any, rights the constitutional corporate person possesses. Those implications require resolution of three interrelated questions.

First, was Field speaking for the Court, or for himself, when he declared that the constitutional corporate person question had been settled? Initially, the question requires determination of whether the justices would have agreed with Field, but agreement alone is insufficient. If the other justices would have agreed with Field's position, the subsidiary, but more important question is whether Field was authorized to speak for the Court. If Field's declarations were authorized by the Court, the existence of the constitutional corporate person is established and this part of the inquiry ends. Second, if Field was not speaking for the Court—or if his authorization to do so was ambiguous—the more difficult questions about the status of the doctrine and the constitutional rights, if any, of corporations need to be addressed.²⁵⁴ In either

even Supreme Court reporters, are not sources of doctrine, it is impossible to assume that the Court meant to do anything other than accept the argument that corporate property was protected as property of the incorporators, no matter what uses the Court's announcement was put to in later cases." Mark, *supra* note ___ at 1404. See also Donald J. Smythe, *The Rise of the Corporation, the Birth of Public Relations, and the Foundation of Modern Political Economy*, 50 WASH. L.J. 635, 662 (2010-2011) (Because Davis was exercising his own discretion as to what the Court's opinion stated, his headnote had no precedential value, and it did not reflect a change in constitutional doctrine.") (footnote omitted). It simply cannot be assumed that the Chief Justice or anyone else on the Court believed that either the erroneous headnote or the Reporter's preface stated theretofore undecided constitutional doctrine. See *San Bernardino*, 118 U.S. 417, 422-25 (1886) (Field, J. dissenting). See also *California v. Central Pac. R. R. Co.*, 127 U.S. 1, 28 (1887) (Stating that Fourteenth Amendment question raised difficult and "embarrassing" issues requiring "careful scrutiny and consideration," but need not be decided). In fact, Field saw an opening, enlarged it exponentially, and then drove a train through it.

²⁵⁴ G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth Century Legacy*, 154 U. OF PA. L. REV. 1463, 1495 (2005-2006) 1482-483 (Discussing that, because most opinions were not circulated prior to announcement, a majority of justices endorsed disposition of a case but the "reasoning of the opinion of the Court . . . usually represented only the views of one Justice" and, arguably, is, therefore, entitled to "diminished status . . . as precedent []".) (italics in original).

event, unless the constitutional corporate person is wholly disowned, it remains to address what it means to be a corporate person and, specifically, what rights do corporate persons possess and why.

A. Were the Justices in Agreement With Field that “Persons” As Used in the Fourteenth Amendment Included Corporations?

It is possible that the justices would have agreed that the term “persons” in the Fourteenth Amendment included corporations and, therefore, saw no reason to object to the inaccurate headnote to the Reporter’s commentary appended to the *Santa Clara* decision or to Field’s later corporate person claims. The English common law prior to the American Revolution, numerous Supreme Court decisions, decisions of the state courts, and state and federal statutes all defined “person” to include corporations.²⁵⁵ In fact, it has been generally overlooked that, in *Santa Clara*, counsel for the County expressly conceded the point:

The defendants have been at pains to show that corporations are persons, and that, being such, they are entitled to the protection of the Fourteenth Amendment. There was scarcely need of the array of learning and elaborated disquisition which has been displayed on this point. Of course, corporations are persons, and, of course, they are protected by the Fourteenth Amendment. No one, I presume, has ever questioned it.²⁵⁶

²⁵⁵ See *supra* notes ____ ____.

²⁵⁶ See Argument of D.M. Delmas, Esq., Counsel for Plaintiff at 29-35, *Santa Clara* Transcript of Record, *supra* note _____. See also Brief for Plaintiff In Error at 45, *Santa Clara* Transcript of Record, *supra* note _____. (“While conceding that in one sense corporations are persons, we do not admit that they are persons for all the persons contemplated by the fourteenth amendment.”).

Counsel’s concession simply reflects that the rule, then as now, was that, in the absence of special circumstances, words were to be given their usual and customary meaning.

It is certainly true that the Fourteenth Amendment was adopted to extend legal protection to the recently freed slaves and to loyal Southerners.²⁵⁷ The question, however, remains: assuming the framers had neither a primary nor a secondary intent to include corporations, had the framers been asked the meaning of the term “persons,” would they have understood it to include corporate as well as natural persons? Given that the term “persons” included corporations in virtually all other contexts, the framers are likely to have answered in the affirmative.²⁵⁸ Justice Field made the same point in the Circuit and he would seem to have the right of it. The Justices arguably, therefore, would have no need of argument on the matter—history and experience, for them, would have settled the question.

The more difficult question was what a corporation’s status as a legal person meant²⁵⁹ and there is no evidence that the justices were in agreement with Field on that question. Indeed, while

²⁵⁷ See, e.g., *Builed Better*, *supra* note ___ at 543-46.

²⁵⁸ In his *Connecticut General* dissent, Justice Black appears to make a textual argument that the framers intended to exclude corporations, based on the juxtaposition of the terms “citizens” and “persons.” *Connecticut Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 83 (1938). Black also appears to be arguing that the Amendment applied only to the newly freed slaves.

Black’s textual argument depends in the first instance on the conclusion that “citizens” and “persons” necessarily referred to the same legal entity. There is, however, no evidence to that effect and it would deprive both “citizens” and “persons” of their well understood connotations. Second, as Judge Sawyer said in *San Mateo*, “it would have struck the world with some amazement, when this amendment was proposed to the people of the United States for adoption, if it had read: “Nor shall any state deprive any person of the *negro* race of life, liberty and property without due process of law; nor deny to any person of the *negro* race within its jurisdiction the equal protection of the laws.” 13 F. at 761. See generally *McLaughlin*, *supra* note ___ at 45 *et seq.*; *Fourteenth Amendment*, *supra* note ___ at 881-888. (Discussing “Ninth Circuit Law” applying equal protection clause to protect Chinese.).

²⁵⁹ Counsel argued that the Amendment did not protect corporations because corporations were created by the State which could grant or deny corporate rights as the State pleased. See *County of Santa Clara v. Southern Pacific Railroad Co.*, Brief for Plaintiff in Error at 43-47 *Santa Clara* Transcript of Record, *supra* note ___; *id.* Argument of D.M. Delmas, Esq. at 21-37. Cf. *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 351-52, 354-56 (1884) (Waite, C.J.) (Corporate rights depend on statute under which corporation “was organized, and such alternations . . . thereof as may be made by proper authority.

San Mateo sat on the Supreme Court docket argued, but undecided and two years before *Santa Clara* was decided, the disagreement within the Court about the meaning of corporate personhood became manifest. In *Spring Valley Water Works v. Schottler*, Chief Justice Waite speaking for the Court over the lone dissent of Field, upheld amendments to California’s incorporation statute which allowed the state to regulate prices charged by a corporation that had been created under an earlier version of the statute which contained no such authorization.²⁶⁰ According to Waite, “[t]he corporation was created by the State” and all of its powers and obligations . . . depend alone on the statute under which it was organized, and such alternations and amendments thereof as may . . . be made by proper authority.”²⁶¹ Field, in contrast, objected that the statute deprived “the corporators, natural persons” of their property in violation of the Constitution because “they had associated themselves together”.²⁶² That disagreement may have a familiar ring: it is essentially the same philosophic disagreement that divided the *Hobby Lobby* and *Conestoga Wood* judges.

B. Was Field Authorized to Speak for the Court When He Asserted that the Existence of the Constitutional Corporate Person Had Been Settled

With the benefit of hindsight, an argument based on historical and experiential understanding has much to commend it. Yet, it is speculation about what the Court might have done. Moreover, such an argument ignores what the Court, and the individual justices, actually did. In the end, it is a less than satisfactory explanation, because it fails to address many inconsistent facts and, most importantly, does not address what it means to be a constitutional corporate person.

²⁶⁰ 110 U.S. 347 (1884).

²⁶¹ *Id.* at 352, 356.

²⁶² *Id.* at 371-72.

Viewed from the perspective of the late nineteenth century, there was significant doubt about the meaning of the term “person” as used in the Fourteenth Amendment. As Howard Jay Graham has said, treating corporations as legal persons for some concepts, and for some purposes, does not mean that the corporation was a constitutional person as that term was used in the Fourteenth Amendment²⁶³ or that, even if it was a constitutional person, that the corporation’s rights were comparable to those of a natural person. At the very least, even if agreement on some aspects of corporate personhood is assumed, there were critical aspects of the corporate person that remained to be defined.

In fact, despite Field’s assertions that it was settled, the contemporaneous evidence strongly suggests that, in the late nineteenth century, the existence and, even more to the point, the meaning of the constitutional corporate person was far from established. The *Slaughter-House Cases* seemed to expressly reject the possibility of constitutional protection for corporations. Moreover, even if the corporation was a constitutional corporate person, that did not necessarily mean that the Amendment guaranteed equality with natural persons. To the contrary, for example, the county argued, and a long line of Supreme Court decisions appeared to hold, that whether a corporation was denied equal protection of the laws was determined by examining whether the plaintiff corporation was subject to the same regulation and taxation to which other, similarly situated corporations were subject, not by comparing the treatment of natural persons.²⁶⁴

²⁶³ See, e.g., *Builled Better*, *supra* note ___ at 567.

²⁶⁴ See, e.g., Brief for Plaintiff In Error at 46-47, *Santa Clara* Transcript of Record, *supra* note ___. (Arguing that corporations were created by the State and endowed with rights and privileges not possessed by natural persons, thereby precluding comparison to natural persons); Argument of D.M. Delmas, Esq. at 27-37, *Santa Clara* Transcript of Record, *supra* note ___ (“[B]y the very act of incorporation, these human beings [i.e., the incorporators] receive rights, immunities, privileges, which form a part of the sovereign attributes of the State [e.g., eminent domain], which are not enjoyed by any man in his individual capacity. By the very act of incorporation the equality between the corporate body—the group of corporate members, if you please—and isolated individuals is effectively destroyed,” so

The railroads clearly viewed the questions as open. There is no other explanation for the railroads' willingness to sponsor first, *San Mateo* and, when that failed to produce a resolution, *Santa Clara*²⁶⁵ and *The California Railroad Tax Cases*²⁶⁶ as test cases in an effort to force the Court to decide the issue. Indeed, if the question were free from doubt, the railroads would have no need to hire the likes of two former senators, Roscoe Conkling and George F. Edmunds, Senator William M. Evarts, an esteemed law professor, J.N. Pomeroy, and a former justice of the California Supreme Court, S.W. Sanderson, all of whom, at one time or another, in addition to the Southern Pacific's Solicitor General, Creed Haymond, represented the railroads in *San Mateo* and *Santa Clara*. Moreover, the Court itself characterized the constitutional corporate person question as "special and peculiar" when it advanced *San Mateo* ahead of more than a thousand pending cases²⁶⁷ and the *Santa Clara* opinion itself describes the issue as open.²⁶⁸ Finally, as an 1870 opinion (only two years after the Amendment was adopted) by future Justice, then Judge, Woods,

that the State "without infringing the rule of equality" may confer rights and privileges, as well as impose burdens, on a corporation not granted, or imposed on natural persons.)

²⁶⁵ In fact, *San Mateo* and *Santa Clara* were only two of two groups of cases. Shortly, thereafter, the railroads made a third unsuccessful effort to force the Court to decide the issue in another group of test cases, *The California Railroad Tax Cases*, a group of six cases raising the same issues as *San Mateo* and *Santa Clara* which the Court disposed of on like grounds. 127 U.S. 1, 26 (1888). See also *Central Pacific R. Co. v. People*, 162 U.S. 167 (1896) (Fuller, C.J. dismissing case based on *Santa Clara* over Justice Field's dissent.) Argument of Creed Haymond, *California Railroad Tax Cases* 15-16 (Jan. 12 & 13, 1888) (Colloquy between Justice Miller and Mr. Haymond regarding issues presented in which Justice Miller notes referring to the constitutional question: "We have had them here three times, but could not get them brought up, and we have not got them here this time." To which Haymond replies: "All I desire to say is that I do not wish to be held responsible for that. We have attempted twice to get those cases here on the Federal issues alone, and each time the State has prevented.").

²⁶⁶ 127 U.S. 1 (1888). See also *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884) (Decided two years before *Santa Clara*, Chief Justice Waite (for the Court) and Justice Field (in dissent) disagreeing with respect to state's ability to amend state law to permit regulation of corporation not previously authorized.).

²⁶⁷ Likewise, when *San Mateo* was dismissed just a few months before *Santa Clara* was argued, Chief Justice Waite expressly recognized that it was a "test case, and many others are depending on its adjudication." That is hardly the way one describes a case raising easily resolved questions.

²⁶⁸ 118 U.S. at 410 (Case presents "no occasion to consider the grave questions of constitutional law upon which the case was determined below. . . ."); see also *id.* at 416 (same).

makes clear there were credible textual arguments to limit the scope of the Amendment to natural persons or, at least, to distinguish between natural and artificial persons' rights under the Amendment.²⁶⁹

The timeline of the Court's decisions expressly addressing the existence of the constitutional corporate person also belie the notion that Field was authorized to speak for the Court when he asserted that the question was definitively settled. Seen in real-time context, there are multiple occurrences and circumstances which, individually and collectively, refute the notion that the Court was in agreement regarding (or had decided) the corporate person question.

First, the *Santa Clara* argument occurred January 26 through 29, 1886 and the opinion was issued May 10, 1886. Harlan's opinion, as issued from the bench, expressly disclaimed ruling on the constitutional question. Importantly, the *United States Reports'* version of the official opinion prepared by the Reporter—with the erroneous headnote and the commentary attributed to the Chief Justice—was published no earlier than late November 1886.²⁷⁰ Approximately five months after the Santa Clara opinion was issued, on October 25 through 26, 1886, *Home Insurance v. New York*²⁷¹ was argued for the first time. During argument, the parties disputed whether the reasoning of Field's circuit decision in *San Mateo* should control the outcome.²⁷² The parties' arguments

²⁶⁹ *Insurance Co. v. New Orleans*, 1 Woods 85, 13 F. Cas. 67 (C.C. D.La. 1870). (Holding that because persons is first used in the Amendment to refer to “persons born or naturalized in the United States” the term necessarily must be read whenever used in the Amendment to refer only to natural persons.)

²⁷⁰ Volume 118 of the *United States Reports* in which the *Santa Clara* opinion appears contains a memorial for President Chester Arthur. See 118 U.S. at iv. President Arthur died November 18, 1886. Thus, although the specific date on which the volume was published is not given, volume 118 could not have been published prior to mid-November, 1886.

²⁷¹ 119 U.S. 129 (1886).

²⁷² 1886 U.S. LEXIS 1970 at 25 and 31-34 (Arguing that Fourteenth Amendment “contention is based almost entirely upon a recent decision rendered in the case *County of San Mateo v. Southern Pacific Railroad*, 13 Fed. Rep. 222” . . .

regarding the value of Field’s Circuit opinion is inexplicable if *Santa Clara* actually had resolved the constitutional corporate person question.²⁷³

Second, Field issued four opinions between March 19, 1888 and October 29, 1888 asserting that the existence of the constitutional corporate person had been established definitively by *Santa Clara*, among other decisions.²⁷⁴ Yet, on April 30, 1888 the Court decided a case that the Court’s opinion describes as “substantially similar”²⁷⁵ to *Santa Clara*. The unanimous opinion of the Court—consistent with Harlan’s *Santa Clara* opinion—states that “the judgments for the defendants in the former cases [*i.e.*, *Santa Clara*] were affirmed” because “the Board of

). This contrasts with the argument made when the case was re-heard in March 1890. In that argument, the company argued that it “is a person within the meaning of [the Fourteenth Amendment]” as well as Field’s *Pembina* and *Mackey* decisions. 134 U.S. 594, 33 L. Ed. at 1028.

Moreover, two years before, in 1884, the Supreme Court’s opinion in *Spring Valley Water Works v. Schottler*, 110 U.S. 347 (1884), a case argued eleven months after the *San Mateo* argument by some of the same lawyers who had argued *San Mateo* made clear that the Court, as a whole, did not agree with Justice Field’s conception of the corporate person. Speaking for the Court, Chief Justice Waite held that corporations were created by the state and the state retained power to amend the terms of incorporation. *Id.* at 354-56. Dissenting, Justice Field quoted at length from his *San Mateo* circuit decision arguing that “[b]ehind the artificial body created by the legislature stand the corporators, natural persons, . . . who are as much entitled, under the guarantees of the Constitution, to be secured in the possession and use of their property thus held as before they had associated themselves together. *Id.* at 371-72. The 1884 Waite-Field disagreement has an eerie similarity to the disagreements in the *Hobby Lobby* and *Conestoga Wood* opinions.

²⁷³ The plaintiff in error cited the Supreme Court’s *Santa Clara* decision in his initial brief prior to the 1886 argument, so counsel clearly was aware of the opinion, (*i.e.*, as it was issued, without the erroneous headnote and commentary), but it is the *San Mateo* circuit decision on which the Fourteenth Amendment argument rests in 1890. 1886 U.S. LEXIS 1970 at 25. There is no indication that the Court refused to hear the argument. Insofar as can be determined, even after courts became aware of the headnote and the commentary there was uncertainty about what *Santa Clara* had decided. For example, in two decisions the Missouri Supreme Court and the United States Circuit Court for the Northern District of Georgia expressed uncertainty about the significance of the comments attributed to the Chief Justice, treated them as *obiter dicta* and resolved cases on the basis of Field’s Circuit Court *San Mateo* and *Santa Clara* opinions. *See Russel v. Croy*, 164 Mo. 69, 63 S.W. 849 (1901); *Singer Manufacturing Co. v. Wright*, 33 F. 121 (C.C. N.D. Ga. 1887). *But see Stockton v. Balt. & N.Y. R. Co.*, 32 F.9, 13-14 (C.C.D. N. J. (1887) (Bradley, Cir. Justice) asserting, less than one year after the *Santa Clara* decision, that *Santa Clara* “unanimously” and “expressly held that [corporations] [] are entitled, as well as individuals, to the equal protection of the laws, under the Fourteenth Amendment of the Constitution.”).

²⁷⁴ The decisions were: *Pembina*, 125 U.S. 181 (Mar. 19, 1888); *Mackey*, 127 U.S. 205 (April 23, 1888); *Herrick*, 127 U.S. 210 (April 23, 1888) and *Georgia Railroad*, 128 U.S. 174 (Oct. 29, 1888).

²⁷⁵ *California Railroad Tax Cases*, 127 U.S. at 26. *Cf. Southern Pacific R. Co. v. California*, 162 U.S. 167 (1896) (same).

Equalization included in the assessments a valuation of rights, franchises and property which they had no authority to assess . . . rendering the entire assessment in each case void.”²⁷⁶ Thereafter, Justice Bradley, writing for the Court, says that “it [is] unnecessary to express any opinion on the application of the fourteenth amendment”²⁷⁷ and goes on, at length, to express relief at avoiding the

questions arising under that amendment [which] are so numerous and embarrassing, and require such careful scrutiny and consideration, that great caution is required in meeting and disposing of them. By proceeding step by step, and only deciding what it is necessary to decide, light will gradually open upon the whole subject, and lead the way to a satisfactory solution of the problems that belong to it. We prefer not to anticipate these problems when they are not necessarily involved.²⁷⁸

Incredibly, the Reporter directly contradicted his *Santa Clara* headnote that had asserted that the corporate person question had been decided: the Reporter’s headnotes to *The California Railroad Tax Cases* stated that the cases presented “the same constitutional questions . . . as those which were argued (*and not decided*) in *Santa Clara County v. Southern Pacific Railroad Company*, 118 U.S. 394.”²⁷⁹

²⁷⁶ 127 U.S. at 27-28.

²⁷⁷ 127 U.S. at 45.

²⁷⁸ 127 U.S. at 28. *See also Fire Association of Philadelphia v. New York*, 119 U.S. 110, 115-120 (Nov. 15, 1886) (Rejecting argument that foreign corporation is a person denied equal protection in violation of Fourteenth Amendment by differential taxation as compared to domestic corporation).

²⁷⁹ 127 U.S. at 2 (emphasis added).

A clearer, more direct or more emphatic statement that the constitutional corporate person issue had not been decided could not have been made. Roughly twenty-four months after *Santa Clara*, at about the same time that *Pembina*, *Mackey* and *Herrick* were issued, *The California Railroad Tax Cases* Court, whatever the views of individual justices²⁸⁰ and whatever Field had claimed, clearly did not view the corporate person issue as having been decided, let alone settled. Indeed, if the constitutional corporate person question had been resolved, Bradley's opinion and his relief at avoiding the question are nonsensical. Justice Field neither dissented nor mentioned the Court's decision in any of the opinions that he wrote later asserting that the question had been settled.²⁸¹

The California Railroad Tax Cases are a virtually dispositive impediment to the argument that Field was authorized to speak for the Court when asserting that the constitutional corporate person was definitively established. Moreover, it is hardly likely that the existence of the corporate person had been established without some explanation of the reasons that a corporation was able to exercise the rights of a natural person. Counsel for the County of Santa Clara's unanswered argument that corporate personhood did not mean that a corporation was imbued with the rights of a natural person, that Field's explanation in the circuit of the reasons that a corporation possesses the rights of a natural person takes almost ninety pages in the *Federal Reporter* and Bradley's extreme reticence to address the difficult and embarrassing questions and

²⁸⁰ *But see Fire Association of Philadelphia v. New York*, 119 U.S. 110 (Nov. 15, 1886) (Harlan, J. dissenting) (Quoting commentary attributed to the Chief Justice and asserting that *Santa Clara* decided the issue); *Stockton v. Baltimore & New York R. Co.*, 32 F. 9 (C.C.D. N.J Aug. 1, 1887) (Bradley Cir. J.) (Asserting that *Santa Clara* decided the issue). Indeed, inasmuch as *The California Railroad Tax Cases* were notorious and controversial, the statement that the Court had not decided the corporate person question perhaps ought to be given more weight in that individual justices who previously had disagreed, seemed to have reversed course or, at least, silently acquiesced.

²⁸¹ Those decisions are: *Beckwith*, 129 U.S. 26 (Jan. 7, 1889); *Home Insurance*, 134 U.S. 594 (April 7, 1890); *Gibbes*, 142 U.S. 386 (Jan. 4, 1892).

refusal to do so in *The California Railroad Tax Cases*, at the very least, render Field's authority to speak for the Court ambiguous.

Third, when Supreme Court decisions are reviewed one hundred fifty years after the fact, the published decision and its headnotes appear to have been inextricably intertwined and contemporaneous. In fact, the decision and the headnotes and commentary were issued, at best, months apart and are temporally independent of one another. For the constitutional corporate person, timing is everything, because the sequence in which the opinions and headnote were prepared undermines the argument that the *Santa Clara* Court decided the question.

The *Santa Clara* group of cases, which included *San Bernardino*, were argued from January 26 through January 29, 1886. The majority opinion was issued orally from the bench May 10, 1886. Stephen Field's opinion concurring in judgment, but condemning the Court for failing to decide the constitutional question also was issued on May 10, 1886.

Whatever was or was not said by the Chief Justice when *Santa Clara* was argued, Field had no reason to believe that the issue had been decided for two reasons. First, in conference, the other members of the Court would have approved the position—avoiding the constitutional question—taken in Harlan's majority opinion. The issuance of Field's concurring opinion denouncing the Court for failing to reach the constitutional question contemporaneously with Harlan's opinion for the Court demonstrates that Field understood exactly what the Court had done. Second, the idea that the published, official report of the case would assert that the Court had decided the constitutional question first surfaced in the Reporter's private correspondences to the Chief Justice *more than two weeks after the opinions were delivered from the bench*. Because the Chief Justice did not respond until the end of the month, it is likely that the headnote and supporting commentary were prepared at least a month after the Court and Field had stated on the

record that the constitutional corporate person issue had not been decided. The volume of the *United States Reports* containing the headnote and the commentary attributed to the Chief Justice could not have been published—and the contents of the published decision would not have been known to the Justices—earlier than mid-November 1886, about six months after the *Santa Clara* opinions were announced.²⁸²

If the Court had decided the constitutional corporate person question—or there was the least reason to believe that it had done so—Justice Field’s separate opinion denouncing the failure to decide the issue makes no sense. Had Field any basis to believe that the issue had been decided, or to anticipate the headnote, Field surely would have embraced the headnote and the comments attributed to the Chief Justice. Indeed, this is precisely what Field later did when asserting that the constitutional corporate person question had been settled. In short, if Field had any warrant to assert that the issue had been resolved, that authority derived from the erroneous headnote written by the Reporter and from the comments that the Reporter attributed to Chief Justice Waite, not from the Court.

Fourth, the most compelling argument that Justice Field spoke for the Court when he asserted that the existence of the constitutional corporate person had been settled is that no other justice dissented in any of the seven cases in which Field made the assertion. The argument rests on two critical assumptions. First, that the other justices knew that Field’s opinions would make the claim. Second, that the failure to dissent in the face of such knowledge signals agreement with Field’s assertion.

The assumptions are mistakenly grounded in twenty-first century perceptions, rather than in the reality of decision-making by the nineteenth century Supreme Court. The late nineteenth

²⁸² See *supra* note ____.

century Court’s decision-making process²⁸³—and, more specifically, the manner in which opinions in run-of-the-mill cases were prepared, vetted by the Court and published—and the circumstances in which the decisions were rendered likely allowed Field the opportunity to inaccurately, and unilaterally, assert that the existence of the constitutional corporate person had been definitively established.

The nineteenth century Court’s decision-making process was far less collaborative than presently and “silent acquiescence” remained the rule. , Second, Chief Justice Waite—who had restrained Field to some extent—was severely distracted and preoccupied and, later died on March 23, 1888 at the time that Field issued the first of his corporate person rulings, creating a window of opportunity for Field. Five of the seven opinions of the Court written by Field expressly addressing the corporate person question—including those principally cited for the proposition that the issue was resolved—were argued and/or written in the period roughly beginning with Waite’s incapacity and ending with Melville W. Fuller’s installation as Chief Justice.

In the late nineteenth century, cases generally would not be argued for two to three years after reaching the Court.²⁸⁴ Thereafter, however, the deliberative process was cursory and moved at lightening speed.²⁸⁵ In the normal course, a case was voted on at the Court’s conference on the

²⁸³ The Court’s decision-making methodology and its impact on the authority that ought to be accorded the Court’s decisions has not been the subject of much investigation. The text relies heavily on two sources. G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U.P.A.L.REV. 1463 (2006) (hereafter “White Internal Powers”), and Fairman, *supra* note ___ at 69-71.

²⁸⁴ *See generally* White, *supra* note ___ at 1484-85 (Describing nineteenth century decision making process). *See also* Fairman, *supra* note ___ at 69.

²⁸⁵ Fairman, *supra* note ___ at 69, (characterizes the decision-making process as “cursory.”) *See also* White, *supra* note ___ at 1485 (Noting that the 1869 expansion of Supreme Court term “did not result in a more extensive deliberative process. Indeed, a summary deliberative process was the only way in which the Court could have kept abreast of its docket.”).

Saturday after argument.²⁸⁶ The opinion would be assigned at that time, with the expectation that a draft opinion would be completed within a few—usually in two to three—weeks.²⁸⁷ This despite the fact that the justices did not have the assistance of law clerks at the time.²⁸⁸ At that time, the draft opinion – or parts of it – would be read aloud to the Court by its author.²⁸⁹ If approved, the opinion would be orally delivered in open Court the following Monday.²⁹⁰

Of special significance here, except on rare occasions, written opinions were not circulated among the Justices for scrutiny or comment.²⁹¹ Indeed, generally the Justices would see the written opinion for the first time only after it had been delivered from the bench, given to the Clerk and set in type, a period of days to weeks after it was delivered from the bench.²⁹²

As a result, if the Justices were generally satisfied when the opinion—or portions of it—was read to the Court at the conference, the author was largely free to decide the proposed

²⁸⁶ Fairman, *supra* note ___ at 69.

²⁸⁷ Fairman, *supra* note ___ at 69.

²⁸⁸ Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OREGON L. REV. 299, 301-06 (1961). In fact, at the time, [t]he “Justices had practically no support staff.” 10, 441 n. 267.

²⁸⁹ Fairman, *supra* note ___ at 69.

²⁹⁰ For example, *Pembina*, 125 U.S. 181 (1888) was argued February 16, 1888 and decided March 19, 1888; *Mackey*, 127 U.S. 205 (1888) was argued April 12, 1888 and decided April 23, 1888; *Beckwith*, 129 U.S. 26 (1889) was argued December 3, 1889 and decided January 7, 1889; *Home Insurance*, 119 U.S. 129 (1886), on reargument, 134 U.S. 594 (1890) was argued (the first time) October 25-26, 1886 and decided November 15, 1886; the second time, it was argued March 18-19, 1890 and decided April 7, 1890.

²⁹¹ See, e.g., Ruth Bader Ginsburg, *Informing the Public About the Supreme Court’s Work*, 29 LOI. U. CHI. L.J. 275, 283 (1997-1998) (“There was a long time in the U.S. Supreme Court’s history, indeed until Chief Justice Melville Fuller’s 1888-1910 tenure, during which justices did not routinely circulate their draft opinions among their colleagues prior to delivery.”). (hereafter “Ginsburg”).

Exceptions were made in especially important cases. *Munn v. Illinois*, 94 U.S. 135 was such a case. See Fairman, Part Two, *supra* note ___ at 365; Magrath, *supra* note ___ at 182. There were more mundane exceptions, too. See, e.g., Westin, *supra* note ___ at 381-83.

²⁹² Fairman, Part Two, *supra* note ___ at 105.

language and content of the final version of the opinion.²⁹³ Thus, “the other Justices would generally have no opportunity to read the opinion and to reflect upon the drafting. . . . [T]he Court as a body could not have scrutinized opinions to weigh the import of expressions and omissions”.²⁹⁴ As a result, in this “process . . . [the] other[concurring justices] . . . committed themselves to the results of that opinion, hav[ing] no expectation of even seeing it, let alone signing onto its language”²⁹⁵

In the nineteenth century, therefore, as a general rule, “[t]he content of an opinion was a matter only for [the author] [] and the Court Reporter.”²⁹⁶ At the time, given the prevailing legal philosophy of most practitioners and judges, the judgment was most important, not the rationale,²⁹⁷ so that a Justice had neither motive nor need to review a written opinion prior to publication. In

²⁹³ Fairman, *supra* note ___ at 70.

²⁹⁴ Fairman, *supra* note ___ at 70.

²⁹⁵ White, *supra* note ___ at 1482.

²⁹⁶ White, *supra* note ___ at 1482 (Commenting that, because opinions were not circulated, “none of the other Justices had seen, let alone subscribed to, [the opinion’s] justifications.”). See also G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 789 (1999-2000) (Noting that at time of the Marshall Court, only the author of the opinion and the Court’s reporter saw the text of the opinion before publication in the Court’s official *Reports* and that “the Justices ‘mooting’ of a case did not involve a discussion of how arguments supporting a decision should be reflected in an opinion”); White, *supra* note ___ at 1484 (Noting that Court’s internal processes, including noncirculation of opinions, the norm of silent acquiescence, delays of two to three years from docketing to argument and summary deliberation and disposition, remained unchanged through the end of the nineteenth century.); *id.* at 1499, 1501 (Noting that deliberative process “remained strikingly informal and that [t]hrough Fuller’s tenure the Justices continued the practice of not circulating assigned opinions before they were read in conference prior to being announced in Court.”). But see Alan F. Westin, *Stephen J. Field and the Headnote to O’Neil v. Vermont: A Snapshot of the Fuller Court at Work*, 67 YALE L.J. 363 (1958) (Reflecting that non-circulation was not always the case); Magrath, *supra* note ___ at 182-190 (Discussing collaboration of Bradley and Waite in writing of *Munn* opinion.).

²⁹⁷ See, e.g., Linda Przybyszewski, *The Republic According to John Marshall Harlan* ___ (North Carolina, 1999); G. Edward White, *Recovering the World of the Marshall Court*, 33 J. MARSHALL L. REV. 781, 791-92 (1999-2000) (Noting predominant nineteenth century view that conceived “of ‘law’ . . . [as] a body of fixed principles derived from authoritative written sources such as the Constitution, statutes, judicial decisions or from authoritative unwritten sources such as custom” so that, in contrast to the legal realist’s understanding, the background and even involvement of a judge in a case “did not really matter.”); White, *supra* note ___ at 1483 (Noting that in the nineteenth century “judicial decisions were not the equivalent of positivistic law, . . . but mere evidence of legal principles.”).

most cases, therefore, a Justice was responsible only for his vote, not of the content for the Court's opinion.²⁹⁸

The question of the weight to be given to a unanimous opinion of the Court in the Waite era is further confounded because Waite, as had Marshall, sought a “norm of consensus” by affirmatively “discourag[ing] the public display of a divided bench. A Justice who indicated disagreement at conference would later typically acquiesce in what the majority decided.”²⁹⁹ Acquiescence clearly was not endorsement of an opinion's language.

Two observations that explain in large measure Field's ability to unilaterally assert that the constitutional corporate person's existence was settled can be drawn from this process: First, opinion-writing in the nineteenth century “presented a greater opportunity” for one Justice to shape the content of an opinion than the current, collaborative system in which opinions are circulated in advance for comment and discussion in order to develop consensus with respect to the rationale of the opinion, not just the judgment.³⁰⁰ Because “[t]he consultation process was less formal[,] the opinion author . . . had a free[] hand to compose and publish an opinion untouched by all his colleagues' minds,”³⁰¹ with the author of the opinion being given “considerable

²⁹⁸ White, *supra* note ____ at 1481.

²⁹⁹ Donald Grier Stevenson, Jr., *The Waite Court at the Bar of History*, 81 DEN. U.L. REV. 449, 481 n267 (2003-2004) *discussing* Lee Epstein, et al., THE NORM OF CONSENSUS ON THE U.S. SUPREME COURT, 45 AM. J. POL. SCI. 362 (2001). Thus, the appearance of unanimity may be deceiving because Waite encouraged consensus and successfully discouraged dissent. *See* Lee Epstein et al., THE NORM OF CONSENSUS ON THE U.S. SUPREME COURT, 45 AM. J. POL. SCI. 362, 266 (2001) (Noting that number of dissenting votes in conference was much higher than reflected in announced decisions.). As a result, a justice dissenting in conference would often acquiesce in the majority opinion. *Id.* at _____. Waite, himself, often switched his vote following the conference when he had initially dissented. D. Grier Stevenson, *The Chief Justice as Leader: The Case of Morrison Remick Waite* 14 WM. & MARY L. REV. 899, 917 (1973). In addition, “[d]uring Waite's tenure it had become clear that the Court's increased docket had created constant pressure on the Justices to dispose of cases. . . . “ It is, therefore, possible that the press of business suppressed dissent, especially in run-of-the mill cases such as those in which Field declared that the existence of the constitutional corporate person was settled.

³⁰⁰ G. Edward White, *History and the Constitution: Collected Essays* 434 Carolina Academic Press (2007).

³⁰¹ *See* Ginsburg, *supra* note ____ at 283.

autonomy”³⁰² so that, in most cases, the language of an opinion reflects the views of, and ought to be attributed only to, the author.³⁰³ Thus, “opinion assignments,” particularly in cases of interest to a Justice, “may have been . . . coveted”³⁰⁴ Second, “the focus of the Court was on the judgment. This meant that the reasoning of an opinion of the Court, so long as the practice of non-circulation of draft opinions remained in place, usually represented the views of one Justice.”³⁰⁵

In a colossal understatement, one authority has commented that, putting all of this together “cause[s] the jurisprudential status of those opinions, when considered from a modern perspective, often to be misleading.”³⁰⁶ This is so because “[w]hat counts most in legal writing is not authority, but authorization. Whoever wrote the words, whoever speaks them, and whoever believes what they say, the crucial question is whether the person for whom the words are spoken has licensed

³⁰² White, *supra* note ___ at 1501. Fairman, *supra* note ___ at 70 (“So long as the Justices were satisfied on the major points, the author was pretty free . . . to choose his language”).

³⁰³ Fairman Part One, *supra* note ___ at 70. This was the case because judicial opinions, at the time, had, compared to the present, “diminished status . . . as precedents”:

[t]he content of a judicial opinion was not seen as the equivalent of law but only as evidence of the law’s application to a particular case, [thus] the practice of *stare decisis* was qualified [T]he reasoning in a judicial opinion was understood simply as evidence of the applicability of a legal principle or principles to a case. It was a “gloss” on the law, not the law itself. . . . [I]n this context, . . . the stakes in opinion writing might have been perceived to have been lower, especially since the reasoning in an opinion of the Court would have been perceived as simply an effort to apply principles to cases rather than as a doctrinal road map for future cases.

White, *supra* note ___ at 1483-84. See also Linda Przybyszewski, *The Republic According to John Marshall Harlan* (North Carolina 1999).

³⁰⁴ *History and the Constitution*, *supra* note ___ at 434; Magrath, *supra* note ___ at 258-262 (Discussing Field’s anger and vehement protests at Waite’s failure to assign him the opinion in *United States v. Union Pacific Railroad, Co.*, 91 U.S. 72 (1875)).

³⁰⁵ White, *supra* note ___ at 1482.

³⁰⁶ White, *supra* note ___ at 1481-82; (Noting that nineteenth century attitudes “produced what can be regarded, from a modern perspective, as a diminished status for judicial opinions as precedents.”); see also Fairman, *supra* note ___ at 70. Because of the process, “one is less warranted in attributing to the Court the language used.”).

their use in her behalf.”³⁰⁷ This maxim is especially poignant in Field’s case because Field’s assertions about the constitutional corporate person are directly contradicted by the *Santa Clara* majority opinion, by Field’s *San Bernardino* concurrence, by the Court’s opinion in *The California Railroad Tax Cases* and by Chief Justice Waite’s assertion that the issue had been “avoided.”

The decision-making process, especially the combined impact of the Court’s focus on the judgment rather than the opinion’s rationale and the rule of silent acquiescence, assured that the Court, as a whole, was aware of the outcome, *i.e.*, the judgment, of the cases, but, at the very least, creates doubt that Field’s statements about the existence of the corporate person were of much concern to the Court.³⁰⁸ “It follows that, as compared with what might be supposed, one is less warranted in attributing to the Court the very language used, and better entitled to treat the composition (for praise or blame) as showing the quality of the author.”³⁰⁹ It likewise follows that, viewed from a nineteenth century perspective, the absence of dissenting opinions is not really surprising and is not indicative of the other Justices’ agreement with Field’s rationale or with statements made in the opinions. Thus, it has been said that in the nineteenth century “there was not a very high sense of corporate responsibility” for the Court’s opinions and it is a misnomer to refer to the “opinion of the Court” in most nineteenth century Supreme Court cases.³¹⁰

³⁰⁷ John Leubsdorf, *The Structure of Judicial Opinions*, 86 MINN. L.REV. 447, 485 (2001-02).

³⁰⁸ See Fairman Part Two, *Supra* note ___ at 105 (Discussing Justice Miller’s complaint to his brother regarding rationale of *Union Pac. R.R. Co. v. Fort*, 17 Wall. 553 (1874), stating that Miller saw opinion for the first time two weeks after the decision was announced.)

³⁰⁹ Fairman, *supra* note ___ at 70. White, *supra* note ___ at 1484 (footnote omitted). Indeed, the reasoning, while not unimportant, had significantly less importance than it does today because the rationale was then perceived as a “‘gloss’ on the law, not the law itself” and not seen “as a doctrinal roadmap for future cases”.

³¹⁰ Fairman, *supra* note ___ at 70.

Other events likely combined with the Court’s decision-making process to enhance Field’s ability to act autonomously. For example, for many months prior to Field’s campaign, Chief Justice Waite had been fully occupied writing the opinion in *The Telephone Cases*,³¹¹ arguably the most significant patent case of its time. The opinion, which occupies an entire volume of the *United States Reports*, was finished on March 5, 1888 and delivered orally in Court on March 19, 1888. Waite, however, was so ill that Justice Blatchford had to read the opinion for him. Waite died four days later on March 23, 1888.

Field’s first opinion, *Pembina*, asserting that the existence of the constitutional corporate person was settled, also was issued orally from the bench on March 19, 1888. *Pembina*, which, of course, would have been written and vetted while Waite was alive, does not rely on *Santa Clara* as authority for the proposition; in fact, it cites no authority.³¹²

One month later, Field’s April 23, 1888 opinions in *Mackey* and *Herrick* were issued. *Mackey*, as would several of Field’s later opinions, asserts that the constitutional corporate person question was decided in *Santa Clara*.³¹³ At this point, Waite—the one person who could most authoritatively say whether *Santa Clara* had held that corporations were constitutional persons—was dead. Consequently, Field need not be concerned that the Chief Justice would admonish that *Santa Clara* had “avoided” the issue. Rather, writing opinions in non-controversial cases which were decided based on long-standing precedents and always rendering judgment against the corporations, Field must have been relatively certain that his corporate person opinions would

³¹¹ 126 U.S. 1 (1888). The cases were argued January 24-28, 31 and February 1-4, 7-8, 1887 and the opinion issued March 19, 1888.

³¹² 125 U.S. at 189.

³¹³ 127 U.S. at 209-210; 127 U.S. 210, Field’s *Pembina* opinion references Chief Justice Marshall’s comment in *Providence Bank v. Billings*, 4 Pet. 514, 562 about the general purpose of incorporation, but cites no authority with respect to the constitutional status of corporations. *Id.*

attract little or no attention, would not merit the time to prepare a dissent and would pass without contradiction. Moreover, if the opinions were challenged, Field could always point to the headnote and commentary attributed to the Chief Justice in *Santa Clara* as the basis for his assertion without concern of authoritative contradiction.

That Field wrote the Court's opinion in the seven post-*Santa Clara* cases expressly addressing the constitutional corporate person could not have been an accident.³¹⁴ Similarly, it was not happenstance that Field wove *dicta* asserting that the constitutional corporate person was conclusively settled into otherwise seemingly routine, and mostly forgettable, cases. It likewise was not chance that Field's constitutional corporate person *dicta* appeared only in cases in which the judgment was against corporate interests. To the contrary, these are all evidence that Field was acutely aware that the Court's judgment, not its rationale for that judgment, would be the focus of any scrutiny and that he used the Court's processes—including the ability of an opinion's author to shape the rationale and language of the final product—to take advantage, in the least objectionable and most effective way possible, of the opening given him by the Reporter's publication of the Chief Justice's comments and the erroneous headnote.

It also should be emphasized that the view that the corporate person issue was settled by the Chief Justice's pre-argument comments and that all of the Justices were in agreement is heavily dependent on the credibility and accuracy of the Supreme Court Reporter, J.C. Bancroft Davis. Although a respected attorney and former judge of the Court of Claims, Davis was notorious for inadequate and erroneous headnotes. Indeed, it was Davis' misstatement of the

³¹⁴ Field was known to seek writing assignments, particularly in railroad cases. See, e.g., Kens, *supra* note ___ at 101-103 (Discussing Field's unsuccessful efforts to bully Waite into assigning him to write the opinion in *United States v. Union Pacific Railroad Co.*, 91 U.S. 72 (1875)); Donald Grier Stephenson, Jr., The Waite Court at the Bar of History, 81 Denver U. L. Rev. 449, 477p79 (2003-2004).

holding of *Hawley v. Diller*,³¹⁵ that led to the cautionary language that now precedes every Supreme Court decision reported in the *United States Reports*, warning the reader that the headnotes are not the holding of the Court.³¹⁶ So pervasive was Davis' poor reporting that, noting his death in 1908, a widely-circulated legal newspaper excoriated his work as Supreme Court Reporter noting his "invariable practice" to omit points decided and stating, among other things, that "many of [the headnotes] entirely fail to show what the court decided."³¹⁷

The constitutional corporate person opinions confirm the Reporter's foibles. Notwithstanding the *Santa Clara* headnote asserting that the issue had been decided and the comments that he attributed to the Chief Justice, Reporter Davis himself—twice—stated in headnotes that the Court had not decided the constitutional question.³¹⁸

Santa Clara left the constitutional corporate person question, at least initially, in a kind of judicial limbo.³¹⁹ Given the importance that he attached to the issue, Field was not the type to

³¹⁵ 178 U.S. 476 (1900)

³¹⁶ *United States v. Detroit Lumber*, 200 U.S. 321 (1906) (Field's nephew, Justice David Brewer, stating that headnotes reflect only the Reporter's understanding of the decision and, in this instance, the headnote misinterpreted the decision.).

³¹⁷ _____ *J.C. Bancroft Davis as a Reporter*, LAW NOTES 202 (Ed. Thompson Co. Feb. 1908). *See also* Willard L. King, *Melville Weston Fuller: Chief Justice of the United States 1888-1910* 230-31 (New York 1950) (Noting that Davis' papers are replete with letters from Justices correcting headnotes and that Davis' headnotes were vague and misleading). Davis, in fact, was frequently failed to make corrections to headnotes requested by the Justices and frequently reacted angrily toward those requesting the correction. *Id.* at 230. In one case in which he dissented, Justice Harlan told Chief Justice Fuller, the author of the opinion, that the headnotes "are awful & are enough to make you & not me sick." *Id.* at 175. Remarkably, the Chief Justice had previously corrected the headnotes and sent the corrections to Reporter Davis, but the corrections were never made. *Id.* at 174. Davis' work was so problematic that Chief Justice Fuller "[f]requently . . . wrote out head notes for his own opinions and sent them to Davis, thus doing the main part of the Reporter's work for him." *Id.* at 142.

³¹⁸ 118 U.S. at 395-96; 127 U.S. at 2.

³¹⁹ *See, e.g., Singer Mfg. Co. v. Wright*, 33 F. 21, 124-26 (C.C.N.D. Ga. 1887) (Discussing confusion with respect to meaning of Supreme Court's decision, Waite's commentary and status of Field's Circuit decisions; *Russell v. Croy*, 164 Mo. 69, 63 S.W. 849, 853-857 (1901) (Same, ultimately decides case based on Field's Circuit opinions.). *Cf. Northern Pacific R. Co. v. Walker*, 47F. 681, 685-86 (C.C.D. N. Dak.) (Holding that with respect to taxation there is no difference between property owned by a corporation and that owned by a natural person without mentioning *Santa Clara*.).

allow the uncertainty to persist. Field's personality, temperament and, most importantly, his self image as a judicial prophet ordained to lead the resistance to what Field perceived as the disassembling of American culture, society and institutions, would not permit him to accept such an ambiguous outcome,³²⁰ particularly where those who he perceived had built the society and supported the institutions that he protected were at risk.³²¹

It is hardly surprising that Field began to pursue a course to make certain that the corporate person was embedded in the Fourteenth Amendment. To the contrary, doing so was entirely consistent with Field's approach to judging.³²² By temperament and world view, Field believed

³²⁰ See, e.g., Magrath, *supra* note ___ at 100, 190 (Noting that Field was "given to fits of self-righteous moralizing" and for "whom every case involving property rights was an Armageddon where the forces of order and decency contended with those of anarchy."); see Letter from Stephen J. Field to the Chief Justice and the Associate Justices of the Supreme Court of the United States (Oct. 12, 1997), *reprinted in* 168 U.S. 713, 717 (1897) (same (hereafter "Field Letter")); Cachán, *supra* note ___ at 564 (Discussing Field's commitment to conservatism of era and willingness to convert his personal beliefs into precedent); Kens, *supra* note ___ at 10 (same); Stephenson, *supra* note ___ at 472 (Commenting that Field could not keep his opinions to himself.); Carl B. Swisher, *THE TANEY PERIOD 1836-64* 830 (The Oliver Wendell Holmes Devise History of the Supreme Court of the United States, Paul A. Freund, ed. Vol. V 1974) (Discussing Field's capacity for molding the law to reflect his own convictions and to do so without compunction.).

³²¹ See, e.g., Paul Kens, *LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL* 285 (1998) (hereafter "Kens Lochner") (Stating that Field acted and wrote as if he believed he was the one person charged with leading the country into the future); Gould, *supra* note ___ at 154 (Discussing Field's tendency to side with those that he believed were the empire builders, such as Stanford, Huntington and Hopkins.). Field's perspective plainly was shaped by his experience as a pistol-packing judge on the California frontier, see Archibald Hopkins, *The Late Mr. Justice Field*, 11 *GREEN BAG* 245, 246 (June 1899) (hereafter "Hopkins"); Kens Lochner, *supra* Note at 1, and by his personal observation of the 1848 revolutions that swept over Europe, replacing existing structures and institutions with, in his view, unstable, populist ones, as well as the American Civil War and ever more frequent labor strife. See Hopkins, *supra* at 246; *Fourteenth Amendment supra* note ___ at, 851, 857-59. Moreover, in California, Field lived among men who invested all they owned and more in collective efforts to build wealth and society. Kens Lochner, *supra* at 18. Indeed, Field's railroad magnate friends once had been such men for, initially, few were willing to invest in the Central Pacific. Huntington, Standard and Crocker invested their own capital, but found that, even after virtual completion, the railroad remained chronically short of money. *Id.* at 140. In Field's eyes, those who took such risks to provide public services were entitled to public protection.

³²² In *THE SUPREME COURT*, former Chief Justice Rehnquist states that Field "conceived the role of a judge to be little different from that of any other public official—do your best to see that the matter is settled in the way you believe is correct." William H. Rehnquist, *THE SUPREME COURT* _____ (New York 2001). Field's handling, described by the former Chief Justice, of the San Francisco Land Cases is illustrative. Ownership of land outside San Francisco was dependent on a pre-statehood Mexican land grant. When the district judge refused to hear the city's case challenging the United States Board of Land Commissioners' refusal to confirm the city's title, Field drafted a bill providing that the case would be transferred to the circuit court—Field's court. Field arranged for the bill to be sponsored by a California senator and it was passed by Congress. Field held that the city owned the land. The disappointed suitors

himself to be a “judicial barricade against popular government,”³²³ so that, for Field, personal philosophy was at least as important as precedent.³²⁴ Field may have been a Supreme Court justice, but Field saw himself as a lawyer, an advocate before the bar of history, and not as a judge.³²⁵ No good lawyer in his position would have failed to take advantage of the opportunities available to Field.³²⁶

C. What Are the Current Implications of *Santa Clara* and its Progeny?

As counsel for the County of Santa Clara argued, even assuming the existence of the corporate person, “[t]he question is: Does that amendment place corporations upon a footing of equality with individuals.”³²⁷ Yet, because Field inserted the constitutional corporate person into

sought Supreme Court review. Before the cases were heard, Field drafted a bill confirming the city’s title which, with the support of the California delegation was passed by Congress. As a result, the Supreme Court never heard the case and, as a practical matter, Field’s decision awarding title to the city stood. *Id.* at ____.

³²³ Clark, *supra* note ____ at 1007; Field Letter, *supra* note at 777 (Describing the judiciary’s “negative power, this power of resistance” as “the only safety of a popular government . . .”).

³²⁴ Kens, *supra* note ____ at 10; Swisher, *supra* note ____ at 262-63 (Discussing Field’s diametrically opposed positions in *Central Pacific Railroad Co. v. California*, 162 U.S. 91 (1896) and *Southern Pacific Railroad Co. v. California*, 162 U.S. 167 (1896) and *The Sinking Fund Cases*, 99 U.S. 700 (1878) and noting that the statues were the same, but Field quoted “certain phrases which he had seen fit to ignore in the earlier cases” suggesting that Field did so because “the interests [*i.e.*, the railroads] to which he sought to give protection were the same.”) (emphasis in original).

³²⁵ Professor Magrath describes Field’s world view as well as anyone:

. . . Fearing the collectivism of communism—whose challenge he perceived in such diverse events as the Paris Commune, the Granger movement, and miners’ strikes in his native California—and having enjoyed a spectacularly successful career as an individualist, Field came to see the people as a mob of rabble highly susceptible to the suasions of demagogues. He sought therefore to enlarge the judicial function, believing that only the judiciary could save the people from themselves. As he told his fellow judges on the occasion of his retirement in 1897, the Supreme Court “possess the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power is the only safety of a popular government.”

Magrath, *supra* note ____ at 209. *See also* Field’s letter to his Supreme Court colleagues upon his retirement, 168 U.S. 713 (1897).

³²⁶ Paul Kens describes Field as the prototype of the modern judicial activist. *See* Kens, *supra* note ____ at 10. *See also* McCloskey, *supra* note ____ at 69 (Noting that Chase, Bradley and Field felt authorized to help Americans decide what kind of nation they should be.).

³²⁷ *See* Argument of D.M. Delmas, Esq., Counsel for Plaintiff at 29-35, *Santa Clara* Transcript of Record, *supra* note _____. The same point was made in *The California Railroad Tax Cases* by counsel for the State of California. *See* 127

American law virtually by fiat, simply asserting that the question was settled, the Court has never articulated what it means to be a corporate person nor has it identified the source or rationale of corporate rights.

Indeed, the largely forgotten opinion of Field in the Circuit Court are still virtually the only comprehensive explications of the reasons that the rights of corporate persons should be protected.³²⁸ However, those opinions provide no comprehensive theory of corporate personhood. The Circuit opinions of Field and Sawyer state only that corporate *property* was entitled to constitutional protection because their incorporators possessed constitutional property rights in their individual capacities, that their property rights were not lost when the incorporators associated in the corporate form and that failure to protect the corporation's rights would be tantamount to a denial of the incorporators' rights.³²⁹ Those opinions, however, do not address whether corporations possess civil rights, as that term is used today, equivalent to a natural person.³³⁰

In addition, Field's "corporation aggregate" approach is only one approach to corporate theory and to determining a rationale to extend, or to deny, constitutional rights to corporations. Indeed, for some, Field's approach arguably proves too much. Taken to its logical conclusion, for example, it answers the question posed by Justice Ginsburg in *Citizens United*, concluding that it may be irrelevant whether corporations were endowed by their creator with inalienable rights—their incorporators were so endowed and those rights must be protected because those incorporators,

U.S. at 21-22 (Assuming corporations are persons," the question still remains whether they are to be considered as standing precisely on the same footing as natural persons.").

³²⁸ *Innocent Abroad*, *supra* note ___ at 160. *But see Spring Valley Water Works v. Schottler*, 110 U.S. 347, 369-371 (1884) (Field, J., dissenting) (Summarizing theory Field had detailed in *San Mateo* circuit opinion.).

³²⁹ *See, supra* at ___. This view may be too narrow because, in the nineteenth century property rights were considered the quintessential civil rights.

³³⁰ *Cf. United States v. Caroline Products*, 304 U.S. 144, 152 n.4 (1938).

notwithstanding their association in the corporate form, are natural persons entitled by the Constitution to equal protection and due process.³³¹

In contrast, others have noted that Chief Justice Marshall, although at times vacillating between theories of corporate personhood, sometimes described corporations as artificial creatures whose existence was dependent entirely on the state and which, therefore, were able to exercise only those powers, and had only those rights, that the state deigned to give them.³³² If that is the operative theory, the government could, with few restrictions, recognize or deny corporate “rights” largely at will. Still others have argued for other approaches.³³³

The failure to develop a consistent corporate theory, particularly in relation to the constitutional corporate person, has led to a patchwork of decisions that often are inconsistent, sometimes internally, and sometimes externally.³³⁴ This state of affairs creates the impression that

³³¹ See, e.g., *Citizens United v. Federal Election Comm’n*, ___ U.S. ___, 130 S.Ct. 876, 928-29 (2010) (Scalia, J., concurring); *Spring Valley Water Works v. Schottler*, 110 U.S. 347, 371 (Field, J., dissenting).

³³² See, e.g., Krannich, *supra* note ___ at 67-69; Mark, *supra* note ___ at 1441.

³³³ See, e.g., Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L.R. 563 (1986-87) (Discussing theories); Krannich, *supra* note ___ at 62 (Discussing three most common metaphors: (1) the artificial entity; (2) aggregate entity; and (3) the real entity.); Mayer, *supra* note ___ at 579, 580, 620-21 (Discussing Court’s abandonment of corporate theorizing).

³³⁴ Compare *First Nat’l Bank v. Belloti*, 435 U.S. 765, 778 n.14 (1978) (Rejecting view that corporations have only rights given by state) with *CTS Corp. v. Dynamics Corp.*, 481 U.S. 69, 89 (1987) (Criticizing lower court for failing to appreciate that corporations’ “very existence and attributes are product of state law,” citing *Dartmouth College*, 4 Wheat. at 636.).

In *Citizens United*, for example, the majority and concurring opinions appear to follow a corporate aggregate approach which rests on the proposition that individuals who associate in the corporate form do not thereby lose constitutionally protected rights. *Citizens United*, 130 S. Ct. at 907-908; *id.* at 917 (Roberts, C.J., concurring); *id.* at 928-29 (Scalia, J., concurring). The dissenters, in contrast, appear to predicate their disagreement on the theory, that, as an artificial state-created entity, corporations have only those rights conferred on them by the state. *Citizens United*, 130 S. Ct. at 950-52 (Stevens, J., concurring in part and dissenting in part).

the applicability of constitutional rights and guarantees is result-oriented and that justice depends, not on the law, but on personal predilection.³³⁵

The perception that the Court’s constitutional person jurisprudence is reactive and ungrounded in principle would be problematic under any circumstances. It, however, has special poignancy currently. The eight opinions in *Hobby Lobby* and *Conestoga Wood* are the latest paradigms of the problems caused by the Supreme Court’s refusal to define the corporate person. Indeed, the divisions between the eleven judges on the *Conestoga Wood* and *Hobby Lobby* courts could hardly be more pervasive or fundamental.

D. The *Conestoga Wood* and *Hobby Lobby* ACA Challenges

The ACA requires employer-sponsored health insurance plans “to provide coverage without cost-sharing for preventative care and screening for women in accordance with guidelines created by the Health Resources and Services Administration (“HRSA”), a sub-agency of [the Department of Health and Human Services (“HHS”)].”³³⁶ HRSA, however, delegated responsibility for development of the guidelines to the Institute of Medicine (“IOM”), a private, non-governmental entity that “works outside of government to provide unbiased and authoritative advice to decision makers and the public.”³³⁷ HHS, the Department of the Treasury and the Department of Labor ultimately promulgated regulations incorporating the IOM’s recommendation that health plans cover “[a]ll Food and Drug Administration approved

³³⁵ See, e.g., *Rivard*, supra note ___ at 1445-462; Mark, supra note ___ at ___; *What We Talk About* at 1745. Cf. Editorial, “*The Rights of Corporations*”, *N.Y. Times* at A26 (Sept. 22, 2009) (editorial castigates Supreme Court’s conservative block for unprincipled decision-making).

³³⁶ *Conestoga Wood*, 724 F.3d at 381, citing 42 U.S.C. § 300gg-13(a)(4).

³³⁷ *Id.* at 392 n.2 (Jordan, J., dissenting).

contraceptive methods . . . for women with reproductive capacity.”³³⁸ In total, the regulations required coverage of twenty different contraceptive medications and devices.

Citing deeply held religious beliefs, the *Hobby Lobby* and *Conestoga Wood* plaintiffs objected to providing coverage for two “emergency contraception” drugs, commonly known as the “morning-after” pills. According to the plaintiffs, such drugs are abortifacients that take human life in contravention of their religious beliefs by preventing implantation in the uterus “of an already conceived but not yet attached human embryo.”³³⁹ For the same reason, the *Hobby Lobby* plaintiffs objected to covering two types of intrauterine devices. None of the plaintiffs objected to providing coverage for any of the sixteen remaining contraceptives.

1. The Third Circuit’s *Conestoga Wood* Decision

³³⁸ *Id.* at 381.

³³⁹ *Id.* at 381-82, quoting Plaintiffs’ Amended Complaint. *Hobby Lobby*, 723 F.3d at 1123.

The individual *Conestoga Wood* plaintiffs, the Hahns, practice the Mennonite religion. They alleged that their church teaches that the “taking of life which includes anything that terminates a fertilized embryo is intrinsic evil and a sin against God to which they are held accountable.” 724 F.3d at 381-82 (quoting Plaintiffs’ Amended Complaint) (internal quotation marks omitted). The Board of Directors of the corporate *Conestoga Wood* plaintiff adopted “The Hahn Family Statement on the Sanctity of Human Life” asserting that “human life begins at conception . . . , is a sacred gift from God and only God has the right to terminate human life. 724 F.3d at 382 n.5.

The *Hobby Lobby* Complaint alleged that both corporate plaintiffs were “operate[d] according to a set of Christian principles.” 723 F.3d at 1120. Hobby Lobby’s statement of purpose recites that its owners “are committed to honoring the Lord in all that we do by operating the company in a manner consistent with Biblical principles.” 723 F.3d at 1122. Hobby Lobby operates a chain of craft stores. The second corporate plaintiff, Mardel, sells only Christian books and materials and describes itself as “a faith-based company.” 723 F.3d at 1122. The complaint alleged that the owners’ “faith . . . guide[s] the business decisions of both companies. For example . . . the stores [of both companies] are not open on Sundays; Hobby Lobby buys hundreds of full-page newspaper ads inviting people to know Jesus as Lord and Savior, and Hobby Lobby refuses to engage in business activities that facilitate or promote alcohol use.” 723 F.3d at 1122 (internal quotation marks and citations omitted). The companies are operated through a management trust which “exists to honor God . . . and to use the [owners’] family assets to create, support and leverage the efforts of Christian ministries.” 723 F.3d at 1122 (internal quotation marks and citations omitted). The trustees must execute a “Trust Commitment” affirming commitment to those values. 723 F.3d at 1121. “[O]ne aspect of the [owners’] religious commitment is a belief that human life begins when sperm fertilized an egg. In addition, the [owners] believe that it is immoral for them to facilitate any act that causes the death of a human embryo.” 723 F.3d at 1122.

In the Third Circuit, the corporate plaintiff argued that it could assert Free Exercise Rights in its own name.³⁴⁰ Alternatively, the corporate plaintiff argued that it could assert the Free Exercise rights of individual owners on a “passed through” theory.³⁴¹ The individual owner-plaintiffs also asserted claims that their personal Free Exercise rights were impermissibly burdened by the Contraceptive Mandate.

Characterizing the issue as a “threshold” question, the Third Circuit rejected the corporate plaintiff’s claim that “a for-profit, secular corporation, can exercise religion.”³⁴² Despite recognizing that the Supreme Court repeatedly has held that the application of other First Amendment rights may *not* [be] suppress[ed] on the basis of . . . corporate identity,”³⁴³ the Third Circuit nonetheless stated that: “[c]orporate identity has been determinative in denying corporations certain Constitutional rights”³⁴⁴

Emphasizing the distinction between for-profit corporations and non-profit corporations, the Third Circuit concluded that “we simply cannot understand how a for-profit, secular corporation” that was created to make money can exercise religion apart from its owners.³⁴⁵ Because it had concluded that “Conestoga cannot exercise religion,” the Third Circuit declined to “decide whether such a corporation is a ‘person’ protected by RFRA.”³⁴⁶

³⁴⁰ *Conestoga Wood* 724 F.3d at 383.

³⁴¹ *Id.*

³⁴² *Id.* at 382-83.

³⁴³ *Id.* at 383-84 (internal quotation marks omitted), (*quoting Citizens United v. Fed. Election Comm’n* 558 U.S. 310, 365 (2010) (First Amendment protection for political speech depends on whether the *activity* is protected not on the identity of speaker); *Pac. Gas & Elec. Co. v. Pub. Util. Comm’n of Cal.*, 475 U.S. 1, 8 (1986) (same); *First Nat’l Bank of Boston v. Bellotti*, 465 U.S. at 784 (1978) (same).

³⁴⁴ 724 F.3d at 383.

³⁴⁵ *Id.* at 383, 385.

³⁴⁶ *Id.* at 388.

The Third Circuit also rejected the corporate plaintiff’s argument that the corporation could assert the rights of its individual owners on a “passed through” theory because it rested “on erroneous assumptions regarding the very nature of the corporate form.”³⁴⁷ The Third Circuit held that allowing a corporation to assert the rights of its owners “fails to acknowledge that, by incorporating their business, the [owners] themselves created a distinct legal entity that has legally distinct rights and responsibilities from . . . the owners of the corporation.”³⁴⁸

The *Conestoga Wood* rejects the majority’s premise “that Conestoga lacks any right to the free exercise of religion . . . because the Constitution nowhere makes the ‘for-profit versus non-profit’ distinction invented by the government and the language and logic of Supreme Court jurisprudence justify recognizing for-profit corporations like Conestoga are entitled to religious liberty.”³⁴⁹ Further, the dissent also argues that, while religious convictions may be a matter of individual belief and experience, religious observance is exercised collectively, noting that “there is nothing about the ‘nature, history, and purpose’ of religious exercise that limits it to individuals. Quite the opposite; believers have from time immemorial sought strength in numbers.”³⁵⁰

The dissent adopts the plaintiff’s “passed through” approach, arguing that a corporation has the right to Free Exercise for the same reason that a corporation has Free Speech rights: “because the people who form and operate [corporations] do, and we are concerned in this case with people even when they operate through the particular form of association called a corporation.”³⁵¹ Thus, in the dissent’s view, failure to afford the corporate entity Free Exercise

³⁴⁷ *Id.* F.3d at 383.

³⁴⁸ *Id.* F.3d at 387-88.

³⁴⁹ *Id.* F.3d at 398. (Jordan, J., dissenting.)

³⁵⁰ *Id.* F.3d at 400.

³⁵¹ *Id.* F.3d at 399 n.14.

protection is, for all practical purposes, a denial of the Free Exercise rights of the corporation’s owners because it is they who must direct the corporation to comply with the Contraceptive Mandate.³⁵²

2. The Tenth Circuit’s *Hobby Lobby* Decision

In contrast to the Third Circuit, the Tenth Circuit held that the *Hobby Lobby* corporate plaintiffs could assert Free Exercise challenges to the ACA under the RFRA. Because “RFRA provides . . . that Government shall not substantially burden a *person*’s exercise of religion”,³⁵³ the Tenth Circuit first addressed the question “whether [the corporate plaintiffs] are ‘persons’ exercising religion for purposes of RFRA.”³⁵⁴ The Tenth Circuit held that the “first resource in determining what Congress meant by ‘person’ in RFRA is the Dictionary Act”.³⁵⁵ According to the Dictionary Act, “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the word [] ‘person’ . . . include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.”³⁵⁶ The Tenth Circuit then held that “we could end the matter here since the plain language of the [RFRA’s] text encompasses ‘corporations’ including ones like Hobby Lobby”³⁵⁷

The Tenth Circuit continued, stating “courts have recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly,

³⁵² *Id.* F.3d at 410, 406 n.21.

³⁵³ 723 F.3d at 1128, *quoting* 42 U.S.C. 2000bb-1(a) (emphasis in original).

³⁵⁴ *Id.* F.3d at 1126. Although four of the eight sitting judges also believed that the Greens individually could bring RFRA claims, the majority saw no need to reach the question “[b]ecause we conclude RFRA protects Hobby Lobby” 723 F.3d at 1126 n.4.

³⁵⁵ *Id.* F.3d at 1129. The Dictionary Act, 1 U.S.C. § 1, provides definitions for a variety of terms commonly used in statutes.

³⁵⁶ *Id.* F.3d at 1129, *quoting* 1 U.S.C. § 1.

³⁵⁷ *Id.* F.3d at 1129.

petition for the redress of grievance, and *the exercise of religion* . . . as an indispensable means of preserving other individual liberties.”³⁵⁸ Noting that the Supreme Court in *Citizens United*³⁵⁹ had recognized that the First Amendment protected the right of for-profit corporations to express themselves for political purposes, the Tenth Circuit could “see no reason why the Supreme Court would recognize protection for corporation’s political expression, but not its religious expression.”³⁶⁰

The principal dissent rejected the majority’s conclusion that corporate plaintiffs could allege RFRA and Free Exercise claims, asserting that it rested on the novel characterization of the plaintiff for-profit corporations as “faith-based companies and businesses with a religious mission.”³⁶¹ According to the dissent, “neither the United States Supreme Court nor any federal circuit court, until now, has ever used the phrase ‘faith-based company’, let alone recognized such a distinct legal category of for-profit corporations.”³⁶² The dissent argued that it was “simply unreasonable to allow the individual plaintiffs in this case to benefit, in terms of tax and personal liability, from the corporate/individual distinction, but to ignore that distinction when it comes to asserting claims under RFRA.”³⁶³

E. The Problem of the Corporate Person and What the Supreme Court Should Do

The divisions between the eleven judges on the *Conestoga Wood* and *Hobby Lobby* courts could hardly be more pervasive or fundamental. The eight separate opinions reflect disagreement

³⁵⁸ *Id.* F.3d at 1133, quoting *Roberts* 468 U.S. at 618 (emphasis in original; internal quotation marks omitted).

³⁵⁹ 558 U.S. at 342-355.

³⁶⁰ 723 F.3d at 1134.

³⁶¹ *Id.* at 1166.

³⁶² *Id.*

³⁶³ *Id.* at 1173.

over the meaning and application of basic legal concepts governing what it means to be a corporate person. To summarize:

Some judges believed that a for-profit, secular corporation was unable to engage in religious exercise.³⁶⁴ In contrast, other judges argued that there was no statutory or constitutional basis for distinguishing between non-profit and for-profit corporations.³⁶⁵

Some judges argued that the corporate nature of the plaintiff precluded recognition of a Free Exercise right, noting that the Supreme Court had denied corporations protection for other rights possessed by natural person including right against self-incrimination as well as the right to privacy.³⁶⁶ Other judges rejoined that the Supreme Court's case law mandates that the right to all First Amendment protection turns, not on the identity of the claimant, but on whether the conduct is protected by the Amendment.³⁶⁷

Some judges argued that there is no history of the Supreme Court providing Free Exercise Clause protection to for-profit corporations.³⁶⁸ Other judges contended, however, that religious expression, like political speech, is protected whether exercised individually or collectively.³⁶⁹

Some judges believed that a corporation could not claim Free Exercise protection because the “human” and “personal” nature of the right demonstrated that only natural persons were

³⁶⁴ *Conestoga Wood*, 724 F.3d at 381; *Hobby Lobby*, 723 F.3d at 1172 (Brisco, C. J., concurring in part and dissenting in part).

³⁶⁵ *Conestoga Wood*, 724 F.3d at 390 (Jordan, J., dissenting); *Hobby Lobby*, 723 F.3d at 1129, 1133).

³⁶⁶ *Conestoga Wood*, 724 F.3d at 383.

³⁶⁷ *Conestoga Wood*, 724 F.3d at 385 (Jordan, J., dissenting); *Hobby Lobby* 723 F.3d at 1134.

³⁶⁸ *Conestoga Wood*, 724 F.3d at 384-85; *Hobby Lobby*, 723 at 1168 (Brisco, C.J., dissenting).

³⁶⁹ *Hobby Lobby* 723 F.3d at 1133-34; *Conestoga Wood*, 724 F.3d at 398-400 (Jordan, J., dissenting).

protected.³⁷⁰ Other judges, in contrast, asserted that whether a corporation can allege a Free Exercise claim under RFRA or the First Amendment depends upon whether the corporation is deemed to be a legal “person” exercising religion.³⁷¹

Some judges argued that allowing the corporation to assert the rights of its owners to exercise religion would eviscerate foundational principles providing that a corporation is a legally distinct entity from its owners and would be a radical revision of First Amendment law.³⁷² Other judges hold that, whether a corporation can claim a right to Free Expression has nothing to do with the purposes or incidents of incorporation – aggregation of capital and limitation of liability – so that an individual operating for-profit whose Free Exercise rights are protected does not, by incorporating, lose those rights.³⁷³

Some judges refused to allow corporations or their owners to assert the owners’ individual rights because, in their view, responsibility for compliance with the ACA’s Contraceptive Mandate falls exclusively on the corporation which is legally distinct from its owners.³⁷⁴ Yet, other judges believed that both the corporation and the individual owners could assert Free Exercise claims because people who operate in association with one another do not forfeit their rights of conscience; further, as a practical matter, the Contraceptive Mandate requires the corporate owners to direct the corporation to take action that their religion says is morally wrong.³⁷⁵

³⁷⁰ *Conestoga Wood*, 724 F.3d at 385, 388.

³⁷¹ *Hobby Lobby*, 724 F.3d at 1129.

³⁷² *Conestoga Wood*, 724 F.3d at 389; *Hobby Lobby*, 723 F.3d at 1172 (Brisco, C.J., dissenting).

³⁷³ *Hobby Lobby*, 723 F.3d at 1133-34.

³⁷⁴ *Conestoga Wood*, 724 F.3d at 385, 387-89.

³⁷⁵ *Conestoga Wood*, 724 F.3d at 389, 399 n. 14 (Jordan, J., dissenting); *Hobby Lobby*, 723 F.3d at 1152-54 (Gorsuch, J., concurring).

Three interrelated points bear emphasis. First, notwithstanding the conflicts between the courts and the judges, all opinions rely on essentially the same case law precedents and authorities to reach diametrically opposed conclusions. Second, the divide between the courts and judges is so deep that the various opinions do not even agree on an analytic approach to the question—the Third Circuit concludes, for example, that the corporate person question is irrelevant, but the Tenth Circuit views the corporate person question as fundamental. Third, neither Circuit explains why a for-profit corporation, as opposed to a non-profit, can, or cannot, exercise religion; instead both opinions are largely conclusory applications of the “we can’t understand how it could be otherwise” principle. As a result, especially when juxtaposed, the Third Circuit and Tenth Circuit decisions condone disparate treatment of similarly situated entities and the only obvious explanation for the conflicting results seems to be the personal predilections of the judges.³⁷⁶

Most common law legal concepts are products of gradual evolutionary development over time that reflects both logic and experience as courts seek to define decision-making principles that balance individual rights and duties and accord similarly situated individuals and entities similar treatment. The existence of the constitutional corporate person, however, was established essentially by Justice Field’s unilateral decree. Moreover, Justice Field pronounced the existence of the corporate person in cases in which the attributes of a corporate person were irrelevant because the Court held that the corporate plaintiffs—whether persons or not—had no enforceable

³⁷⁶ Compare *First Nat’l. Bank v. Bellotti*, 435 U.S. 765, 778 n. 14 (1978) (Rejecting view that corporations have only rights given by the state) with *CTA Corp. v. Dynamics Corp.* 481 U.S. 69, 89 (1987) (Criticizing lower court for failing to appreciate that corporations’ “very existence and attributes are products of state law,” citing *Dartmouth College*, 4 Wheat. at 636.). Compare, *Hale v. Henkel*, 201 U.S. 43, 70, 74 (1906) (Using two different theories of corporate personhood to hold that corporations are not protected by the Self-Incrimination Clause of the Fifth Amendment, but are protected by the Fourth Amendment’s prohibition against unreasonable searches) with *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (holding that Fifth Amendment Double Jeopardy Clause protects corporations).

rights. As a result, Justice Field had no need to explain why a corporation should be permitted to exercise the rights of a natural person.

As the ACA challenges illustrate, because there is no definition of what it means to be a corporate person and no specification of the attributes of the corporation which have legal significance to the determination of what, if any, rights a corporation may assert, advocates and judges have used the corporate person concept in the same fashion that Lewis Carroll's Humpty Dumpty used words—to “mean[] just what [they] choose [them] to mean—neither more nor less.”³⁷⁷ Consequently, and especially when the issues implicate vigorously contested political issues touching on important personal and societal values like Free Speech, Free Exercise, Freedom of Association and access to affordable health care, the absence of a settled, principled understanding of the meaning of corporate personhood that explains results in confusion and inconsistent results. Until the Supreme Court provides a principled basis explaining why and when corporations are to be protected as legal persons that courts can apply to determine what, if any, rights corporations may assert and in what circumstances, the confusion, inconsistencies and divisiveness that characterizing *Conestoga Wood* and *Hobby Lobby* will continue to be the rule.³⁷⁸

³⁷⁷ Lewis Carroll *Alice's Adventures In Wonderland & Through the Looking Glass* 222 (Magnum 1968).

³⁷⁸ It bears emphasis that *Conestoga Wood* and *Hobby Lobby* focus only on the narrow question of a for-profit corporation's constitutional rights, but that is only one aspect of the problem and those cases are not isolated examples. For example, *Hobby Lobby's* October 2013 response to the government's petition for a writ of certiorari states: “The existing conflict [between the courts] is likely to deepen rapidly, with the same issues pending in some thirty-five other [ACA] cases around the country. Brief for the Respondents at 17-18, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (October 21, 2013). Moreover, that the ACA has brought the corporate person issue to the fore should not obscure that, as *Citizens United* illustrates, the issue has been and will continue to be dispositive in numerous other constitutional and statutory contexts.

The meaning of corporate personhood has arisen in a wide variety of contexts prior to the current dispute. For example, the question whether the corporate person could assert protected rights appears to have first arisen with respect to the anti-divestiture provisions of the treaties between the United States and Great Britain ending the Revolutionary War. See *The Soc'y for the Propagation of the Gospel in Foreign Parts v. The Town of New Haven*, 21 U.S. 464, 482 (1823). Another early case held that corporations were “persons” as the term was used in civil and criminal statutes. *United States v. Amedy*, 11 Wheat. 392, 412-13 (1826) (Story, J.).

In order to define the meaning of corporate personhood, the Court must recognize that there are several possible theories of corporate personhood, that all theories ultimately are metaphors that analogize corporations to natural persons based on historical and policy considerations and that case law utilizes all three metaphors from time-to-time and sometimes has used more than one metaphor in the same case.³⁷⁹ The need for the Court to, in effect, start over with first principles is evident in that the Third Circuit and the Tenth Circuit freely mix corporate person metaphors and do not appear to understand that there are competing theories of corporate personhood, that each theory has outcome implications, or that the theories are, at times, in conflict and largely independent of one another.

For example, in *Conestoga Wood*, the Third Circuit starts its analysis with the assertion that States “are [not] free to define the rights of their creatures [i.e. corporations] without constitutional limit” because “[o]therwise corporations could be denied the protection of all constitutional guarantees, including due process and the equal protection of the laws.”³⁸⁰ The Third Circuit’s caveat is based on the assumption that corporate existence is imbued with some inherent, inalienable rights not granted by the State when it created the corporation. The difficulty is that the basis for that assertion is not immediately obvious and the Third Circuit fails to articulate any explanation of the source or basis for such corporate rights. The source of the corporate person’s rights is critical because, in theory, rights conferred by the state may be taken

³⁷⁹ Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 61 Loy. U. Chicago L. J. 61, 84 n. 150 (2005); Gregory A. Mark, *The Personification of the Business Corporation In American Law*, 5. U. Chi. L. Rev. 1441, 1442 (1987).

³⁸⁰ *Conestoga Wood*, 724 at 383. See also, *Bellotti*, 435 U.S. at 778 n.14.

away, or limited, by the state whereas corporate rights derived from, or exercised on behalf of, natural persons may be inalienable.³⁸¹

The Third Circuit’s statement—although something of a throw-away-line—seems to reflect the “real entity” theory of corporate personhood. As one commentator has explained, “[t]he real entity theory generally views the corporate entity as a natural creature, to be recognized apart from its owners, existing autonomously from the state.”³⁸² Thus, real entity theory posits that “corporate legal status does not arise solely from the state; instead it arises primarily from the individual incorporators” and the corporation “enjoy[s] a degree of autonomy from the state.” Similarly, the separation of management and control renders the corporation “an entity apart from its shareholders.” As a result, “the corporation is a real entity rather than an artificial entity”, in effect, an analog to a natural person imbued with certain, unspecified rights as a legal convention simply because the corporation exists.³⁸³

The *Conestoga Wood* majority opinion, however, also relies on a second corporate person metaphor—the artificial entity theory—seemingly without recognizing the potential doctrinal differences or the conflict with the real entity approach.³⁸⁴ The “artificial entity” approach argues that, because corporations are created by the state, the state can decide what, if any, rights a

³⁸¹ Cf., *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, 636 (1819) (Marshall, C.J.) (Corporation “possesses only those properties which the charter of its creation confers upon it. . . .”).

³⁸² Krannich, *supra* note 78 at 80.

³⁸³ Michael D. Rivard, *Comment, Toward a General Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. Rev. 1425, 1459-61 (1992).

³⁸⁴ A court’s reliance on more than one corporate person theory is not unique to *Conestoga Wood*. The Supreme Court has done the same. See, e.g., *Hale v. Henkel*, 201 U.S. 43, 70, 74, (1906) using two different corporate person theories to hold that corporations have Fourth Amendment protection against unreasonable searches but not Fifth Amendment protection against self-incrimination. See, also Rivard, *supra* note 81 at 1461-62 (Discussing the Supreme Court’s use of two different corporate person theories to deny Fifth Amendment protection against self-incrimination while granting Fifth Amendment double jeopardy protection, stating that various corporate person theories are “merely post hoc nationalization for result-oriented decisions.”)

corporation possesses and may exercise.³⁸⁵ Thus a corporation may be a ‘person’ but the scope of the rights of the corporate person are determined and fixed by the state.

Without explanation or analysis, *Conestoga Wood* appears to predicate its holding directly on the artificial entity theory or, perhaps, on a conflation of the artificial entity and real entity theories: “We do not see how a for-profit artificial being, invisible, intangible, and existing only in contemplation of law . . . that was created to make money could exercise such an inherently ‘human’ right.”³⁸⁶ One difficulty—not recognized or addressed by the Third Circuit—is that the artificial entity theory posits that corporations have the rights given them by government and, in this case, the Dictionary Act—as the Tenth Circuit pointed out—expressly includes corporations in the definition of “persons” protected by RFRA’s Free Exercise guarantee. Moreover, all corporations, whether for-profit or non-profit, must make money if they are to survive, but the Third Circuit never explains why the corporate plaintiff’s for-profit status precludes it—but not a non-profit—from claiming Free Exercise rights.

The Tenth Circuit—also without argument or much analysis—appears to rest primarily on a third theory of corporate personhood: corporation aggregate. The corporation aggregate approach posits that a corporation is merely an amalgam, an association of individuals, including natural persons who have come together to pursue, collectively, some joint purpose. This “corporation aggregate” theory asserts that individuals, by associating in a collective, do not thereby surrender their constitutional rights. Indeed, because the Constitution explicitly protects

³⁸⁵ See, e.g., Sanford A. Schane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 Tul. L. R. 563 (1986-87); Krannich, *supra* note 78 at 62 (Discussing three most common metaphors: (1) the artificial entity; (2) aggregate entity; and (3) the real entity.) Compare, *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819) (Marshall, C.J.) (Corporation “possesses only those properties which the charter of its creation confers upon it . . .”) with *Charles River Bridge Co. v. Warren*, 36 U.S. 420 (1837) (Allowing government to alter corporate rights charter, because state always retains the power to regulate in the public interest.)

³⁸⁶ 724 F.3d at 385 (internal citations and quotation marks omitted). See also *id.* (“[W]e simply cannot understand how a for-profit, secular corporation—apart from its owners—can exercise religion.”)

freedom of association, government action denying such individuals the ability to protect their personal and property rights would effectively penalize joint actors for exercising their constitutional right to associate in otherwise legal ventures and entities.³⁸⁷

In sum, *Hobby Lobby* and *Conestoga Wood* diverge on three foundational points that the Court should address. First, when a corporation seeks to assert constitutional or statutory rights, what basis, if any, supports the conclusion that the corporation itself, as distinct from its owners, has been vested with the right the corporation seeks to vindicate? Second, when a corporation claims constitutional protection, is the corporation treated as a legal person because it is asserting rights possessed by its owners on a derivative or “passed through” basis?³⁸⁸ Third, whether a corporation can assert constitutional rights on its own or derivatively on behalf of its owners or not, may the individual owners assert that the burdens and obligations imposed directly on the corporation effectively deny their personal constitutional rights?

Citizens United, *Hobby Lobby* and *Conestoga Wood* illustrate that, because the Court has failed to articulate a consistent, principled explanation of what it means to be a constitutional corporate person, the Supreme Court’s decisions on the subject, in a variety of contexts, have an ad hoc, result-driven appearance.³⁸⁹ Moreover, the lack of a principled distinction between those

³⁸⁷ Cf. *Citizens United*, U.S., 130 S. Ct. 876, 928-29 (2010) (Scalia, J., concurring).

³⁸⁸ Note that, although it does not appear to have figured significantly into the analysis of any members of the court, *Hobby Lobby* was a closely held family business organized as an S-Corp., but it was not owned directly by the family members. Instead, the family members operated Hobby Lobby through a management trust of which each member of the family was a trustee. *Hobby Lobby*, 723 F.3d at 1122.

³⁸⁹ This debate is long-standing as are the problems caused by the Court’s failure to resolve it. Compare, e.g., *The Bank of the United States v. Deveaux*, 5 Cranch 61, 87.90 (1809) (Marshall, C.J.) (Holding that when determining right to sue, courts may look through corporate form because “the corporate name represents persons who are members of the corporation.”) with *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819) (Marshall, C.J.) (Corporation “possess only those properties which the charter of its creation confers upon it . . .”). Compare also *Hale v. Henkel*, 201 U.S. 43, 70, 74 (1906) (Using two different theories of corporate personhood to hold that corporations are not protected by the Self-Incrimination Clause of the Fifth Amendment, but are protected by the Fourth Amendment’s prohibition against unreasonable searches) with *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (holding that Fifth Amendment Double Jeopardy Clause protects corporations). See also, *Hope*

cases in which corporations may, and may not, claim constitutional or statutory rights makes the Supreme Court appear to be a political body whose members, like any other public official, pursue whatever means is necessary to achieve their personal view of an appropriate outcome, whatever the law.³⁹⁰ That appearance not only causes disrespect for the Court, it undermines the Court's authority to as "fair broker" trusted to evenhandedly objectively and dispositively resolve difficult disputes.³⁹¹ Indeed, legal realists can make the case that, from long before the Fourteenth Amendment was adopted, Supreme Court decisions regarding corporate citizenship and personhood have reflected, not controlling legal principles, but society's shifting and ambivalent view of the role and value of corporations.³⁹² That perception has persisted too long.

IV. Conclusion

In 1886 when the Supreme Court refused to decide the constitutional corporate person question in *Santa Clara*, Justice Field warned about the consequences of avoiding the question: "The question is of transcendent importance, and it will come here [to the Supreme Court], and continue to come, until it is authoritatively decided. . . ." ³⁹³ *Conestoga Wood's and Hobby*

Ins. Co. v. Boardman, 9 U.S. 57 (1809) (holding that diversity jurisdiction depended on citizenship of members of corporation); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 2 How. 497 (1844) (holding that jurisdiction depends on imputed citizenship of the corporation without regard to actual citizenship of corporate members).

³⁹⁰ William H. Rehnquist, THE SUPREME COURT ___ () (Discussing Justice Field's perceived approach to deciding cases).

³⁹¹ See comments Pres. Obama made during State of Union address following *Citizen's United*.

³⁹² Compare, e.g., *Dartmouth College v. Woodward*, 4 Cranch 518, 636 (1819) (Marshall, C.J.) (Corporation is an artificial person created by state which can give or deny rights), with *Bank of the United States v. Deveaux*, 5 Cranch 61 (1809) (Marshall, C.J.) (Corporation is aggregate association of individuals who are the real parties in interest for purposes of diversity jurisdiction), with *Bank of Augusta v. Earle*, 13 Pet. 519 (1839) (Overturning *Deveaux*, treating corporation as an artificial person distinct from its incorporators), with *Louisville, Cinn. & Charl. R. Co. v. Letson*, 43 U.S. 497 (1844). See also Mayer, *supra* note ___ at 641 (Tracing changing theories against political and social climate); *Constitutional Rights*, *Supra* note __ at 1657 (same).

³⁹³ *County of San Bernardino v. Southern Pacific Railroad Co.*, 118 U.S. 417, 423 (1886) (Field, J., concurring).

Lobby's challenges to the ACA's Contraceptive Mandate almost 130 years after Field's warning demonstrate that the Justice was not overstating his case.

One of the principal purposes of the law is to provide structure and predictability so that individuals and businesses may assess the potential burdens and benefits of proposed conduct and order their affairs accordingly. Predictability is especially important with respect to complex statutes, like the ACA, that attempt to pervasively restructure a major component of the economy and appear to threaten fundamental individual rights and access to basic services and entitlements. Additionally, by predicating conflict resolution on known and articulated principles, law provides elements of objectivity, evenhandedness and integrity that promote acceptance of even adverse results by bitterly disappointed litigants.

Conestoga Wood and *Hobby Lobby* well-illustrate the confusion and inconsistency caused by the Supreme Court's failure to define when and why a corporation may, and may not, claim the rights of a 'person.' For example, *Conestoga Wood* and *Hobby Lobby* both seem to agree—without explaining why—that at least some non-profit corporations possess and may assert a constitutionally protected right to Free Exercise. Yet, neither court explains why a corporation's for-profit status is relevant to—or not relevant to—its ability to claim First Amendment Free Exercise Rights. The underlying problem is that, neither court can point to any Supreme Court decision providing a rationale for—or undermining—the for-profit versus non-profit distinction. In short, because much of health reform depends on corporate involvement, the Supreme Court's failure to define the corporate person leaves the application of the ACA in doubt and, on a broader scale, the resultant confusion and uncertainty denies the predictability necessary to develop and effectively implement complex programs utilizing private corporations to address major societal problems.

As important as the systemic problems caused by the Supreme Court’s failure to provide guidance are, one should not lose sight of the fact that the consequences of the failure to define the meaning of the corporate person are potentially devastating on a personal level. If the owners of Conestoga Wood and Hobby Lobby had elected to do business in their individual capacities, rather than in the corporate form, they may have foregone certain benefits of incorporation, such as limitations on liability, but it seems likely that the owners would have been able to assert RFRA claims in opposition to the ACA’s Contraceptive Mandate and, at the very least, attempt to vindicate their personal Free Exercise rights. Instead, because the owners of Conestoga Wood and Hobby Lobby elected to incorporate, their ability to assert Free Exercise rights as a defense to the Contraceptive Mandate is in doubt and they are currently compelled to engage in what they believe to be immoral behavior or suffer ruinous fines.

Hobby Lobby and its owners are faced with the choice of adhering to their religious beliefs or potentially incurring a “fine that would total at least \$1.3 million per day, or almost \$475 million per year” or, alternatively, “dropping employee health insurance altogether [and] fac[ing] penalties of \$26 million per year.”³⁹⁴ Similarly, Conestoga Wood would be subject to fines of about \$95,000 per day, or in excess of \$34 million per year, with the result that Conestoga Wood’s business would be destroyed and 950 jobs would be lost.³⁹⁵

In *Citizens United*, Justice Sotomayor suggested that the Court consider re-examining the question of corporate personhood and the entitlement of corporations to the constitutional protections afforded “persons.” Normally, such a suggestion would implicate considerations of

³⁹⁴ 723 F.3d at 1125.

³⁹⁵ 724 F.3d at 392 (Jordan, J., dissenting).

stare decisis. But what decision should the Court let stand?³⁹⁶ And what weight should be given to opinions that, as a result of nineteenth century Supreme Court protocols and jurisprudence, may be the views of a single justice who manipulated the process to secure his ends, are surely mere *dicta* and, in any event were probably not authorized by the Court and, moreover, lack a principled rationale?

Alternatively, should the Court, as it has done on at least one prior analogous occasion, refuse to reexamine constitutional corporate personhood because of the extreme disruption that undoing the theory is likely to have?³⁹⁷ In *Marshall v. Baltimore & Ohio Railroad Co.*,³⁹⁸ for example, the Court's holdings in *Letson*³⁹⁹ and *Deveaux*⁴⁰⁰ regarding corporate citizenship for purposes of determining diversity jurisdiction were challenged as "extrajudicial, and therefore not authoritative."⁴⁰¹ The Court, however, refused to consider the challenge, saying

If we should now declare these judgments [i.e., *Letson* and *Deveaux*] to have been entered without jurisdiction or authority, we should inflict a great and irreparable evil on the community... For this reason alone, even if the court were now of the opinion that the principles affirmed in ... [*Letson*], and that of ... [*Deveaux*] were

³⁹⁶ Howard Jay Graham, perhaps the foremost authority on the history behind the constitutional person, has said that Chief Justice Waite's dictum is wrong and should be overruled. See _____. Assuming that dictum can be overruled, then what? Mr. Graham, despite his suggestion, rejects the idea that corporations should be denied constitutional protections, accepting the idea of an evolving Constitution. See Goldman, *Supra* note _____ at 869.

³⁹⁷ See *Marshall v. B.&O. R.R. Co.*, 16 How. 314, 325-26 (1853).

³⁹⁸ 16 How. 314 (1853).

³⁹⁹ 2 How. at 497.

⁴⁰⁰ 5 Cranch at 61.

⁴⁰¹ 16 How. at 325.

not founded on right reason, we should not be justified in overruling them. The practice founded on these decisions... injures or wrongs no man; while their reversal could not fail to work wrong and injury to many.⁴⁰²

A similar argument can be made with respect to the *existence* of the constitutional corporate person. The *theory* of the constitutional corporation, however, is another matter altogether, never having never been defined.

There is great irony in the Court's inconsistent analysis of a corporation's entitlement to constitutional rights because it often occurs in the context of a case in which the Court ostensibly is applying the guarantee of equal protection of the laws. It is fundamental, however, that equality of legal protection cannot be assessed unless the nature and position of the entity alleging discrimination relative to its peers is known. Without such a touchstone, it is impossible to identify similarly situated entities against which to assess the quality of the plaintiff's treatment.

Indeed, this was the debate at the heart of *Santa Clara* and the debate has never been resolved. The railroads argued that corporations were imbued with the rights of their corporators—who were natural persons—so that the equality of the corporate person's treatment was assessed by comparison to the treatment accorded a natural person. The county, in contrast, argued that as creatures created by the State and given rights, privileges and immunities unknown to natural persons, corporations were an entirely different class of legal person than a natural person and that the rule of equality requires only that equality shall be observed among [persons] of the same class."⁴⁰³

⁴⁰² 16 How. at 325-26. *See also*

⁴⁰³ *See* Argument of D.M. Delmas, Esq. at 35, *Santa Clara* Transcript of Record, *supra* note ____.

The Court’s questioning during argument in *Citizens United* reflected an unstated, but obvious disconnect among the justices and between the justices and counsel that can be explained by the absence of settled first principles.⁴⁰⁴ In many respects, this is the lasting and most serious problem wrought by Field’s campaign because, even if the existence of the corporate person is admitted, the absence of a principled basis for such conclusion means that the attributes of a corporate person are unknown and unknowable. As the *Citizens United* colloquy, the *Hobby Lobby* and *Conestoga Wood* opinions and subsequent reactions illustrate, such uncertainty enhances the perception that the Court is primarily advancing a political agenda, impairs public confidence in government and, in this instance, calls into question a critical aspect of the economy.

It is long past time for the Supreme Court to establish a corporate person theory and concomitant decisional principles that should produce, if not consistent, at least understandable and rational outcomes when questions regarding the corporation’s entitlement to constitutional protection are raised. Failure to do so will assure, as Justice Field prophesized, that the corporate person issue will remain divisive and that “it will come [before the Supreme Court], and continue to come, until it is authoritatively decided . . .”⁴⁰⁵

⁴⁰⁴ *Citizens United* Transcript at 48, 55 (Scalia, J.) (questioning denial of speech rights of shareholder in corporation sole); (Roberts, C.J.) (corporations have diverse interests similar to individuals); (Ginsburg, J.) (Corporation not endowed with inalienable rights, ability to amass huge sums); (Kagan, Sol. Gen.) (Arguing corporations engage in discourse differently from individuals, based on profit motive differentiating them from individuals).

⁴⁰⁵ *County of San Bernardino v. Southern Pac. R.R. Co.*, 118 U.S. 417, 422 (1886) (Field, J. dissenting).