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FRANKENSTEIN'S BABY: THE FORGOTTEN HISTORY OF CORPORATIONS, RACE, AND EQUAL PROTECTION

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This Article highlights the crucial role corporations played in crafting an expansive interpretation of the Fourteenth Amendment. Exposing the role of race in the history of the constitutional law of corporate personhood for the first time, this Article argues that corporations were instrumental in laying the foundation of the Equal Protection Clause that underlies civil rights jurisprudence today. By simultaneously bringing cases involving both corporations and Chinese immigrants, corporate lawyers and sympathetic federal judges crafted a broad interpretation of equal protection in order to draw a through-line from African Americans, to Chinese immigrants, and finally to corporate shareholders. At the same time that corporate litigation expanded the umbrella of protected "persons," however, it limited the capacity of the Fourteenth Amendment to address issues of substantive inequality.

This Article reveals that central to the argument in favor of corporate constitutional personhood was a direct analogy between corporate shareholders and racial minorities. This Article thus highlights the intersection of corporate personhood and race, a connection that has

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rarely, if ever, been explored. Corporate lawyers' expansive interpretation of equal protection ultimately triumphed in the Supreme Court with the twin cases of *Yick Wo v. Hopkins*, a bedrock of modern civil rights doctrine, and *Santa Clara v. Southern Pacific Railroad*, a case credited with extending equal protection rights to corporations. This is the first Article to juxtapose these two seminal cases and to expose the deep and long-standing connections between them. In so doing, this Article uncovers a neglected history of the link between corporations and race, as well as a lost history of the Fourteenth Amendment.

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INTRODUCTION

“Like Frankenstein’s baby, there was no end to its growing, and no limit to its voracity. And, like that wonderful child, it started in to devour its author.”

– Records of the California Constitutional Convention (1878)

“The Fourteenth Amendment . . . stands in the constitution as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.”

– *The Railroad Tax Cases* (9th Cir. 1882)

Since the controversial cases of *Citizens United v. Federal Election Commission*¹ and *Burwell v. Hobby Lobby*,² which recognized the political speech and religious freedom rights of corporations,³ respectively, activist groups have been lobbying for a constitutional amendment to eliminate corporate constitutional personhood.⁴ Granting corporations constitutional rights, they argue, gives powerful mega-corporations even greater means to avoid regulation and manipulate elections, thus threatening “the democratic promise of America.”⁵ In 2019, Rep. Pramila Jayapal (D-WA) introduced a bill to provide that “the rights extended by the Constitution are the rights of natural persons only”

¹ 558 U.S. 310 (2010).

² 573 U.S. 682 (2014).

³ In *Citizens United*, the Supreme Court struck down a federal law, 2 U.S.C. § 441b (2006), that banned direct corporate spending on political campaigns. 558 U.S. at 372. *Citizens United* was part of a long line of cases in which the Court had recognized the First Amendment rights of corporations, including: *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (freedom of association); *NAACP v. Button*, 371 U.S. 415, 428–29 (1963) (freedom of expression and association); *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964) (freedom of speech and the press); and *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978) (campaign expenditures as political speech). *Hobby Lobby* concluded that corporations were “persons” under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb–1, and held that Health and Human Services regulations requiring employers to provide insurance that covered contraceptives unconstitutionally burdened closely held corporations’ exercise of religion. 573 U.S. at 736.

⁴ See Move to Amend, <https://www.movetoamend.org/> [<https://perma.cc/RH9L-2FZT>] (last visited Aug. 19, 2020); United for the People, <http://united4thepeople.org/> [<https://perma.cc/XS9X-LZNR>] (last visited Aug. 19, 2020).

⁵ United for the People, *supra* note 4; Move to Amend, *supra* note 4. See Joanna M. Meyer, The Real Error in *Citizens United*, 69 Wash. & Lee L. Rev. 2171, 2198 (2012).

and that corporations “shall have no rights under this Constitution.”⁶ Supporters of this amendment showcase buttons and bumper stickers that proclaim: “Corporations are not People!”⁷

Corporate constitutional rights have been debated since the early years of the American Republic.⁸ Missing from histories of corporate personhood, however, is the central role that race played in the development of corporate constitutional rights.⁹ This Article uncovers this link by highlighting the strategy of a group of corporate lawyers and

⁶ H.R.J. Res. 48, 116th Cong. (2019) (proposing an amendment to the Constitution of the United States providing that the rights extended by the Constitution are the rights of natural persons only). Other bills introduced in both the House and the Senate have targeted specific constitutional rights, such as one “waiving the application of the first article of amendment to the political speech of corporations.” H.R.J. Res. 39, 116th Cong. (2019). See United for the People, <http://united4thepeople.org/amendments/> (last visited Oct. 31, 2021) [<https://perma.cc/QGU7-883U>], for an up-to-date list of proposed amendments relating to corporate constitutional rights.

⁷ See Move to Amend, <https://move-to-amend.myshopify.com/collections/frontpage> [<https://perma.cc/8JVP-CYAD>] (last visited Dec. 28, 2021).

⁸ For early cases debating the constitutional rights of corporations, see *Bank of United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 63–64 (1809); *Hope Insurance Co. of Providence v. Boardman*, 9 U.S. (5 Cranch) 57, 58 (1809); *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43, 46–47 (1815); *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheaton) 518, 556 (1819); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Peters) 420, 421 (1837); and *Louisville, Cincinnati & Charleston Railroad Co. v. Letson*, 43 U.S. (2 Howard) 497, 499 (1844). See also Adam Winkler, *We the Corporations: How American Businesses Won Their Civil Rights*, at xxi (2018) (describing how the country’s most powerful corporations have persistently tried to use the Constitution to evade unwanted government regulations); Margaret M. Blair & Elizabeth Pollman, *The Derivative Nature of Corporate Constitutional Rights*, 56 *Wm. & Mary L. Rev.* 1673, 1680 (2015) (explaining how the Supreme Court was tasked with determining the applicability of constitutional provisions to corporations in an 1809 case involving the first Bank of the United States).

⁹ Legal historians of corporate personhood have discussed corporate Fourteenth Amendment cases in some detail but have neglected the role that race played in the development of these cases. For representative writings on corporate personhood and constitutional rights, see Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 *W. Va. L. Rev.* 173, 174 (1985); Blair & Pollman, *supra* note 8, at 1677; Reuven S. Avi-Yonah, *Citizens United and the Corporate Form*, 2010 *Wis. L. Rev.* 999, 1033–34; Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 *U. Chi. L. Rev.* 1441, 1443 (1987); Herbert Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 *Geo. L.J.* 1593, 1640–41 (1988); David K. Millon, *Theories of the Corporation*, 1990 *Duke L.J.* 201, 205–07; Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 *Utah L. Rev.* 1629, 1630; Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 *U. Ill. L. Rev.* 785, 796–97; Kent Greenfield, *In Defense of Corporate Persons*, 30 *Const. Comment.* 309, 310–12 (2015); Tamara R. Piety, *Why Personhood Matters*, 30 *Const. Comment.* 361, 362–63 (2015); Turkuler Isiksel, *Corporations as Rights-Bearers*, *J. Pol.* (forthcoming) (manuscript at 1–2) (on file with the author).

Ninth Circuit¹⁰ judges to expand the Fourteenth Amendment using cases involving both corporations and race. As this Article reveals, modern ideas about corporate personhood are predicated on a historical analogy between corporate shareholders and racial minorities.¹¹ Yet racial analogies not only helped corporations gain constitutional rights; corporations themselves created constitutional guarantees that ultimately protected racial minorities. This neglected history shows that corporations have been crucial players in shaping rights guarantees—particularly an expansive interpretation of equal protection under the Fourteenth Amendment—that apply to individuals as well. In revealing these complex interconnections, this Article exposes the multifaceted legacy of litigation over corporate personhood in the development of modern equal protection jurisprudence.

This Article juxtaposes two seminal cases, decided on the same day in 1886 and brought by the same lawyers: *Santa Clara County v. Southern Pacific Railroad*,¹² credited with establishing corporate Fourteenth

¹⁰ At the time, the Circuit Court for the District of California, where the cases discussed in this Article arose, was located in the federal circuit encompassing California and Oregon. This court exercised both original and appellate jurisdiction and was staffed by one Supreme Court Justice (Stephen Field), one circuit court judge (Lorenzo Sawyer), and one district court judge (Ogden Hoffman), any two of which could hear a case. Christian G. Fritz, *Federal Justice in California: The Court of Ogden Hoffman, 1851–1891*, at 29–30 (1991). To avoid confusion, this Article follows contemporary scholarship that refers to these cases as occurring in the Ninth Circuit. *Id.* at 29; Howard J. Graham, *Everyman's Constitution: Historical Essays on the Fourteenth Amendment, the "Conspiracy Theory," and American Constitutionalism* 573 (1968); Winkler, *supra* note 8, at 153–54. However, this should not be confused with the modern-day U.S. Court of Appeals for the Ninth Circuit, which was not created until the federal appellate system was redesigned in 1891. Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *Cardozo L. Rev.* 1753, 1826 (2003).

¹¹ A growing area of scholarship explores the connections between corporations and race. See, e.g., Cheryl L. Wade, *Attempting to Discuss Race in Business and Corporate Law Courses and Seminars*, 77 *St. John's L. Rev.* 901 (2003); Alfred Dennis Mathewson, *Race in Ordinary Course: Utilizing the Racial Background in Antitrust and Corporate Law Courses*, 23 *St. John's J. Legal Comment.* 667, 685 (2008); Cheryl L. Wade, *Introduction to Symposium on People of Color, Women, and the Public Corporation: The Sophistication of Discrimination*, 79 *St. John's L. Rev.* 887, 890 (2005); Thomas W. Joo, *Corporate Hierarchy and Racial Justice*, 79 *St. John's L. Rev.* 955 (2005); Thomas W. Joo, *Race, Corporate Law, and Shareholder Value*, 54 *J. Legal Ed.* 351 (2004); Juliet E.K. Walker, *White Corporate America: The New Arbiter of Race? in Constructing Corporate America: History, Politics, Culture*, 246, 253, 260 (Kenneth Liparito & David B. Sicilia eds., 2007).

¹² 118 U.S. 394 (1886).

Amendment rights,¹³ and *Yick Wo v. Hopkins*,¹⁴ a touchstone of modern civil rights jurisprudence.¹⁵ This Article uncovers the conjoined history of these two Fourteenth Amendment cases, one involving a corporation and the other a Chinese immigrant, and their antecedents.¹⁶ Drawing on little-known archival sources, it traces how the same coterie of corporate lawyers simultaneously brought Fourteenth Amendment cases involving Chinese and corporate litigants before the sympathetic Ninth Circuit in order to strategically craft a broad interpretation of the Equal Protection Clause that applied to all “persons,” natural and artificial alike.¹⁷ Although in the *Slaughter-House Cases* the Supreme Court had suggested that it would read the Fourteenth Amendment narrowly,¹⁸ in *Yick Wo* and *Santa Clara* the Court changed course and adopted the Ninth Circuit’s expansive interpretation of equal protection, a doctrinal shift with lasting effects today.

This is not a story of unintended consequences. By expanding the scope of the Equal Protection Clause to include Chinese immigrants, corporate lawyers were able to use the Chinese cases to draw a through-line from

¹³ See Horwitz, *supra* note 9, at 173; Blair & Pollman, *supra* note 8, at 1694–95; Avi-Yonah, *supra* note 9, at 1033–34.

¹⁴ 118 U.S. 356 (1886).

¹⁵ See 2 Encyclopedia of American Civil Rights and Liberties 482, 1055 (Kara E. Stooksbury, John M. Scheb, II & Otis H. Stephens, Jr. eds., rev. and expanded ed. 2017); Peter Irons, *Jim Crow's Children: The Broken Promise of the Brown Decision* 53 (2004); see also *infra* notes 327–35 (noting early civil rights cases citing *Yick Wo*).

¹⁶ Scholars have studied the connection between Fourteenth Amendment claims of Chinese immigrants and the Supreme Court’s desire to protect economic rights. See Thomas Wuil Joo, *New “Conspiracy Theory” of the Fourteenth Amendment: Nineteenth Century Chinese Civil Rights Cases and the Development of Substantive Due Process Jurisprudence*, 29 U.S.F. L. Rev. 353, 354–55 (1995); Thomas W. Joo, *Yick Wo Re-Visited: Nonblack Nonwhites and Fourteenth Amendment History*, 2008 U. Ill. L. Rev. 1427, 1428; Charles McClain, Jr., *In Search of Equality: The Chinese Struggle Against Discrimination in Nineteenth-Century America* 83 (1994); Graham, *supra* note 10, at 15; Daniel W. Levy, *Classical Lawyers and the Southern Pacific Railroad*, 9 W. Legal Hist. 177, 211, 216 (1996); Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* 209 (1997); Winkler, *supra* note 8, at 153. However, no prior scholarship has specifically examined the intersection of Fourteenth Amendment claims by corporations and by Chinese immigrants.

¹⁷ See *In re Ah Fong*, 1 F. Cas. 213, 213 (C.C.D. Cal. 1874) (No. 102); *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 252 (C.C.D. Cal. 1879) (No. 6,546); *In re Ah Chong*, 2 F. 733, 737 (C.C.D. Cal. 1880); *In re Tiburcio Parrott*, 1 F. 481, 482 (C.C.D. Cal. 1880); *The Railroad Tax Cases*, 13 F. 722, 727 (C.C.D. Cal. 1882); *In re Quong Woo*, 13 F. 229, 233 (C.C.D. Cal. 1882); *County of Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385, 386, 397 (C.C.D. Cal. 1883), *aff’d*, 118 U.S. 394 (1886); *In re Yick Wo*, 9 P. 139, 139 (Cal. 1885), *rev’d sub nom. Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *In re Wo Lee*, 26 F. 471, 475 (C.C.D. Cal. 1886).

¹⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 80–81 (1873).

African Americans—the original beneficiaries of the Fourteenth Amendment—to Chinese immigrants, to corporate shareholders.¹⁹ This comparison was made possible because corporate lawyers and federal judges intentionally portrayed the corporation as simply an aggregate of rights-bearing shareholders who did not forsake their constitutional rights when they joined the corporation. In this framing, shareholders were members of a persecuted group, the same as racial minorities.

This view of the corporation as solely an aggregate of rights-bearing shareholders was at odds with an older common law vision of the corporation as both an aggregate of individuals *and* a separate legal person with special rights and duties distinct from those of “natural” persons.²⁰ In Part I below, this Article exposes a contour of common law corporate personhood that has not previously been noted: incorporation was a status in which corporate legal persons existed in a hierarchical relationship with the public, akin to master-servant or parent-child.²¹ The common law view of the corporation as a “child” or “servant” of the public justified more stringent state regulation of corporations than of individuals: the state was the benevolent parent, overseeing its corporate child to ensure the corporation acted in the public interest.²²

Yet as Part II discusses, throughout the nineteenth century, corporate lawyers challenged this view, arguing that corporations were not “children” who owed a special duty of obedience to the parental state but private, profit-making entities whose interests were unrelated or even potentially opposed to those of the public. In this view, the corporation was a naturally arising market phenomenon, akin to any other private market actor, with no special obligation to the public welfare.²³ In support

¹⁹ The social and political connections of Chinese “coolies” with railroad and mining corporations in the context of Greater Reconstruction debates over the meaning of “free labor” and “equality” are explored in Evelyn Atkinson, *Slaves, Coolies, and Shareholders: Corporations Claim the Fourteenth Amendment*, 10 *J. Civ. War Era* 54 (2020).

²⁰ See John Dewey, *The Historic Background of Corporate Legal Personality*, 35 *Yale L.J.* 655, 656 (1926); 3 *The Collected Papers of Frederic William Maitland* 307 (H. A. L. Fisher ed., 1911).

²¹ See discussion *infra* Part I.

²² William Novak discusses the extensive power of state legislatures to regulate in the “public interest” in William J. Novak, *The People’s Welfare: Law and Regulation in Nineteenth-Century America* 19–20 (1996).

²³ This has been called the “natural” or “real entity” theory of the corporation, that corporations are naturally emerging market entities controlled by their managers. See Avi-Yonah, *supra* note 9, at 1000–01; Blair, *supra* note 9, at 805; Pollman, *supra* note 9, at 1642; Arthur W. Machen, Jr., *Corporate Personality*, 24 *Harv. L. Rev.* 253, 262 (1911).

of this argument, corporate lawyers reframed the corporation not as a group of individuals authorized to act as one “artificial,” “legal person” for certain purposes, but as solely an aggregation of constitutional-rights-bearing shareholders.²⁴ By framing the corporation simply as a collection of private, rights-bearing individuals, corporate lawyers were able to argue that the rights and duties of corporations were simply the rights and duties of the natural persons who composed them, and no more.²⁵

This debate over whether the corporation was a state creation granted legal personhood in certain contexts for the purpose of furthering the public interest, or simply a group of private, rights-bearing individuals pursuing their own economic gain, was central to the cases involving corporate Fourteenth Amendment rights. While Morton Horwitz, Gregory Mark, and others have shown that key to the Ninth Circuit’s reasoning in *Santa Clara* was a view of the corporation as an aggregate of shareholders,²⁶ they have not examined the equally viable, alternative vision of the corporation as a “child of the state” presented by opposing counsel and reflected in public opinion. More importantly, they have overlooked the racial analogy underlying the precedents to *Santa Clara* on which the doctrine of corporate constitutional personhood was built.²⁷ This Article reveals the background and reasoning behind this significant judicial reframing of corporate personhood: the aggregate theory of the corporation allowed corporate lawyers and judges to analogize

²⁴ This is called the “aggregate” or “associational” theory. See Horwitz, *supra* note 9, at 182; Mark, *supra* note 9, at 1462; Hovenkamp, *supra* note 9, at 1597–98; Pollman, *supra* note 9, at 1662. Morton Horwitz argues that the aggregate theory was short-lived because of the increasing separation of management and control and that the “entity” theory replaced the aggregate theory in the early twentieth century. Horwitz, *supra* note 9, at 182. However, *Citizens United*, *Hobby Lobby*, and other recent cases have invoked an aggregate view of the corporation to justify extending freedom of speech and religion to corporations. See *Citizens United v. FEC*, 558 U.S. 310, 356 (2010) (“Yet certain disfavored associations of citizens—those that have taken on the corporate form—are penalized for engaging in the same political speech.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720 (2014) (attributing the religious beliefs of the shareholders of a closely held corporation to the corporate entity itself). But see *Avi-Yonah*, *supra* note 9, at 1040 (arguing that “both the majority and the dissent [of *Citizens United*] adopted the real entity view of the corporation”). Actually, the Court tacked back and forth between different conceptions of corporate personality.

²⁵ See *infra* Part I.

²⁶ Horwitz, *supra* note 9, at 223; Mark, *supra* note 9, at 1464.

²⁷ Mark and Horwitz have explained the reliance on the aggregate theory of corporate personhood as primarily rooted in property protection. Mark, *supra* note 9, at 1464; Horwitz, *supra* note 9, at 177.

shareholders to racial minorities as similarly persecuted groups targeted by discriminatory legislation.

This analogy, of course, disregarded the immense power discrepancy between corporate shareholders and persecuted racial groups. By holding that the Equal Protection Clause applied to “the despised laborer from China” as much as the “envied master of millions,”²⁸ the Ninth Circuit endorsed an interpretation of the Amendment as treating all persons alike, regardless of their social and economic power. This reasoning bolstered a “formal equality” interpretation of the Fourteenth Amendment, in contrast to claims that the Amendment embodied a commitment to “substantive equality” or anti-subordination—part of a trend towards limiting the Amendment’s ability to address long-standing inequalities that continues today.²⁹

This is not a case of manipulation by corporate lawyers of disempowered minority litigants. Chinese litigants were willing partners in the strategy to join forces with corporations to expand the Fourteenth Amendment. As this Article reveals, the economic and social connections between industrial corporate magnates and the elite Chinese mercantile and political community were long-standing. Both relied financially on the continued immigration of Chinese laborers, and both had long been represented by the same corporate lawyers. They were also both the target of discriminatory regulations that aimed to simultaneously curb corporate power and stem Chinese immigration. The Fourteenth Amendment provided a valuable tool for corporate lawyers to advocate on behalf of both sets of clients. By eliding the difference between Chinese immigrants and shareholders in these interrelated lines of cases, corporate lawyers cemented an interpretation of equal protection that culminated in the success of the twin cases of *Santa Clara* and *Yick Wo*.

²⁸ The Railroad Tax Cases, 13 F. 722, 741 (C.C.D. Cal. 1882).

²⁹ “Substantive equality,” or “anti-subordination,” consists not only in eliminating discrimination but also in “alter[ing] the circumstances that are identified as giving rise to equality questions in the first place.” Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 1, 11 (2011) [hereinafter MacKinnon, *Substantive Equality*]; see also Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 Ohio St. L.J. 1089, 1090 (2008) (contrasting a “formal equality” with an “anti-subordination” perspective); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1336 (1988) (contrasting “equality as a process” with “equality as a result”). For an extensive analysis of “formal” versus “substantive” concepts of equality, see generally Catharine A. MacKinnon, *Sex Equality* (2007) [hereinafter MacKinnon, *Sex Equality*].

For years, scholars have pondered Chief Justice Morrison Waite's famously blithe comment at the outset of oral argument in *Santa Clara* that the Justices did not wish to hear argument on whether the Fourteenth Amendment applied to corporations, as they were "all of [the] opinion that it does."³⁰ Gregory Mark has pointed out that Waite expressly avoided addressing the constitutional question and argued that his statement indicated that the Court merely intended to accept the argument that the corporate property in this case was protected as property of the shareholders.³¹ Elizabeth Pollman has also explained Waite's statement as concerned with protecting the shareholders' property interests.³² Howard Graham, dismissing the claim as "dictum," went so far as to contend that "the recording of this statement was a fluke—the Court reporter's after-thought!"³³ Adam Winkler has likewise claimed that Waite never intended his quote to become part of the opinion, but that it was intentionally misrepresented in the case report by a perfidious court reporter.³⁴ J. Willard Hurst even posited that, given late nineteenth-century law's general embrace of economic activity, extending the Fourteenth Amendment to corporations "provoked no significant contemporary controversy."³⁵

This Article offers a novel interpretation of this puzzle. By reading *Santa Clara* in light of *Yick Wo* and the preceding line of corporate and Chinese Fourteenth Amendment cases, this Article illuminates the context of equal protection jurisprudence surrounding Waite's enigmatic statement—specifically, the interplay between corporate personhood and race. As this Article reveals, the definition of equal protection that the Court adopted in *Yick Wo* had been developed in Ninth Circuit corporate and Chinese Fourteenth Amendment cases throughout the preceding decade and was central to the arguments of counsel in both *Yick Wo* and *Santa Clara*. By the time the Waite Court heard *Santa Clara*, the link

³⁰ *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886); see, e.g., Howard Jay Graham, *The Waite Court and the Fourteenth Amendment*, 17 *Vand. L. Rev.* 525, 530 (1964) ("Nowhere in the United States Reports are there to be found words more momentous or more baffling than these."); Horwitz, *supra* note 9, at 173 ("[The decision] has always been puzzling and controversial"); Pollman, *supra* note 9, at 1644 n.92 ("[T]he unusual circumstances of this case have evoked skepticism and debate.").

³¹ Mark, *supra* note 9, at 1464.

³² Pollman, *supra* note 9, at 1644–45.

³³ Graham, *supra* note 30, at 530.

³⁴ Winkler, *supra* note 8, at 153.

³⁵ James Willard Hurst, *The Legitimacy of the Business Corporation in the Law of the United States 1780–1970*, at 68 (1970).

between racial minorities and corporate shareholders had become well established in equal protection jurisprudence.³⁶ Although the Court announced its expanded interpretation of equal protection in *Yick Wo* rather than *Santa Clara*, its reasoning had long been applied equally to corporate litigants. This Article suggests that one reason why the Court declined to hear arguments on whether the Fourteenth Amendment protected corporations was because the combined precedent of Chinese and corporate cases had already established that it did.

The success of corporations at claiming constitutional rights has produced a forked legacy. Critics of *Citizens United* and *Hobby Lobby* have contended that corporate personhood has been used to trump the rights of individuals³⁷ and to subvert the democratic process.³⁸ In contrast, supporters of the decisions have argued that corporations are collections of shareholders who do not lose their fundamental rights simply because they do business as a corporation.³⁹ Yet even those who oppose corporate constitutional personhood must acknowledge the discomfiting reality that corporate rights litigation has been, and continues to be, an important means of expanding rights protections for natural persons. Today, corporations play an important role in protecting civil rights in other contexts, such as by bringing claims for racial discrimination on behalf of their members under the 1866 Civil Rights Act.⁴⁰ This does not mean we

³⁶ Elizabeth Pollman notes the precedential effect of the Ninth Circuit's equal protection jurisprudence but does not explore the explicit connections to race. Pollman, *supra* note 9, at 1644.

³⁷ As Justice Ruth Bader Ginsburg argued in *Hobby Lobby*, the majority prioritized religious rights of employers over the reproductive rights of female employees. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting); see also Jessica L. Waters & Leandra N. Carrasco, *Untangling the Reproductive Rights and Religious Liberty Knot*, 26 *Yale J.L. & Feminism* 217 (2014).

³⁸ One outcome of *Citizens United* has arguably been to permit dark-money groups to sway elections. See Heather K. Gerken, *The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 *Marq. L. Rev.* 903, 905 (2014); Danny Emmer, *Shedding Light on "Dark Money": The Heightened Risk of Foreign Influence Post-Citizens United*, 20 *Sw. J. Int'l L.* 381, 382 (2014).

³⁹ *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *Hobby Lobby*, 573 U.S. at 706–07; see, e.g., Richard A. Epstein, *The Defeat of the Contraceptive Mandate in Hobby Lobby: Right Results, Wrong Reasons*, 2014 *Cato Sup. Ct. Rev.* 35, 45; Paul Horwitz, *The Hobby Lobby Moment*, 128 *Harv. L. Rev.* 154, 162–63 (2014).

⁴⁰ 42 U.S.C. § 1981(a). Because corporations are typically the contracting party in these cases, not the natural persons against which the actual discrimination is directed, under common law principles of contract law the corporation is the only "person" that has standing to sue. See *infra* note 342.

should rehabilitate constitutional-rights-bearing corporate persons; but we must admit that a blanket condemnation of corporate personhood ignores the important historical legacy of corporate rights litigation and the continued interconnection—even interdependency—of corporations and racial minorities.

The Article proceeds in three Parts. Part I addresses the common law vision of the corporation as both an aggregate of individuals and a “child of the state” with rights and duties different from those of natural persons and traces the continued viability of this vision throughout the period in which *Santa Clara* was decided. Part II concerns corporate challenges to this traditional view in Fourteenth Amendment litigation, examining the strategy of corporate lawyers’ and Ninth Circuit judges’ reliance on the aggregate theory of corporate personhood to analogize Chinese immigrants to corporate shareholders in order to support a broad reading of the Equal Protection Clause. Part III examines the background of *Santa Clara* and reveals how the meaning of equal protection established by the Chinese and corporate Fourteenth Amendment cases informed the Court’s ultimate rulings in *Santa Clara* and *Yick Wo*, laying the groundwork for modern equal protection doctrine today.

I. DUELING VISIONS: THE COMMON LAW CORPORATION

A. Both “Community” and “Individual”: The Dual Nature of the Corporation

Corporations were separate legal “persons” from the beginning of Anglo-American corporate law.⁴¹ This was, in fact, the purpose of incorporation; as an early American commentary on corporations

Corporate litigation has also laid the groundwork for individual claims regarding religious freedom. *Hobby Lobby* has been invoked by smaller corporations, nonprofits, individuals, and partnerships claiming freedom of religion rights in similar contexts. See, e.g., Brief for Petitioners at 38 n.6, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111); Reply Brief for Petitioners in Nos. 14-1418, 14-1453 & 14-1505, at 7–8, *Zubik v. Burwell*, 578 U.S. 403 (2016) (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191); Brief for Petitioners in Nos. 15-35, 15-105, 15-119 & 15-191, at 2, *Zubik*, 578 U.S. 403 (Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191). The wealth and institutional knowledge of large corporations like *Hobby Lobby* and their lawyers make them ideally suited to pursue impact litigation that establishes precedent for non-corporate claims of religious freedom violations.

⁴¹ David Ciepley, *Beyond Public and Private: Toward a Political Theory of the Corporation*, 107 *Am. Pol. Sci. Rev.* 139, 154 (2013).

explained, the object of incorporation was “to enable numerous bodies of men, acting under a charter . . . to negotiate as an individual.”⁴² The common law recognized that corporations had a dual nature as both entities and associations. The corporation was a “community” of incorporators combined into a singular, “artificial person” in law.⁴³ Once incorporated, the members were “then considered as *one person*, which has but one will,—the will being ascertained by a majority of the votes.”⁴⁴ This dual identity is shown in the early nineteenth-century practice of speaking of the corporation in the plural: “Charles River Bridge Corporation *are*”⁴⁵

Importantly, though legal persons, early American corporations exercised only limited rights.⁴⁶ These rights were not coextensive with those of its shareholders but were confined to those set out in the corporate charter, such as exemption from taxation or the power to exercise eminent domain, and in the common law of corporations, such as the right to own

⁴² Corporations, 4 Am. Jurist & L. Mag. 298, 298 (1830).

⁴³ Id.; Joseph K. Angell & Samuel Ames, *A Treatise of the Law of Private Corporations Aggregate* 3 (Bos., Little & Brown 2d ed. 1843). The conventional story is that the aggregate theory of the corporation was dominant in the nineteenth century but was replaced by the end of the nineteenth century by the personal theory. See Horwitz, *supra* note 9, at 181–82; Mark, *supra* note 9, at 1443–44; Hovenkamp, *supra* note 9, at 1597–98. These claims have been widely accepted by corporate-personhood scholars. See, e.g., Pollman, *supra* note 9, at 1630; Blair, *supra* note 9, at 797–98. Adam Winkler claims that the aggregate and personal theories of the corporation were often employed by different sides of the debate over corporate rights with advocates of regulation claiming that corporations were single entities while corporate lawyers relied on the aggregate theory. Winkler, *supra* note 8, at xxi. However, the reality is more complex—both the aggregate and personal theories of the corporation were recognized legally and in public discourse and employed by both sides at different times.

⁴⁴ Joseph K. Angell & Samuel Ames, *Treatise of the Law of Private Corporations Aggregate* 7 (Bos., Hilliard, Gray, Little & Wilkins 1832).

⁴⁵ For examples of this usage, see *Free Bridge to Charlestown*, Bos. Comm. Gazette, Feb. 26, 1827, at 2 (emphasis added); *Fourth Annual Report of the Directors of the Western Railroad Corporation to the Stockholders* 30 (1839) (emphasis added); John C. Lowber, *Ordinances of the Corporation of the City of Philadelphia* 61 (Phila., Moses Thomas 1812); James Watson Gerard, *A Treatise on the Title of the Corporation and Others to the Streets, Wharves, Piers, Parks, Ferries, and Other Lands and Franchises in the City of New York* 118 (N.Y.C., Poole & McClachlan 1872).

⁴⁶ The distinctly American “internal improvement” corporation differed from English- and European-chartered corporations like the East India Company or Massachusetts Bay Colony, which exercised significant autonomy and governing powers. See Henry S. Turner, *The Corporate Commonwealth: Pluralism and Political Fictions in England, 1516–1651*, at 108 (2016); Johann N. Neem, *Creating a Nation of Joiners: Democracy and Civil Society in Early National Massachusetts* 18–19 (2008); Gerard Henderson, *The Position of Foreign Corporations in American Constitutional Law* 18–19 (1918).

property, contract, and sue and be sued as one person in law.⁴⁷ The corporation also bore special duties that “natural” persons did not.⁴⁸ As one commentator explained, shareholders in corporations possessed “certain property, income, or rights,” and were “subject to certain burdens, distinct from other men.”⁴⁹ These burdens, outlined in the charters, could include provisions specifying the par value of shares, limiting the number of shares investors could purchase, or even requiring unlimited liability for shareholders.⁵⁰ The corporation was thus an “artificial,” “legal” person with rights and duties distinct from “natural” persons.⁵¹

In contrast to the modern-day belief that corporations’ central purpose is to increase shareholder profit, the primary duty of corporations in early nineteenth-century America was to promote the public welfare and only secondarily to advance private gain.⁵² The first American corporate

⁴⁷ 1 Stewart Kyd, *A Treatise on the Law of Corporations* 13 (London, Butterworth 1793); Hurst, *supra* note 35, at 22–23; Dewey, *supra* note 20, at 657; *The Collected Papers of Frederic William Maitland*, *supra* note 20, at 307. Contrary to today, limited liability was not typical in early American corporate law, emerging in its modern form only in the 1850s. See Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 *Wm. & Mary Q.* 51, 55 (1993); Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 *J. Corp. L.* 573, 575–76 (1986); Hurst, *supra* note 35, at 28; Ron Harris, *A New Understanding of the History of Limited Liability: An Invitation for Theoretical Reframing*, at 1 (Mar. 28, 2020), <https://ssrn.com/abstract=3441083> [<https://perma.cc/G23B-YGTM>].

⁴⁸ According to Blackstone, “Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government; which are called corporations or bodies politic.” 1 William Blackstone, *Commentaries* 123 (Phila., J.B. Lippincott Co. 1893).

⁴⁹ *Corporations*, *supra* note 42, at 298.

⁵⁰ John Majewski, *Toward a Social History of the Corporation: Shareholding in Pennsylvania, 1800–1840*, in *The Economy of Early America: Historical Perspectives and New Directions* 294, 301 (Cathy Matson ed., 2006); Naomi R. Lamoreaux, *Antimonopoly and State Regulation of Corporations in the Gilded Age and Progressive Era*, in *Antimonopoly and American Democracy* (Daniel A. Crane & William J. Novak eds., forthcoming 2022) (draft on file with author).

⁵¹ Avi-Yonah, *supra* note 9, at 1001–02; Blair, *supra* note 9, at 799.

⁵² In early America, corporations were seen as “agencies of government . . . for the furtherance of community purposes.” Maier, *supra* note 47, at 55–56. Internal improvements were seen as public-spirited investments in community welfare, with stock ownership open to a broad, democratic base. Majewski, *supra* note 50, at 297. Shareholders were commonly considered to be equal members of a “democratic” corporation; in about one-third of the corporations chartered between 1825–1835, shareholders were entitled to one vote per person, rather than one vote per share. Colleen A. Dunlavy, *From Citizens to Plutocrats: Nineteenth-Century Shareholder Voting Rights and Theories of the Corporation*, in *Constructing Corporate America: History, Politics, Culture* 66, 73, 77 (Kenneth Lipartito & David B. Sicilia eds., 2004). This view was not unique to America; a late eighteenth-century British treatise on

treatise explained that “[t]he object in creating a corporation is . . . to gain the union, contribution and assistance of several persons for the successful promotion of some design of general utility.”⁵³ Secondly, the treatise acknowledged, “the corporation may, at the same time be established for the advantage of those who are members of it.”⁵⁴ This can be seen in the practice of residents buying stock in corporations, such as railroads, that would benefit their communities but were unlikely to turn a profit.⁵⁵ Corporations, in other words, were “the grant of the whole people of certain powers to a few individuals, to enable them to effect some specific benefit, or promote the general good.”⁵⁶

This joint private-public partnership was necessary in the early years of the American Republic, when an “absence of great wealth was common” and state governments were impoverished.⁵⁷ Incorporation was considered a democratic means of promoting economic development.⁵⁸ As the treatise explained, “a State would have accomplished but little in the way of banking and insurance, and in turnpike and railroads, had not the absence of great capitalists been remedied by corporate associations, which aggregate the resources of many persons”⁵⁹ Corporations also had the benefit of promoting “our republican institutions,” as they “yield[ed] the advantage of great capitals without the supposed disadvantages of great private fortunes.”⁶⁰ State legislatures were eager to grant corporate charters for turnpike, canal, and railroad corporations as the primary means of building such “internal improvement” projects, in addition to liberally chartering social and charitable organizations like

corporations emphasized that “lay” corporations, which included banks, insurance companies, and bodies for “the regulation of trade, manufactures, and commerce, such as the East India Company,” were “established for the maintenance and regulation of some particular object of public policy” while acknowledging that corporations could also operate to benefit their members. Kyd, *supra* note 47, at 28–29, 192–93.

⁵³ Angell & Ames, *supra* note 44, at 7.

⁵⁴ *Id.* at 7–8. Limits on authorized capital and earnings for business corporations were not unusual. See *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 550–54 (1933) (Brandeis, J., dissenting); Maier, *supra* note 47, at 76–77.

⁵⁵ John Majewski, *A House Dividing: Economic Development in Pennsylvania and Virginia Before the Civil War* 8–9 (2000).

⁵⁶ Corporations, *supra* note 42, at 307.

⁵⁷ Joseph K. Angell & Samuel Ames, *Treatise on the Law of Private Corporations Aggregate* 57 (Bos., Little, Brown & Co. 5th ed. 1855); Hurst, *supra* note 35, at 23.

⁵⁸ Majewski, *supra* note 50, at 301.

⁵⁹ Angell & Ames, *supra* note 57, at 57; see Maier, *supra* note 47, at 55.

⁶⁰ Angell & Ames, *supra* note 57, at 57.

churches, schools, and even musical societies that were considered important to the general welfare of society.⁶¹

Because corporations were chartered by the state to promote the public welfare, legislatures—the representatives of “the people”—had the right to control and limit the operation of corporations in a way that they could not for private individuals.⁶² The relationship of the public to the corporation was hierarchical and benevolent; in exchange for the privilege of incorporation and limited profit, the corporation was expected to promote the public welfare. This interdependent relationship was based on altruism and mutual benefit, not impersonal market transactions.⁶³ Writing in 1765, English jurist William Blackstone explained that society was constructed around four different relationships: magistrates and the people; husbands and wives; parents and children (or guardian and ward); and master and servant.⁶⁴ Each was a mutually beneficial relationship of benevolent authority and obedient service. Had Blackstone been writing in early nineteenth-century America, he may well have added the relationship of “people and corporations” to this list.⁶⁵ Like the subordinate statuses of servant or child, the status of incorporation entailed the state’s protection and care of the corporation—its grant of special privileges and the right to act as a single person in law—in exchange for obedience to public oversight and control. The public’s right to control corporations was especially necessary, it was thought, both because of the public functions of the corporation as well as the possibility of the abuse of the corporate form by unscrupulous private interests.⁶⁶

⁶¹ See Kevin Butterfield, *The Making of Tocqueville’s America: Law and Association in the Early United States* 170 (2015); Maier, *supra* note 47, at 53–54, 70.

⁶² This aspect of corporate personality has been called the “grant” or “concession theory”—the idea that because legislatures “grant” or “concede” certain powers to corporations, they have the power to regulate corporations in a way distinct from the regulation of individuals. Hurst, *supra* note 35, at 17; Horwitz, *supra* note 9, at 181; Pollman, *supra* note 9, at 1635.

⁶³ The corporation in early American common law was embedded in the web of affective, interdependent relations that characterize pre-capitalist societies. See, e.g., Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* 169–70 (2001); Charles Sellers, *The Market Revolution: Jacksonian America 1815–1846*, at 13–14 (1991).

⁶⁴ 1 Blackstone, *supra* note 48, at 422.

⁶⁵ As Alexis de Tocqueville noted, voluntary associations, including corporations, were much more prevalent in the United States than in England, a product of the necessity of pooling private resources to effect social and economic improvements that impoverished state governments were unable to provide. 1 Alexis de Tocqueville, *Democracy in America* 204–05 (N.Y.C., J. & H. G. Langley 1841); see Butterfield, *supra* note 61, at 2–3.

⁶⁶ Americans also worried that corporate shareholders would form an elite class that would undermine the new republic’s ostensibly egalitarian society, which justified state regulation.

B. Rights-Bearing Shareholders or “Spoiled Children of Legislation”

Yet the ink on the Constitution was barely dry before corporations began to challenge this relationship of special privileges in exchange for public duties.⁶⁷ Key to their argument was a reframing of the corporation as purely an aggregate of private, rights-bearing individuals, not a separate entity with unique rights and duties. Famed orator Daniel Webster, representing the Charles River Bridge Corporation before the Massachusetts Supreme Judicial Court in 1829, argued that the bridge monopoly was “a private civil corporation,” not “a public corporation over which the legislature have [sic] a control,” and that “[a]ny notion, therefore, which may be entertained, that the grant of our bridge is connected with the public benefit, is of no consequence.”⁶⁸

The debate over the nature of the corporation became especially fiery in the years after the Civil War, particularly with regard to railroad corporations. Aided by federal and state subsidies, railroads grew rapidly in size and power, and the concentration of railroad shareholders and bondholders on the East Coast and in Europe disconnected the railroads from the communities in which they operated.⁶⁹ Abuses by railroad corporations prompted a wave of state regulation in the West and Midwest, led by populist social movements.⁷⁰

Maier, *supra* note 47, at 62, 76–77; Naomi R. Lamoreaux, Partnerships, Corporations, and the Limits on Contractual Freedom in U.S. History: An Essay in Economics, Law, and Culture, *in* *Constructing Corporate America: History, Politics, Culture*, *supra* note 52, at 29, 33.

⁶⁷ See, e.g., *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 665–66 (1819); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Pet.) 420, 552–53 (1857). These cases extended the constitutional protection against impairment of contracts to eleemosynary corporations and business corporations, respectively.

⁶⁸ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 24 Mass. (7 Pick.) 344, 436 (1829).

⁶⁹ Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* 26–28 (2011).

⁷⁰ These included the Grangers, a national association of farmers’ organizations, or “granges,” formed in the early 1870s to promote the interests of rural and merchant communities. See, e.g., Solon Justus Buck, *The Granger Movement: A Study of Agricultural Organization and its Political, Economic and Social Manifestations 1870–1880*, at vi, 302 (1913); George H. Miller, *Railroads and the Granger Laws 161–62* (1971); Lee Benson, *Merchants, Farmers, & Railroads: Railroad Regulation and New York Politics 1850–1887*, at 24 (1969); Herbert Hovenkamp, *Enterprise and American Law 1836–1937*, at 128 (1991); Gabriel Kolko, *Railroads and Regulation 1877–1916*, at 20 (1976); Paul Kens, *Property, Liberty, and the Rights of the Community: Lessons from Munn v. Illinois*, 30 *Buff. Pub. Int. L.J.* 157, 162 (2012). In the late 1870s–80s, impoverished farmers in the West, Midwest, and South formed regional Farmers’ Alliances to protest industrial and financial abuses, including railroad rates and extortionate credit systems, as well as to advocate for economic

Invoking the common law vision of the corporation, proponents of railroad regulation argued that corporations were not rights-bearing entities equivalent to private individuals, but wayward children who defied parental authority.⁷¹ One state supreme court judge emphasized that regulation of corporations was “not vindictive; but is rather of the nature of parental anger against those spoiled children of legislation.”⁷² A Populist senator similarly advocated for railroad regulation on the basis that corporations “are creations of man, only of man,” and “[t]he children should understand where authority rests, and whether the parent has power to chastise the child, or the child the parent.”⁷³ These competing visions of the corporation—as a “child of the state” with distinct rights and duties, or simply a vehicle for a group of private individuals—would inform the legal arguments that state and corporate attorneys would make in cases challenging corporate regulation for the rest of the century.⁷⁴

In addition to corporate lawyers’ reframing of corporate personality, another challenge to the “child of the state” view of the corporation was the growing prevalence of general incorporation statutes—laws that allowed any persons, sometimes limited to particular industries, but increasingly generally—to incorporate simply by filing documentation with a state official.⁷⁵ Under early nineteenth-century Anglo-American corporate law, a group of persons could obtain incorporated status only through a special grant by the legislature via a charter that designated and limited the specific rights and privileges that the corporation could exercise.⁷⁶ A few states passed general incorporation laws early in the nineteenth century to promote certain industries, such as textile or iron

cooperatives. This national agrarian movement coalesced into the Populist Party at the end of the nineteenth century. See, e.g., John D. Hicks, *The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party* 96–97, 133 (1931); Charles Postel, *The Populist Vision* 14–17 (2007).

⁷¹ See *Railway Control*, *Bos. Daily Advertiser*, Sept. 17, 1874, at 1; *The Railroads*, *Milwaukee Daily Sentinel*, Sept. 17, 1874, at 1; *Railroads*, *Milwaukee Daily Sentinel*, July 2, 1874, at 1.

⁷² *Att’y Gen. v. Chi. & Nw. Ry. Co.*, 35 Wis. 425, 582 (1874).

⁷³ *Railway Control*, *supra* note 71, at 1.

⁷⁴ See discussion *infra* Part III.

⁷⁵ Jonathan Levy, *Altruism and the Origins of Nonprofit Philanthropy*, in *Philanthropy in Democratic Societies: History, Institutions, Values* 19, 28–29 (Rob Reich, Chiara Cordelli & Lucy Bernholz eds., 2016).

⁷⁶ Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 *Am. U. L. Rev.* 81, 84 (1999). A few exceptions existed for religious and educational corporations in several states in the late eighteenth century. Levy, *supra* note 75, at 28–29.

manufacturing.⁷⁷ Yet as industrial development and financial institutions expanded in the United States, and as partisan legislatures granted corporate charters only to their political supporters, Jacksonian Democrats began to demand general incorporation as a means of ensuring equal access to the marketplace.⁷⁸ As one commentator argued in the wake of the economic crisis of 1837, widely seen to be the result of the exclusive privileges granted to partisan-influenced banking corporations, the “easy expedient of general incorporation” was “the only policy consistent with the true theory of democracy.”⁷⁹ Making the corporate form available to all furthered the principles of “democratic *equality of rights* and *freedom of trade*.”⁸⁰ General incorporation accelerated during the late 1850s; by 1875, over ninety percent of states had passed general incorporation laws.⁸¹ The motivations behind general incorporation were to ensure equality of access to the benefits and privileges of incorporation, to prohibit the creation of a partisan corporate aristocracy, and to prevent monopolies.⁸²

The growing prevalence of general incorporation had an unforeseen effect on conceptions of corporate personhood. Because they were not

⁷⁷ In 1811, New York became the first state to pass a general incorporation law for textile manufacturing in order to counter competition from British imports. Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 *Ohio St. L.J.* 1459, 1495 n.165 (1998). In the late 1830s, Pennsylvania passed a law allowing general incorporation for companies manufacturing iron, while Connecticut allowed general incorporation in manufacturing, mining, “or any other lawful business.” *Id.*

⁷⁸ Naomi R. Lamoreaux & John Joseph Wallis, *Economic Crisis, General Laws, and the Mid-Nineteenth-Century Transformation of American Political Economy*, 41 *J. Early Republic* 403, 429 (2021); Pollman, *supra* note 9, at 1640; Hamill, *supra* note 76, at 98–103. In the early 1840s, a fiscal crisis in which eight states defaulted on their bonded debt led five of these states, and three others that had come close to default, to also put general incorporation laws on the books. Lamoreaux, *supra* note 50, at 4–5.

⁷⁹ *The Moral of the Crisis*, in 1 *The United States Magazine, and Democratic Review* 108, 117–18 (Conrad Swackhamer ed., D.C., Langtree & O’Sullivan 1838).

⁸⁰ *Id.* at 117.

⁸¹ Hamill, *supra* note 77, at 1495; Hamill, *supra* note 76, at 86–87; Horwitz, *supra* note 9, at 181; Levy, *supra* note 75, at 30.

⁸² Lamoreaux, *supra* note 50, at 5; Levy, *supra* note 75, at 29; Pollman, *supra* note 9, at 1640. In many states, general and special incorporation coexisted, with most states continuing to pass special charters into the early twentieth century. Hamill, *supra* note 76, at 87. Incorporators asked for special charters in cases in which their enterprise was not covered by the general incorporation statute or when they wished to obtain privileges from the legislature beyond those granted in the general incorporation statute. Lamoreaux & Wallis, *supra* note 78, at 424. As a result, the democratic access to the corporate form envisioned by proponents of general incorporation was hampered as legislatures continued to grant special corporate charters to political allies. *Id.* at 408–09.

passed by legislative charters that subjected them to unique duties and granted them specific privileges, corporations chartered under general laws appeared less like “artificial” creatures of the state and more like private market actors.⁸³ Incorporation began to look more like a “natural” outgrowth of economic activity, a tool anyone could use.⁸⁴ Distancing the corporation from the state provided support for corporate lawyers’ argument that corporations had the same rights as, and no special duties beyond those that incurred to, any individual proprietor or partnership.⁸⁵ This was the vision of the corporation—a vehicle for private market activity, not a child of the state—that the lawyers in *Santa Clara* would draw on to support their claim for corporate equal protection rights.⁸⁶

⁸³ Horwitz, *supra* note 9, at 181–82, 188; Levy, *supra* note 75, at 31 (“With general incorporation, the language of public purpose was slowly lost.”). As Naomi Lamoreaux points out, however, as states passed general incorporation laws, they also increased state regulation of corporations, such as by providing ceilings on the amount of capital a corporation could raise or limiting borrowing power, and provided other means of encouraging corporate responsibility, such as by holding shareholders unlimitedly liable for company debts. Lamoreaux, *supra* note 50, at 6–7.

⁸⁴ Horwitz, *supra* note 9, at 184; Pollman, *supra* note 9, at 1641–42.

⁸⁵ This argument was more tenuous regarding corporations that had been specially chartered, that tended towards monopoly, and/or that exercised obvious public functions, such as railroads. However, even with regard to railroads and other “quasi-public” corporations, from the 1870s on, the Supreme Court became increasingly willing to treat even specially chartered corporations identically to individual proprietors or partnerships in terms of the extent of constitutional state regulation. For instance, in *Peik v. Chicago & North-western Railway Co.*, 94 U.S. 164, 176 (1876), a case involving the regulation of railroad corporations, the Supreme Court applied the same rule of decision as that of *Munn v. Illinois*, 94 U.S. 113, 134–36 (1876), which involved an unincorporated partnership. Even with regard to generally incorporated entities, the lack of a special charter did not destroy the conception that corporate charters were grants of privileges subject to special state control. See, e.g., Ernst Freund, *Standards Of American Legislation: An Estimate of Restrictive and Constructive Factors* 39–40, 42 (1917) (arguing that, regardless of the manner of incorporation, “the corporation has always presented the same problem of how to check the tendency of group action to undermine the liberty of the individual or to rival the political power of the state” and that one way to ensure that the corporation acts in the public interest is “to construe charter limitations in conformity to public policy, and thus to identify injury to public interests with illegality”).

⁸⁶ Corporate responsibility is extensively debated today. A growing consensus among scholars of corporate personhood is that the law should not assimilate corporate “persons” into the rights rubric that exists for individuals but rather should recognize corporations as unique public-private entities that serve a variety of different social, economic, and political functions and adjust their rights and duties accordingly. See, e.g., Ciepley, *supra* note 41, at 140; Pollman, *supra* note 9, at 1630–31, 1671; Zoë Robinson, *Constitutional Personhood*, 84 *Geo. Wash. L. Rev.* 605, 661 (2016); Turkuler Isiksel, *The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights*, 38 *Hum. Rts. Q.* 294, 300 (2016); Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 *Harv. L. Rev.* 2009, 2014 (2019) (book review).

Post-Civil War, opponents of corporate regulation adopted the rhetoric and imagery of Reconstruction to justify breaking free of the hierarchical, subordinate relationship between the public and corporations.⁸⁷ They explicitly invoked the relationship of master and slave in their arguments.⁸⁸ Comparing corporations to African Americans, the pro-railroad *Chicago Tribune* hyperbolized that allowing railroad regulations “mean[t] that no corporation . . . ha[d] any rights which the state [was] necessarily bound to respect.”⁸⁹ This statement invoked the infamous antebellum Supreme Court decision of *Dred Scott v. Sandford*, in which Chief Justice Roger Taney stated that “the class of persons who had been imported as slaves” and their descendants “had no rights which the white man was bound to respect.”⁹⁰ In echoing Taney’s language, anti-regulation advocates remarkably compared corporations to Black men, obscuring the striking power difference between monopolistic companies and enslaved persons.⁹¹ This argument presented the corporation not as a child of the state, but as an oppressed minority subjected to unjust servitude. Like freed people, corporations were attempting to escape a hierarchical status relationship and recreate themselves as independent, rights-bearing legal persons.⁹² This analogy between a corporation and a

⁸⁷ The battle over slavery forced Americans to rethink the meanings of rights and legal personhood. Equal rights proponents argued that all persons possessed certain “fundamental,” “inalienable” rights to life, liberty, due process, and equal protection under the law, a belief Reconstruction-era Republicans inscribed into the Fourteenth Amendment. The presumption of equality underlying universal rights challenged pre-Civil War hierarchies of status. See, e.g., Eric Foner, *Reconstruction: America’s Unfinished Revolution, 1863–1877*, at 256–57 (1988); Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* 55 (1998); Barbara Young Welke, *Law and the Borders of Belonging in the Long Nineteenth Century United States* 2–3 (2010); Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* 121–22 (2015).

⁸⁸ See Atkinson, *supra* note 19, at 68.

⁸⁹ *The Railroads*, *Milwaukee Daily Sentinel*, July 7, 1874, at 1 (quoting the *Chicago Tribune*); see also *The Wisconsin Railway Decision*, *N. Am. & U.S. Gazette (Phila.)*, July 14, 1874, at 2 (using the same phrase).

⁹⁰ *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857).

⁹¹ Atkinson, *supra* note 19, at 69.

⁹² On formerly enslaved persons’ struggle to gain rights-bearing personhood, see Stanley, *supra* note 87; Welke, *supra* note 87. Regarding efforts by other groups, such as servants, Black women, and white women, to escape the hierarchy of the patriarchal household, see Evelyn Atkinson, *Out of the Household: Master-Servant Relations and Employer Liability Law*, 25 *Yale J.L. & Humans* 205 (2013); Thavolia Glymph, *Out of the House of Bondage: The Transformation of the Plantation Household* (2008); Linda K. Kerber, *No Constitutional Right to Be Ladies: Women and the Obligations of Citizenship* (1998).

persecuted minority would prove useful to corporations in litigation over the Fourteenth Amendment.

II. “NO RIGHTS WHICH THE LEGISLATURE IS BOUND TO RESPECT”:
CORPORATE SHAREHOLDERS AS A PERSECUTED MINORITY

A. Chinese Immigrants, Corporate Shareholders, and “Ninth Circuit Law”

The Fourteenth Amendment was ratified in 1868 in order to extend citizenship to formerly enslaved persons and their descendants and to guarantee them the protection of the federal government of certain fundamental rights.⁹³ It was intended to strike down the “Black Codes,” laws the states of the former Confederacy had enacted to limit the ability of African Americans to exercise their freedom.⁹⁴ The Amendment mandated,

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.⁹⁵

Although its core purpose was to protect formerly enslaved persons and their descendants, the question of who else could claim the Amendment’s protections was and continues to be a point of contention.⁹⁶ Some scholars have suggested that the drafters of the Fourteenth Amendment knew—or even intended—that the Amendment would protect corporations.⁹⁷ It is

⁹³ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71–72 (1872); see Eric Foner, *A Short History of Reconstruction, 1863–1877*, at 254 (1990).

⁹⁴ Foner, *supra* note 93, at 93.

⁹⁵ U.S. Const. amend. XIV, § 1.

⁹⁶ See, e.g., *Slaughter-House Cases*, 83 U.S. at 70–71 (butchers); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872) (women); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 132–33 (1873) (alcohol purveyors); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 170 (1874) (women). For a recent case implicating whether to extend the Fourteenth Amendment to LGBTQ persons, for instance, see *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *Bostock* granted LGBTQ plaintiffs protection under Title VII of the Civil Rights Act, and, as Justice Samuel Alito warned, may “exert a gravitational pull” on future equal protection cases. *Id.* at 1783 (Alito, J., dissenting).

⁹⁷ The originators of this “conspiracy” theory were Charles and Mary Beard. Charles A. Beard & Mary R. Beard, *The Rise of American Civilization* 112–13 (1933). The Beards argued that the Fourteenth Amendment’s drafters had a twofold purpose: to protect the rights

not improbable that the main drafter of the Amendment, Rep. John Bingham, was aware that the language of the Fourteenth Amendment was broad enough to cover “persons” other than African Americans, including corporations.⁹⁸ Formerly counsel for a powerful insurance company, Bingham was active in promoting the rights of corporations to be free from unequal treatment in other contexts; at the same time the Fourteenth Amendment was being ratified, he introduced a bill to ensure insurance corporations would enjoy the “privileges and immunities of citizens,” which failed to pass the House.⁹⁹ In light of his pursuance of greater protections for corporations, Bingham may have entertained the possibility that corporations could claim Fourteenth Amendment protection as “persons,” even if he did not expressly intend to covertly draft the Amendment to that effect.

Regardless of Bingham’s intentions, the important point is that the scope of the Amendment was not at all clear. Even before ratification, groups other than African Americans had begun to consider how they could use the Fourteenth Amendment to their advantage.¹⁰⁰ Advocates for the Chinese immigrant community in California were among the first to

of formerly enslaved people and their descendants and to reassert federal control over the economy and protect private property rights. *Id.* at 111–12; see also Carl Brent Swisher, Stephen J. Field: Craftsman of the Law 416 (1930) (accepting this claim). They based this argument on the argument of Roscoe Conkling, an original drafter of the Fourteenth Amendment and a corporate lawyer who represented the Southern Pacific Railroad in the *Railroad Tax Cases*, 13 F. 722, 727 (C.C.D. Cal. 1882), a few years before the Court issued its opinion in *Santa Clara*. Beard & Beard, *supra*, at 114; Winkler, *supra* note 8, at 133. Conkling’s claim that the Fourteenth Amendment was intended to apply to corporations relied on scanty evidence and, though resurrected by the Beards, has since been scaled back significantly. See Graham, *supra* note 10, at 32–37 (discussing the “conspiracy theory” presented by Charles and Mary Beard); *id.* at 93–94 (concluding that the Fourteenth Amendment was not “*designed*” to aid corporations but that the drafters may have been aware of the possibility that it could be used that way); Hurst, *supra* note 35, at 67 (“No direct evidence supports this conspiracy theory . . .”).

⁹⁸ Graham, *supra* note 10, at 123 n.57.

⁹⁹ *Id.* at 88–89, 122 n.54. Bingham’s connection to powerful corporations has not previously been explored. As an Ohio lawyer, Bingham’s main client had been the Ohio Life Insurance and Trust Company. Gerard N. Magliocca, *Founding Son: John Bingham and the Invention of the Fourteenth Amendment* 24 (2013). Magliocca simply refers to the company as a “small bank,” but, in fact, the corporation was covertly run by major Eastern financiers. See John Denis Haeger, *The Investment Frontier: New York Businessmen and the Economic Development of the Old Northwest* 39–40 (1981).

¹⁰⁰ See, e.g., *People v. Washington*, 36 Cal. 658, 670–71 (1869) (hinting that, under the Fourteenth Amendment, prohibitions on the testimony of Chinese persons would be unconstitutional); Kens, *supra* note 70, at 176 (discussing how railroad magnates considered using the Fourteenth Amendment to protect railroad corporations from regulation).

invoke the Amendment's protections.¹⁰¹ Focusing specifically on the Equal Protection Clause, they argued for a broad interpretation of the Fourteenth Amendment as covering not just African Americans, but any "persons" singled out for special discriminatory legislation.¹⁰²

Corporate lawyers quickly realized that an expansive interpretation of the Fourteenth Amendment would benefit their corporate clients as well. Throughout the 1870s–1880s, the same set of corporate lawyers in California represented both Chinese immigrants and corporate clients simultaneously, making similar claims to Fourteenth Amendment rights in each set of cases.¹⁰³ These lawyers successfully argued for a broad interpretation of the Fourteenth Amendment that extended the right to equal protection not only to Chinese immigrants, but also to corporations. In so doing, they elided the difference between persecuted racial minorities and powerful corporations and their shareholders.¹⁰⁴

These lawyers were aided in their strategy by state and federal judges, who had already indicated a disposition to interpret the Amendment broadly. In a case challenging a law that prohibited Chinese persons from testifying in court, Justice Lorenzo Sawyer, at the time serving on the California Supreme Court, intimated his willingness to apply the nascent Fourteenth Amendment to Chinese immigrants, communicating that it was "unmistakable" that the Amendment "confers the right to testify in protection of his life or his property."¹⁰⁵ Justice Silas Sanderson, who would shortly retire from the bench to become lead counsel for the Central

¹⁰¹ See Atkinson, *supra* note 19, at 63–64; McClain, *supra* note 16, at 83–91; Yucheng Qin, *The Diplomacy of Nationalism: The Six Companies and China's Policy Toward Exclusion* 52 (2009).

¹⁰² McClain, *supra* note 16, at 33–35. The first case to argue the Equal Protection Clause applied to Chinese persons was the California lower court case of *People v. Cunningham*, discussed in *The Chinese Testimony Test Case*, *Daily Alta Cal.*, Dec. 18, 1868, at 1. See also the cases of *Welch v. Ah Hund*, discussed in *The Question of Chinese Testimony*, *Marysville Daily Appeal (Cal.)*, Oct. 8, 1869, at 3; *Washington*, 36 Cal. at 661; *People v. Brady*, 40 Cal. 198, 198–99 (1870); *Local Intelligence*, *Daily Alta Cal.*, Nov. 26, 1869, at 1. For a discussion of the Chinese testimony cases, see McClain, *supra* note 16, at 29, 31–33.

¹⁰³ Howard Jay Graham noted that Chinese immigrants "succeeded in advancing . . . the very interpretations of the key words 'person,' 'liberty,' 'property,' 'due process,' and 'equal protection' which corporation lawyers had sought in vain," but did not link the Chinese cases to corporate lawyers' strategy for advancing corporate constitutional rights. Howard Jay Graham, *Justice Field and the Fourteenth Amendment*, 52 *Yale L.J.* 851, 885 (1943).

¹⁰⁴ See Atkinson, *supra* note 19, at 67–68.

¹⁰⁵ *The Question of Chinese Testimony*, *supra* note 102, at 3; *Chinese Testimony in Our Courts*, *Daily Alta Cal.*, Oct. 7, 1869, at 1.

Pacific Railroad, agreed.¹⁰⁶ A few months later, a San Francisco police court judge echoed this position, allowing Chinese testimony in another case: “That the words ‘any person,’” he said, “include every natural person, within the jurisdiction of the State, be he or she white or black, Chinese or Indian, citizen or alien, can admit of no doubt.”¹⁰⁷

¹⁰⁶ In the California Supreme Court case *People v. Washington*, Justices Sawyer and Sanderson joined the majority opinion, which suggested that, although the question was not before them, prohibitions on Chinese testimony might violate the Fourteenth Amendment, applying as it did to “*all persons*.” 36 Cal. at 671; Resignation of Judge Sanderson, Sacramento Daily Union, Jan. 6, 1870, at 2; The Railroad Crossing—Communication from S.W. Sanderson, Sacramento Daily Union, Jan. 25, 1870, at 2; Levy, *supra* note 16, at 182.

¹⁰⁷ Chinese Testimony, Daily Alta Cal., Dec. 8, 1869, at 2. The Supreme Court of California, however, ultimately came to the opposite conclusion in 1871. What is Equal Protection, Daily Alta Cal., Feb. 6, 1871, at 1.

Thomas Nast, "The Chinese Question," Harpers Wkly. (Feb. 18, 1871).¹



¹ In this political cartoon depicting the conflict between racial animosity and the Fourteenth Amendment's principle of equal rights, a despondent Chinese man is comforted by the beautiful Columbia, representing American liberty. The wall behind them is plastered with anti-Chinese placards, while a noose and burned-out building reading "Colored Orphanage" haunt the background. Columbia chastises a mob of caricatured working men, saying "Hands off, Gentlemen! American means Fair Play for All Men."

Attorneys for the Central Pacific Railroad embraced the possibility of an expansive interpretation of the Fourteenth Amendment and sought to instantiate this doctrine in federal jurisprudence. Their goal was to expand the meaning of “person” beyond “natural persons,” as the police court judge had assumed, to include artificial persons as well. They also sought to enshrine a broad concept of “equal protection” as meaning equal treatment in law for all persons, regardless of any class or category to which the person belonged.¹⁰⁸

In the early years after the passage of the Fourteenth Amendment, national conversations about the Amendment’s scope centered on the Privileges and Immunities Clause. Not only African Americans and women, but also white laborers and merchants took advantage of the Clause to argue that state and local regulations infringed on the privileges and immunities of United States citizenship.¹⁰⁹ Yet both federal and state courts insisted on a narrow reading of the meaning of “privileges and immunities of citizenship,” concluding that they did not include, *inter alia*, the right of African Americans and white people to marry; the right of Black children to attend white schools; or the right of women to vote.¹¹⁰

Neither Chinese immigrants nor corporations were citizens, however, so the Privileges and Immunities Clause of the Fourteenth Amendment would have done them no good, even if the courts had been willing to read it broadly.¹¹¹ Instead, lawyers for Chinese and corporate litigants turned to the second and third clauses of the Amendment—the Due Process and Equal Protection Clauses, which applied to “persons.” Their goal was to cement the inclusion of Chinese immigrants and corporations under the umbrella of “persons,” and to define the meaning of “equal

¹⁰⁸ See Atkinson, *supra* note 19, at 66.

¹⁰⁹ See *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 36–37, 55, 70–71 (1873) (butchers arguing against a law granting a monopoly over slaughterhouses); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 130 (1873) (women seeking the right to be admitted to practice law); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 130 (1873) (alcohol purveyors arguing for the right to sell alcohol); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 162 (1874) (women arguing for the right to vote).

¹¹⁰ See, e.g., *Slaughter-House Cases*, 83 U.S. at 82; *Bradwell*, 83 U.S. at 142; *Bartemeyer*, 85 U.S. at 133; *Minor*, 88 U.S. at 171; *Lonas v. State*, 50 Tenn. (3 Heisk.) 287, 311 (1871); *State ex rel. Ganes v. McCann*, 21 Ohio St. 198, 210 (1871); *State v. Gibson*, 36 Ind. 389, 405 (1871); *Cory v. Carter*, 48 Ind. 327, 355–56 (1874); *Spencer v. Bd. of Registration*, 8 D.C. (1 MacArth.) 169, 175 (1873); *Ward v. Flood*, 48 Cal. 36, 49 (1874).

¹¹¹ The Supreme Court had adamantly refused to recognize corporations as citizens for anything other than diversity jurisdiction. See *Bank of U.S. v. Deveaux*, 9 U.S. (5 Cranch) 61, 86–92 (1809); *Louisville, Cincinnati & Charleston R.R. Co. v. Letson*, 43 U.S. (2 How.) 497, 551–58 (1844); *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177–78 (1868).

protection” as treating all persons alike, regardless of any category or group to which they belonged. In the *Slaughter-House Cases*, the Court had noted in dicta that the Thirteenth Amendment’s prohibition against slavery “equally forbids Mexican peonage or the Chinese coolie trade.”¹¹² For corporate lawyers and supporters of Chinese immigration, this aside indicated that, with the right case as their vehicle, other persecuted racial minorities might have a chance to wedge open the Reconstruction Amendments to apply beyond formerly enslaved persons and their descendants. Cases involving Chinese immigrants, therefore, presented an opportunity for corporate lawyers to advocate for expanding the Amendments to cover other targeted groups as well—which they promptly did.¹¹³

In the spring of 1874, the chief counsel of the Central Pacific Railroad wrote to ex-Justice Silas Sanderson, who now headed the railroad’s legal department, and the railroad’s director, Collis P. Huntington, to advocate for using the Fourteenth Amendment’s Due Process Clause to challenge California’s existing railroad tax laws.¹¹⁴ A few months later, lawyer Thomas I. Bergin, of the eminent and expensive San Francisco firm Bergin & McAllister, represented Chinese litigants in the first federal circuit court case to apply the Fourteenth Amendment to Chinese persons. That case, *In re Ah Fong*, was a habeas corpus petition by Chinese women who had been detained on a Pacific Mail Steamship on the grounds that they were suspected prostitutes.¹¹⁵ Bergin and his partner Hall McAllister were longtime counsel for large industry players, including the Pacific

¹¹² *Slaughter-House Cases*, 83 U.S. at 37.

¹¹³ Notably, these corporate lawyers were so successful in defending the rights of Chinese persons that the California Constitutional Convention entertained the idea that any lawyer appearing on behalf of Chinese litigants should be disbarred. Hudson N. Janisch, *The Chinese, the Courts, and the Constitution: A Study of the Legal Issues Raised by Chinese Immigration to the United States, 1850–1902*, at 363 (1971).

¹¹⁴ Graham, *supra* note 103, at 862 n.51; Letter from Huntington to Hopkins (Mar. 30, 1874) (on file with the Stanford University Archives) (enclosing Letter from James C. Storrs, Chief Counsel for the Central Pacific Railroad to Collis P. Huntington (Mar. 17, 1874)). Railroad magnates in the Midwest were having similar discussions; that same year, counsel for the Chicago, Burlington & Quincy Railroad also discussed using the Fourteenth Amendment to challenge railroad regulations. Kens, *supra* note 70, at 176.

¹¹⁵ *In re Ah Fong*, 1 F. Cas. 213, 214 (C.C.D. Cal. 1874) (No. 102). Notably, Congress had only expanded the federal courts’ jurisdiction over state habeas cases in 1863 and 1867, providing Chinese litigants with a new, more sympathetic forum for litigation. Laura F. Edwards, *A Legal History of the Civil War and Reconstruction: A Nation of Rights* 150 (2015).

Mail Steamship Company, which assisted with the lawsuit.¹¹⁶ Under a San Francisco ordinance, the master of any steamship carrying “lewd or debauched women” into the city had to post bond.¹¹⁷ Bergin, in his brief, claimed that the law violated the women’s constitutional rights because it deprived them of liberty without due process of law.¹¹⁸

Bergin found a willing ally in Justice Stephen Field, who heard the case of the Chinese women while riding circuit.¹¹⁹ In fact, Field was so eager to write the opinion in *Ah Fong* that he took the case from then-Circuit Judge Lorenzo Sawyer, who was originally the presiding judge appointed to the case.¹²⁰ Although Ah Fong’s habeas petition did not argue that the law violated the Fourteenth Amendment’s guarantee of equal protection, Justice Field, of his own accord, focused his opinion on this clause. He explained that “all persons, whether native or foreign, high or low, are, whilst within the jurisdiction of the United States, entitled to the equal protection of the laws.”¹²¹ Field pointed out that such discriminatory legislation, if allowed to stand, could just as easily be used to target “other parties, besides low and despised Chinese women.”¹²² If states were permitted to deny rights to one group of people, Field reasoned, there was nothing to stop them from infringing on the rights of others. Although Field admitted that “there is ground for this feeling” of opposition to Chinese immigration, he emphasized that this did “not justify any legislation for their exclusion, which might not be adopted against the inhabitants of the most favored nations of the Caucasian race, and of Christian faith.”¹²³

¹¹⁶ McClain, *supra* note 16, at 57; Stacey L. Smith, *Freedom’s Frontier: California and the Struggle Over Unfree Labor, Emancipation, and Reconstruction* 219 (2013). Bergin’s law partner Hall McAllister was counsel of record in numerous cases involving the Pacific Mail Steamship Company. See, e.g., *Pac. Mail S.S. Co. v. Ten Bales Gunny Bags*, 18 F. Cas. 950, 950 (D. Cal. 1874) (No. 10,648); *Smith v. Pac. Mail S.S. Co.*, 1 Cal. 445, 445 (1851); *Bd. of Health of Marine Hosp. v. Pac. Mail S.S. Co.*, 1 Cal. 197, 197 (1850); *Yonge v. Pac. Mail S.S. Co.*, 1 Cal. 353, 353 (1850).

¹¹⁷ *In re Ah Fong*, 1 F. Cas. at 215.

¹¹⁸ Application of Ah Fong for Writ of Habeas Corpus, at 6, *In re Ah Fong*, 1 F. Cas. 213 (Nos. 1292 and 1294) (on file with National Archives).

¹¹⁹ At the time, each Supreme Court Justice was responsible for serving on one federal circuit court. Field oversaw the circuit comprising California and Oregon. Fritz, *supra* note 10, at 30.

¹²⁰ Graham, *supra* note 16, at 145 n.125.

¹²¹ *In re Ah Fong*, 1 F. Cas. at 218.

¹²² *Id.* at 217.

¹²³ *Id.* Furthermore, he pointed out the law violated this commitment to equal protection because it prohibited the “lewd or debauched” women who arrived by ship (i.e., from China)

Justice Field's goal in expounding on Ah Fong's Fourteenth Amendment rights was to expand the interpretation of the Amendment he had put forth a few years earlier in his dissent in the *Slaughter-House Cases*, one of the few Supreme Court decisions to interpret the Fourteenth Amendment at the time.¹²⁴ There, butchers in New Orleans had sued the city for granting a slaughterhouse monopoly to one company, arguing that the Fourteenth Amendment's Privileges and Immunities Clause protected their right to labor in their trade. The Supreme Court had denied their claim, reading the Fourteenth Amendment as primarily designed to secure "the freedom of the slave race" and the privileges of citizenship as not including the right to labor. The Court explained that the Court must "look to the purpose" that was "the pervading spirit" of the Reconstruction Amendments to ensure "the security and firm establishment of that freedom" of the "newly-made freeman and citizen."¹²⁵ With regard to the Equal Protection Clause in particular, the Court elaborated that the "evil to be remedied by this clause" was the "existence of laws in the States . . . which discriminated with gross injustice and hardship" against "the newly emancipated negroes."¹²⁶ To make the point absolutely clear, the Court warned, "[w]e doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on

from entering the state but not the "bedizened and painted harlot of other countries" who entered by rail or over land. *Id.* at 215, 217. The case was subsequently appealed to the Supreme Court as *Chy Lung v. Freeman*, 92 U.S. 275 (1875). The Court held the law unconstitutional on the grounds that only Congress possessed the power to pass laws "which concern the admission of citizens and subjects of foreign nations to our shores." *Id.* at 280. The Court did not discuss the equal protection claims.

¹²⁴ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 83 (1873) (Field, J., dissenting); see Graham, *supra* note 16, at 144; Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970, 971–72 (1975). One other case was *Bradwell v. Illinois*, which held that the right to practice law was not a privilege of citizenship under the Fourteenth Amendment. 83 U.S. (16 Wall.) 130, 130 (1873). In *Bartemeyer v. Iowa*, the Court held that a state prohibition on the sale of alcohol did not deprive the plaintiff of his Fourteenth Amendment rights. 85 U.S. (18 Wall.) 129, 129 (1873). Justice Field, in his concurrence, announced that the Fourteenth Amendment "was intended to make it possible for *all* persons, which necessarily included those of every race and color, to live in peace and security wherever the jurisdiction of the nation reached." *Id.* at 140 (Field, J., concurring). One month after *Ah Fong*, the Supreme Court decided *Minor v. Happersett*, which further limited the scope of the Fourteenth Amendment, holding that voting was not a "privilege and immunit[y] of citizenship," so laws prohibiting women from voting were not unconstitutional. 88 U.S. (21 Wall.) 162, 162 (1874).

¹²⁵ *Slaughter-House Cases*, 83 U.S. at 71–72.

¹²⁶ *Id.* at 81.

account of their race, will ever be held to come within the purview of this provision.”¹²⁷ The Court’s narrow reading of the Equal Protection Clause as applying solely to incursions on the freedom of African Americans set up a significant hurdle for use of the Clause by other groups.

Justice Field had dissented in *Slaughter-House*, however, offering an expansive reading of the Fourteenth Amendment as applying beyond formerly enslaved persons and their descendants.¹²⁸ In a case decided the same year, Field argued, “The amendment was not . . . primarily intended to confer citizenship on the negro race. It had a much broader purpose It was intended to make it possible for *all* persons . . . to live in peace and security.”¹²⁹ In spite of the Court’s narrow reading of the Amendment in the *Slaughter-House Cases*, Field set about making his view the guiding doctrine of the Ninth Circuit, beginning with cases involving Chinese immigrants.¹³⁰

Instead of focusing on the Privileges and Immunities Clause, on which the Supreme Court had focused in *Slaughter-House*, Field focused on the Equal Protection Clause.¹³¹ As the presiding Supreme Court Justice, Field’s opinion prevailed as the majority for the circuit court, even if the lower federal judges disagreed.¹³² Additionally, the initial Chinese and

¹²⁷ *Id.*

¹²⁸ *Id.* at 71–72, 97 (Field, J., dissenting).

¹²⁹ *Bartemeyer*, 85 U.S. at 140 (Field, J., concurring).

¹³⁰ *Graham*, supra note 16, at 144.

¹³¹ The reason for this is likely that the Privileges and Immunities Clause applied to “citizens,” whereas the Equal Protection and Due Process Clauses applied to “persons.” In an earlier case, Field had adamantly held that corporations could not be citizens for the purposes of exercising the privileges and immunities of citizenship, so he could not well change course later. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1869). *Paul* was cited in the *Slaughter-House Cases* to support the Court’s reading of a narrow Privileges and Immunities Clause. 83 U.S. at 76–77. Field’s opinion in *Paul* explained that granting corporations citizenship would allow foreign corporations from economically developed states to conduct business in less developed states: “[W]ith the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States.” *Paul*, 75 U.S. at 182. Courts’ long-standing policy concerns regarding powerful inter-state corporations apparently trumped Field’s belief in equal treatment for corporations. For an example of such a case expressing concern about the power of out-of-state corporations, see *Marshall v. Baltimore & Ohio Railroad Co.*, 57 U.S. (16 How.) 314, 328 (1853).

¹³² *Fritz*, supra note 119, at 31; *Kens*, supra note 16, at 209–10. Judge Lorenzo Sawyer complained to a fellow judge, “we are bound to follow [Field] till reversed by the Supreme Court although every other Judge in the Circuit disagrees with him.” Letter from Lorenzo Sawyer, Cir. J., Cir. Ct. Dist. Cal., to M.P. Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (Nov. 9, 1884) (on file with the Oregon Historical Society).

corporate Fourteenth Amendment cases that came before the Ninth Circuit took the form of habeas corpus cases, which, at the time, could not be appealed to the Supreme Court.¹³³ As a result, Field had significant leeway to shape the court's interpretation of the Amendment as he saw fit. His renegade interpretation of the Fourteenth Amendment subsequently became known as "Ninth Circuit law."¹³⁴

Field expanded the vision of the Fourteenth Amendment he had set out in *Slaughter-House* and *Ah Fong* in a case involving a San Francisco ordinance mandating that all male prisoners in the city jail have their hair cut within one inch of their scalps. Colloquially known as the "Queue Ordinance," the purpose of this law was to compel Chinese inhabitants to pay fines rather than accept jail time by threatening to cut off their queues.¹³⁵ Ho Ah Kow, whose queue had been cut, alleged only tort claims for assault and mental anguish in his initial complaint.¹³⁶ Yet Field once more seized the opportunity to flesh out his vision of the Fourteenth Amendment. Again taking over the case from Judge Lorenzo Sawyer, Field held that the ordinance violated the Equal Protection Clause because it "was intended only for the Chinese" and was "not enforced against any other persons."¹³⁷ Field posited that, should the law have mandated that "all prisoners confined in the county jail should be fed on pork," this "would be seen by every one to be leveled" at Jewish prisoners, and "notwithstanding its general terms, would be regarded as a special law in its purpose and operation."¹³⁸ Allowing laws that appeared general but targeted persons of one "class, sect, creed or nation," he concluded, would open the door to laws aimed at any other group, and thus none of them could be permitted. In *Ah Fong* and *Ho Ah Kow*, Field laid the groundwork for an expansive interpretation of the Fourteenth Amendment that protected any and all "persons" who were singled out for adverse treatment, by laws that were either facially discriminatory or

¹³³ McClain, *supra* note 16, at 91.

¹³⁴ Graham, *supra* note 10, at 573; Winkler, *supra* note 8, at 153–54. In 1885, Congress restored the Supreme Court's jurisdiction in habeas cases, largely in response to Field's renegade jurisprudence. Graham, *supra* note 10, at 141–42 n.114.

¹³⁵ *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 253 (C.C.D. Cal. 1879) (No. 6,546).

¹³⁶ Complaint at 5–6, *Ho Ah Kow*, 12 F. Cas. 252 (No. 1,905) (on file with National Archives).

¹³⁷ *Ho Ah Kow*, 12 F. Cas. at 255; Graham, *supra* note 10, at 145 n.125. Sawyer, Graham reports, at first did not think the Fourteenth Amendment had any bearing on the *Ho Ah Kow* case. *Id.* at 145 n.127.

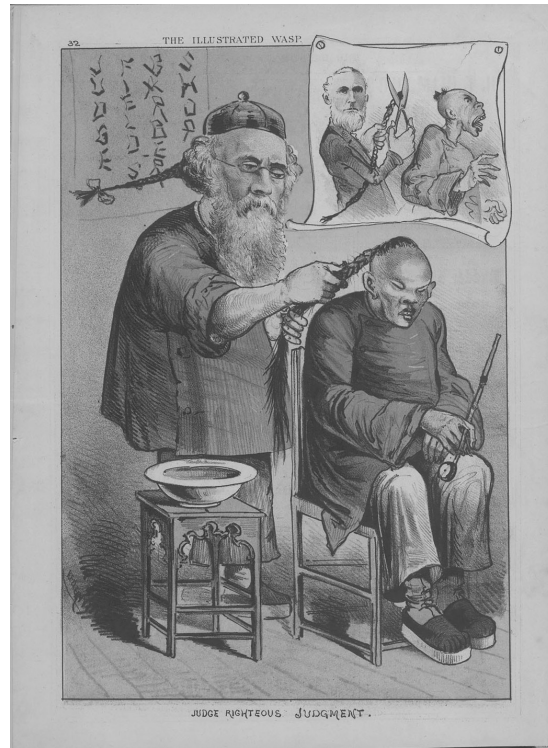
¹³⁸ *Ho Ah Kow*, 12 F. Cas. at 255.

discriminatory in effect.¹³⁹ This view of the Equal Protection Clause as guarding against both overt and disparate impact discrimination would be adopted by the Supreme Court in *Yick Wo*.¹⁴⁰

¹³⁹ Some scholars have argued that Field's primary goal was to protect business property, and he saw the Chinese issue as a means to that end. See, e.g., Graham, *supra* note 10, at 144 (arguing that Field's intention in Chinese habeas corpus cases was to make his *Slaughter-House* dissent the law of the Ninth Circuit); Janisch, *supra* note 113, at 89–90 (arguing that the Chinese found “limited protection, not based on any humanitarian or egalitarian grounds, but in a philosophy of property which refused to allow restraints to be placed, on racial grounds among others, on the rights of exploitation of property”). But see Ruth Bloch & Naomi Lamoreaux, *Corporations and the Fourteenth Amendment*, in *Corporations and American Democracy* 286, 293 (Naomi R. Lamoreaux & William J. Novak eds., 2017) (stating that Field did not see the Fourteenth Amendment as limiting states' ability to regulate, just to draw unconstitutional distinctions); McClain, *supra* note 16, at 314 n.164 (disagreeing that Field's goal in the Chinese cases was to protect corporate property). Although Field espoused no love for the Chinese personally, see Graham, *supra* note 10, at 139 n.108, he did profess a certain racial egalitarianism, arguing that Chinese residents “differ only from citizens in that they cannot vote, or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution.” *Fong Yue Ting v. U.S.*, 149 U.S. 698, 754 (1893) (Field, J., dissenting).

¹⁴⁰ In the twentieth century, the Supreme Court narrowed the Equal Protection Clause so that disparate impact claims are no longer cognizable. *Washington v. Davis*, 426 U.S. 229, 242 (1976). However, disparate impact claims are covered by Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 425–26 (1971).

“Judge Righteous Judgement,” The Illustrated Wasp (1879).¹



¹ This political cartoon criticizes Justice Field for his ruling in *Ho Ah Kow*, depicting him wearing Chinese dress and braiding the queue of a stereotypically caricatured Chinese man. The author acknowledges that the depiction of the Chinese immigrant in this cartoon is offensive and reprehensible in modern discourse. Its inclusion is important, however, in order to understand the depth of the racial animosity that obstructed the broad implementation of the Fourteenth Amendment’s Equal Protection Clause, and to highlight the socially and legally defiant nature of the Ninth Circuit’s jurisprudence.

Field’s vision of equality was in some tension with that of a leading jurist of the time, Thomas McIntyre Cooley, in that Field contended that racial and religious distinctions were illegitimate classifications for differential legal treatment, whereas Cooley did not.¹⁴¹ Cooley, in his

¹⁴¹ Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 296, 467–72 (Bos., Little, Brown &

influential *Treatise on Constitutional Limitations*, published the same year that the Fourteenth Amendment was ratified, asserted that while “every one has a right to demand that he be governed by general rules” and that any law that singled out a particular group was unconstitutional, the legislature may “deem it desirable to establish . . . distinctions in the rights, obligations, and legal capacities of different classes of citizens.”¹⁴² In other words, laws must be applied equally among members of a group, but different groups could be subject to different sets of laws based on their particular characteristics. At the time, race was a generally accepted basis on which to classify persons and was not considered to violate Cooley’s general prohibition of “class legislation.”¹⁴³ In later editions of his treatise, Cooley explicitly endorsed discrimination based on race as a legitimate expression of state power.¹⁴⁴

The new California Constitution of 1879, the railroads’ response to which ultimately prompted the *Santa Clara* case, brought this question of the meaning of equality to the fore. The delegates to the California Constitutional Convention shared Cooley’s view about the dangers of distinguishing among classes of white men, while also assuming the legitimacy of distinctions based on race, gender, and corporate status. To promote equal treatment, delegates embraced the idea of general laws—laws that “affect all alike,” as opposed to special laws, which were “intended to advance the interests of some particular person, or some particular corporation.”¹⁴⁵ The new constitution forbade special

Co. 1868). Field’s understanding of equality invokes Aristotle’s definition of treating “likes alike and unalikes unalike.” See MacKinnon, *Sex Equality*, supra note 29, at 5.

¹⁴² Cooley, supra note 141, at 390–91.

¹⁴³ *Id.* at 390, 394; *People v. Dean*, 14 Mich. 406, 407, 434 (1866); see also Atkinson, supra note 19, at 60–61.

¹⁴⁴ Thomas Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 490 n.1 (Bos., Little, Brown & Co. 4th ed. 1878) (“It has been decided that State laws forbidding the intermarriage of whites and blacks are such police regulations as are entirely within the power of the States, notwithstanding the provisions of the new amendments to the federal Constitution.”).

¹⁴⁵ 1 *Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878*, at 434 (Sacramento, J.D. Young 1880) [hereinafter *Debates*] (statement by Samuel Wilson). On the history of special legislation versus general incorporation, see Naomi R. Lamoreaux, *Revisiting American Exceptionalism: Democracy and the Regulation of Corporate Governance: The Case of Nineteenth-Century Pennsylvania in Comparative Context*, in *Enterprising America: Businesses, Banks, and Credit Markets in Historical Perspective* 25, 31 (William J. Collins & Robert A. Margo eds., 2015); Lamoreaux & Wallis, supra note 78, at 407; Hamill, supra note 76, at 139–40, 143.

legislation in a long list of enumerated cases, including the chartering of corporations.¹⁴⁶ It also mandated that “[i]n all other cases where a general law can be made applicable, no local or special law shall be enacted.”¹⁴⁷ For the delegates, this commitment to general laws served to promote democracy by curbing the legislature’s ability to reward supporters with special privileges, such as charters of incorporation that granted the ability to exercise eminent domain or exemption from taxation to a few wealthy donors—market advantages that were not available to small-scale enterprises or individuals.¹⁴⁸ Yet delegates were also perfectly comfortable passing laws that discriminated against Chinese immigrants, women, and corporations; these groups were not in the same class as white men, and so the principle of general laws that treat all alike did not apply to them.¹⁴⁹

Cooley’s treatise became a guide for early state and federal court opinions interpreting the Fourteenth Amendment.¹⁵⁰ The justices of the California Supreme Court at first adopted Cooley’s view of equal treatment as prohibiting class legislation among white men, while permitting special legislation for persons in particular categories, such as

¹⁴⁶ 1 Debates, *supra* note 145, at 434. This provision was included in the first constitution of 1849 as well. *Id.* at 382.

¹⁴⁷ *Id.* at 363.

¹⁴⁸ *Id.* at 434. This was the motivation behind the passage of general laws throughout the country beginning in the 1840s through the end of the century. Lamoreaux & Wallis, *supra* note 78, at 427.

¹⁴⁹ See 2 Debates, *supra* note 145, at 680 (1881) (statement by Joseph Winans) (arguing that Cooley’s prohibition on class legislation did not apply to laws that discriminated against Chinese immigrants in the name of public health and welfare). As one contemporary analysis of the new California Constitution explained, “The meaning of this section is not that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly or in the same manner upon all persons who stand in the same category.” Robert Desty, *The Constitution of the State of California Adopted in 1879*, at 186 (S.F., Sumner Whitney & Co. 1879).

¹⁵⁰ Howard Gillman has argued that the Equal Protection Clause was a “formalization” of Cooley’s view of the “singular aim of the law, which was the protection of equality of rights and privileges.” Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers* 59 (1993); see, e.g., *People v. Cent. Pac. R.R. Co.*, 43 Cal. 398, 436 (1872); *Barbier v. Connolly*, 113 U.S. 27, 31 (1884); *Soon Hing v. Crowley*, 113 U.S. 703, 707–08, 711 (1885); *The Stockton Laundry Case*, 26 F. 612, 614–15 (C.C.D. Cal. 1886); *In re Lee Sing*, 43 F. 359, 360–61 (C.C.N.D. Cal. 1890). Notably, Field did believe that differential treatment among different categories of persons was permissible when such distinctions were based on legitimate police power concerns, such as safety, but he objected to singling out racial groups for discriminatory treatment, as he feared this would permit Congress to exercise “[a]rbitrary and despotic power” over any other minority, including capitalists. *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting).

race or gender.¹⁵¹ In an opinion written by then-Justice Sanderson, later the head of the Central Pacific's legal department, the Court explained that a law prohibiting women from frequenting public houses after hours did not violate the Equal Protection Clause because it treated men and women differently.¹⁵² The meaning of equal treatment, Sanderson explained, did not mean

that general laws must act alike upon all subjects of legislation, or upon all citizens and persons, but that they shall operate uniformly, or in the same manner upon all persons who stand in the same category, that is to say, upon all persons who stand in the same relation to the law.¹⁵³

Equal treatment “was not intended to overturn the laws of nature . . . or obliterate distinctions, where, from the very nature and necessity of things, distinctions must exist.”¹⁵⁴ A broader definition of equality as applying to all persons regardless of their membership in a particular class, Sanderson warned, “would be to erase three fourths of the statutes of this State, to overturn the foundations of the common law itself and to discard as useless, the main pillars of the social compact.”¹⁵⁵ Then-Justice Sawyer, who would soon be named to the federal district court, joined Sanderson's opinion.¹⁵⁶ Yet both Sanderson and Sawyer, in their new capacities as railroad counsel and federal judge, would soon endorse Justice Field's broader conception of equality that challenged some categories—namely, race and corporate membership—as legitimate bases for differential legal treatment.

¹⁵¹ See *Brooks v. Hyde*, 37 Cal. 366, 377 (1869); *Ex parte Smith*, 38 Cal. 702, 711 (1869); *Cent. Pac. R.R. Co.*, 43 Cal. at 432–33. The California Supreme Court's commitment to general laws predated Cooley's treatise. See *People ex rel. Smith v. Judge of 12th Dist.*, 17 Cal. 547, 551, 554–55 (1861); *Ex parte Ah Pong*, 19 Cal. 106, 107 (1861).

¹⁵² *Ex parte Smith*, 38 Cal. at 710–11.

¹⁵³ *Id.* at 710.

¹⁵⁴ *Id.* at 711. Justice Bradley echoed this view in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 140–42 (1873) (Bradley, J., concurring). The Supreme Court adopted it in *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875), continuing to recognize women as a separate class meriting distinct legislation through the early twentieth century. See *Muller v. Oregon*, 208 U.S. 412, 422–23 (1908); *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937).

¹⁵⁵ *Ex parte Smith*, 38 Cal. at 711–12.

¹⁵⁶ *Id.* at 712.

B. Competing Visions of the Corporation: The Case of In Re Tiburcio Parrott

The first opportunity for corporate lawyers to advocate for Fourteenth Amendment rights for corporations came in the 1880 case of *In Re Tiburcio Parrott*.¹⁵⁷ This case involved a provision of the newly minted 1879 California Constitution that prohibited corporations from employing Chinese laborers.¹⁵⁸ The goal of the new constitution was to combat three evils: “corporations, taxation, and Chinese.”¹⁵⁹ Delegates to the constitutional convention saw the threat of corporate power and Chinese immigration as deeply intertwined.¹⁶⁰ They believed that, by restricting the ability of corporations to employ Chinese labor, they would rid themselves of Chinese competition and compel corporations to pay them a living wage.¹⁶¹

Representing Tiburcio Parrott, the director of a prominent mining corporation employing hundreds of Chinese miners, were Thomas Bergin, the corporate attorney who had successfully argued *Ah Fong* several years earlier, and Bergin’s law partner Hall McAllister, a well-connected San Francisco lawyer known for quoting Shakespeare, the Bible, and even his own poorly written poetry in court.¹⁶² The Chinese consul intervened in the case, represented by wealthy San Francisco attorney Delos Lake.¹⁶³ Lake, “a singularly fine” lawyer with “a rich

¹⁵⁷ 1 F. 481 (C.C.D. Cal. 1880).

¹⁵⁸ Cal. Const. of 1879, art. XIX, § 2.

¹⁵⁹ 2 Debates, *supra* note 145, at 661 (1881) (statement of John Lindow); see Hugh J. Glenn, Address Accepting the Democratic Nomination for Governor (July 30, 1879), *in* S.F. Chron., Aug. 11, 1879, at 5 (“With the railroads controlled and Chinese emigration stopped, and with radical reductions in State and county taxes, new courage will be infused into all the industries of the State and corresponding prosperity promoted among the people.”); Carl Brent Swisher, Motivation and Political Technique in the California Constitutional Convention, 1878–79, at 24, 42 (1930).

¹⁶⁰ Atkinson, *supra* note 19, at 55.

¹⁶¹ *Id.* at 58; Stacey L. Smith, Freedom’s Frontier: California and the Struggle over Unfree Labor, Emancipation, and Reconstruction 81, 93 (2013); Moon-Ho Jung, Coolies and Cane: Race, Labor, and Sugar in the Age of Emancipation 9, 224 (2006); Beth Lew-Williams, The Chinese Must Go: Violence, Exclusion, and the Making of the Alien in America 32 (2018).

¹⁶² History of the Bench and Bar of California 418–20 (Oscar T. Shuck ed., 1901).

¹⁶³ Highlighting the connection between corporate and Chinese Fourteenth Amendment claims, at the same time that he intervened in *Parrott*, Lake was representing the Central Pacific Railroad in an infamous case involving the Mussel Shoals Massacre, in which settlers had been killed in a face-off with the railroad over contested property claims. The Responsibility for the Tulare County Murders, *Sacramento Daily Rec.-Union*, May 17, 1880. The same year, Lake also represented another Chinese immigrant in a case challenging a

voice,” “a keen wit,” and a penchant for satire, was also an attorney for the Central Pacific Railroad and a close friend of Justice Stephen Field, having saved his life from a package bomb some years earlier.¹⁶⁴

The intervention of the Chinese consul in the case was not surprising, as the legal, economic, and social connections between the Chinese elite and San Francisco industry magnates were long-standing. Chinese merchants had long realized that if they wished to combat discriminatory legislation, they needed the best legal counsel they could find.¹⁶⁵ When anti-Chinese laws began to be passed in the 1850s, among the first lawyers they employed was Hall McAllister,¹⁶⁶ they later became regular clients of Bergin and McAllister’s firm.¹⁶⁷ Throughout this period, Bergin and McAllister also represented a number of corporate clients, including railroad, shipping, and mining companies.¹⁶⁸ The American who served

licensing requirement for Chinese fisherman. In re Ah Chong, 2 F. 733 (C.C.D. Cal. 1880). Lake himself had no love for the Chinese, describing them in another context as a “repugnant,” “objectionable,” “inferior race.” Report of the Royal Commission on Chinese Immigration 346 (Ottawa, 1885).

¹⁶⁴ Alonzo Phelps, Contemporary Biography of California’s Representative Men 51 (S.F., A.L. Bancroft & Co. 1881). During a social call, the Justice received a suspicious package, which the quick-thinking Lake threw into a bucket of water. The package turned out to be a homemade bomb. History of the Bench and Bar of California, supra note 162, at 428; see also Graham, supra note 10, at 146 n.130.

¹⁶⁵ In 1849, a public meeting of 300 Chinese immigrants adopted a resolution to hire a lawyer, Selim E. Woodworth, to represent and advise them. Janisch, supra note 113, at 40–41; see McClain, supra note 16, at 23–24, 54, 86; Qin, supra note 101, at 31–33, 47; Charles J. McClain Jr., The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of *Baldwin v. Franks*, 3 L. & Hist. Rev. 349, 351 (1985).

¹⁶⁶ Janisch, supra note 113, at 97; Hall McAllister, The Statute Forbidding the Immigration of Chinese into California by Sea, Unconstitutional and Void, Alta Cal., July 28, 1858, at 1.

¹⁶⁷ McClain, supra note 16, at 23; Qin, supra note 101, at 106. Cases in which Bergin and McAllister represented Chinese litigants or interested parties (likely funded by the consulate) include: *Ex parte Ah Fook*, 49 Cal. 402 (1874); *Case of Chinese Cabin Waiter*, 13 F. 286 (C.C.D. Cal. 1882); *Case of Chinese Laborers on Shipboard*, 13 F. 291 (C.C.D. Cal. 1882); *Case of the Chinese Merchant*, 13 F. 605 (C.C.D. Cal. 1882); *In re Quong Woo*, 13 F. 229 (C.C.D. Cal. 1882); *People v. Lee Chuck*, 74 Cal. 30 (1887); *In re Baldwin*, 27 F. 187 (C.C.D. Cal. 1886). See History of the Bench and Bar of California, supra note 162, at 421; The California Scrap-book: A Repository of Useful Information and Select Reading 585 (Oscar T. Shuck ed., S.F., H. H. Bancroft & Co. 1869); Levy, supra note 16, at 226. The Chinese Six Companies and Chinese consulate retained a number of other attorneys as well. Qin, supra note 101, at 106–08. Although Bergin represented Ah Fong, this was at the behest of some San Francisco Chinese groups (possibly the tongs, or Chinese mafia) and the Pacific Mail Steamship Company, not the Chinese Six Companies, who publicly condemned Chinese prostitution. Qin, supra note 101, at 90; Smith, supra note 161, at 219.

¹⁶⁸ See, e.g., *S. Pac. R.R. Co. v. Raymond*, 53 Cal. 223, 224 (1878) (for Southern Pacific); *Fremont v. Merced Mining Co.*, 9 F. Cas. 772, 773 (C.C.N.D. Cal. 1858) (No. 5,095) (for

as the Chinese consul, Frederick Bee, was a lawyer and self-described “capitalist” with interests in telegraph, railroad, and mining companies, who moved in the same social circles as the corporate lawyers and federal judges involved in the *Parrott* case.¹⁶⁹ The interests of wealthy Chinese merchants, who operated under a large mutual aid society known as the Chinese Six Companies, were also aligned with those of major corporate employers.¹⁷⁰ Both Chinese merchants and corporate directors were capitalists who depended on the immigration of Chinese laborers for their continued prosperity.¹⁷¹ For the merchants, Chinese laborers purchased the Chinese products they imported and supplied income for the Chinese Six Companies in dues and interest on loans for passage to America.¹⁷² For railroad and mining employers, Chinese immigrants provided a cheap, reliable source of labor.¹⁷³

In furtherance of their mutual economic interests, the Chinese mercantile elite engaged socially and politically with their American counterparts. The Six Companies hosted extravagant banquets where

Fremont); *Yonge v. Pac. Mail S.S. Co.*, 1 Cal. 353, 353 (1850) (for Pacific Mail); *Knox v. New Idria Mining Co.*, 4 F. 813, 813 (C.C.D. Cal. 1880) (for New Idria, before Field); *Bd. of Health of Marine Hosp. v. Pac. Mail S.S. Co.*, 1 Cal. 197, 198 (1850); *Phelps v. Union Copper Mining Co.*, 39 Cal. 407, 408 (1870) (for Union Copper); *George v. N. Pac. Transp. Co.*, 50 Cal. 589, 591 (1875) (for Northern Pacific); *Mahony Mining Co. v. Bennett*, 16 F. Cas. 497, 497 (C.C.D. Cal. 1878) (No. 8,969) (for Mahony, before Sawyer); *Knox v. Quicksilver Mining Co.*, 4 F. 809, 809 (C.C.D. Cal. 1880) (for Quicksilver, before Field).

¹⁶⁹ See Fritz, *supra* note 119, at 211, 214–15, 217 (describing how Chinese litigants generally faced equal treatment in Hoffman’s court); Linda C.A. Przybyszewski, Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit, 1 W. Legal Hist. 23, 45 (1988); Letter from Delos Lake to Matthew Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (June 3, 1870) (on file with the Oregon Historical Society); Letter from Silas Sanderson to Matthew Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (July 20, 1882) (on file with the Oregon Historical Society).

¹⁷⁰ Founded in the late 1850s, the organization was renamed the Chinese Consolidated Benevolent Association in 1882. Qin, *supra* note 101, at 44, 103. The Chinese Six Companies controlled the Chinese consulate. *Id.* at 102.

¹⁷¹ See *The Chinese: The Investigation by the Senate Committee*, S.F. Chron., Apr. 18, 1876, at 3 (noting the close cooperation between the Pacific Mail Steamship Company and the Chinese Six Companies).

¹⁷² Smith, *supra* note 161, at 37; Qin, *supra* note 101, at 21. The Chinese Six Companies were accused of importing Chinese laborers to serve as “serfs” or “coolies.” *The Chinese Question and the Burlingame Treaty*, S.F. Chron., Mar. 25, 1876, at 1. Although the claim that Chinese laborers were serfs was overstated, the Chinese Six Companies did pay for emigrants’ passage in exchange for repayment out of future earnings plus four to eight percent interest. Qin, *supra* note 101, at 21, 67–68.

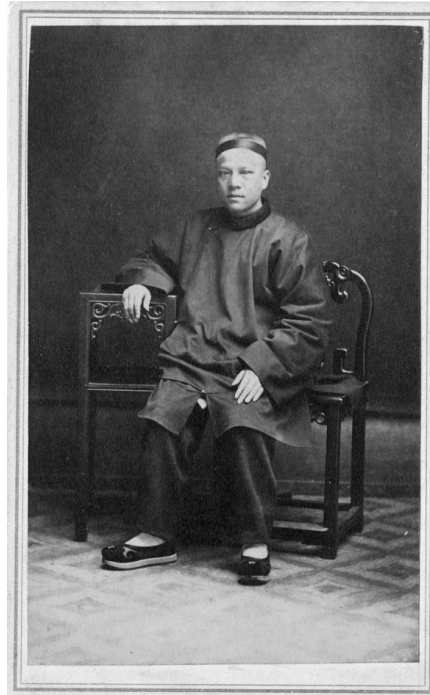
¹⁷³ Andrew Scott Johnston, *Mercury and the Making of California: Mining, Landscape, and Race, 1840-1890*, at 200–01 (2013); Janisch, *supra* note 113, at 237–43.

Chinese merchants mingled with “the leading citizens of California,” such as politicians, judges, lawyers, and industrial magnates—including the corporate lawyers and federal judges who heard the case in *Parrott*.¹⁷⁴ The Six Companies also entertained congressional delegations, to whom they emphasized that equal protection for Chinese persons was necessary so that the “very rich merchants and bankers” in China would use their “gold and silver . . . profitably here”; they warned that, “like your own capitalists,” Chinese merchants “wish to know that their property is protected and secure to them before parting with it.”¹⁷⁵ The joint defense mounted by the Chinese consulate and the mining corporation in *Parrott*, although perhaps curious at first glance, was actually the product of a long-standing relationship. Importantly, this was not a case of the exploitation of a racial minority to serve the interests of a powerful legal actor; rather, these eminent lawyers saw that the interests of both sets of clients converged in the Fourteenth Amendment cases, and that an alliance between the two could, and did, benefit both.¹⁷⁶

¹⁷⁴ The California Scrap-book, *supra* note 169, at 220–25, 584–85.; Qin, *supra* note 101, at 42, 53.

¹⁷⁵ Local Intelligence, *supra* note 102, at 1; Qin, *supra* note 101, at 53–54.

¹⁷⁶ This situation is similar to Derrick Bell’s theory of “interest convergence,” but the power dynamics are slightly different. Under Bell’s theory, which draws on the civil rights movement as a case study, disempowered minorities succeed in civil rights claims only when those claims are useful to the interests of a powerful majority. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980). As Marc Galanter explains, the financial resources to litigate are a vital factor in bringing rights claims before a judicial tribunal. Marc Galanter, Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc’y Rev. 95, 113–14 (1974). When the interests between the powerful ally and minority group diverge, the minority’s resources disappear, making their continued success difficult. Unlike the civil rights litigation that Bell discusses, however, here both the corporations and the Chinese mercantile and diplomatic elite were well-funded, longtime legal players.

Portrait of Fung Tang¹

¹ Fung Tang, a wealthy Chinese merchant who specialized in the transpacific metal trade, spoke English fluently, and engaged in social meetings and business ventures with white politicians and merchants. For original image, see York Lo, *Fung Tang: The Firm, the Family, the Transpacific Metal Trade and Tin Refinery*, *The Industrial History of Hong Kong Group* (Feb. 9, 2018), <https://industrialhistoryhk.org/fung-tang-the-firm-the-family-the-transpacific-metals-trade-and-tin-refinery/> [<https://perma.cc/AZ3S-ZX9Z>].

The constitutional provision at issue in *Parrott*, which prohibited corporations from employing Chinese laborers, had been motivated by the traditional view of corporations as subservient to the public. Because corporations were created by state law, one convention delegate had argued, “we can control corporations, and prevent them from employing any class of laborers we choose. We can make it a condition of the existence of their charter.”¹⁷⁷ The State’s lawyers adopted this same view during oral argument. The corporation, claimed California’s Attorney

¹⁷⁷ 2 Debates, *supra* note 145, at 699 (1881) (statement of David S. Terry).

General, was “the child of the State—a creature of the law” that “received its life” from the state and so “was subject to its laws.”¹⁷⁸ No right of the Chinese to equal protection, he argued, could “restrict the power of the State in controlling the acts of its corporations, its own natural offspring.”¹⁷⁹ “[I]f the State cannot control its own child, its own corporation,” his co-counsel warned, “then is State sovereignty a farce, and no power at all can be said to be reserved to a State of this Union.”¹⁸⁰

Furthermore, they argued, corporations possessed limited rights and special duties. Corporations could exercise only the rights granted in their charters, not constitutional rights.¹⁸¹ The State “breathes the breath of life” into corporations, whose powers “are derived from the statute that authorized their existence”; as such, the corporation “claims no rights and can assert no rights except those that are enumerated in the charter that gives it its organization.”¹⁸²

The lawyers for Parrott and the Chinese consulate, in contrast, argued that the corporation was equivalent to a private, constitutional-rights-bearing person. In their oral arguments, they conflated the rights of Chinese laborers with corporate employers.¹⁸³ Unlike in Fourteenth Amendment jurisprudence today, they discussed the Due Process Clause and Equal Protection Clause as a single unit: the right to equal protection of the fundamental rights of life, liberty, and property. This view of the Amendment had been prevalent in the cases involving Chinese testimony, discussed *supra*, in which lawyers for the Chinese litigants argued that the Fourteenth Amendment provided “equal benefit of all laws and proceedings for the protection of life and property.”¹⁸⁴ The law violated the Fourteenth Amendment rights of corporations and Chinese workers, Delos Lake argued, because it denied them both the equal protection of their right to property. Prohibiting the right to labor, he explained, was tantamount to a deprivation of property without due process: “The right to labor is property; it is impossible to conceive the idea of property without labor.”¹⁸⁵ The law not only denied Chinese persons their right to

¹⁷⁸ Corporations and Chinese, Daily Alta Cal., Mar. 7, 1880, at 1; Parrott’s Plea, S.F. Chron., Mar. 7, 1880, at 7.

¹⁷⁹ Corporations and Chinese, *supra* note 178.

¹⁸⁰ Will It Hold Water?, S.F. Chron., Mar. 9, 1880, at 4.

¹⁸¹ The Parrott Case, Daily Alta Cal., Mar. 9, 1880, at 1.

¹⁸² *Id.*; Will It Hold Water?, *supra* note 180, at 4.

¹⁸³ Atkinson, *supra* note 19, at 68.

¹⁸⁴ The Chinese Testimony Test Case, *supra* note 102, at 1.

¹⁸⁵ Corporations and Chinese, *supra* note 178, at 1.

labor/property but also deprived corporations of their right to contract with laborers of their choosing, thereby preventing them from “employing the cheapest means of using their property, and hence of the means of making a profit out of it and of competing with all other natural persons engaged in the same kind of business, and to that extent they are deprived of their property.”¹⁸⁶

Challenging the claim that corporations possessed only the rights granted in their charter, the corporate lawyers anthropomorphized the corporation, arguing that the corporation had rights “conferred upon it by the organic law,” which “are as necessary to their existence as breath is to a human being.”¹⁸⁷ Corporate rights were just as sacrosanct as private rights, Bergin continued: the corporation was “an artificial person invested with certain rights, immunities, and privileges, which the Legislature can no more take from them, under the Constitution, than it could the life, liberty, or property of a natural person.”¹⁸⁸ If the State could prohibit corporations from employing Chinese people, the lawyers warned, “it can go a step farther and enact that no natural person shall employ them, and by so doing deprive them of an inalienable right.”¹⁸⁹ Thus, Lake reasoned, the law was “no more constitutional as confined to corporations than it would be if applied to natural persons.”¹⁹⁰

In this strain of their argument, Lake and Bergin spoke of the corporate “person” as a single, rights-bearing entity. Yet, echoing the common law understanding of the dual nature of the corporation as both a single entity and an aggregation of members, they also portrayed the corporation as a collective body. “In affecting injuriously the rights of a corporation, which is but an aggregation of natural persons,” Lake concluded, “the rights of naturalized persons [a]re injured.”¹⁹¹ To prohibit corporations from employing Chinese people, Bergin argued, “would deprive citizens of this State of a constitutional privilege, and is therefore unconstitutional.”¹⁹² “They,” he continued, without explaining whether he meant shareholders or corporations, “possess a constitutional right to

¹⁸⁶ The Chinese Question, *Sacramento Daily Rec.-Union*, Mar. 8, 1880, at 4.

¹⁸⁷ The Last Word, *S.F. Chron.*, Mar. 10, 1880, at 1.

¹⁸⁸ The Parrott Case, *Daily Alta Cal.*, Mar. 10, 1880, at 1.

¹⁸⁹ *Corporations and Chinese*, supra note 178, at 1.

¹⁹⁰ The Chinese Question, supra note 186, at 4.

¹⁹¹ *Corporations and Chinese*, supra note 178, at 1; The Chinese Question, supra note 186, at 4.

¹⁹² The Parrott Case, supra note 188, at 1.

employ just whom they choose.”¹⁹³ For these corporate lawyers, the corporation was both a combination of rights-bearing persons *and* a single, rights-bearing “person” itself.

This argument proved compelling to District Judge Ogden Hoffman, who wrote the majority opinion in the *Parrott* case, and Circuit Judge Sawyer, who wrote a concurrence.¹⁹⁴ The scholarly, meticulous Hoffman, a member of the New York elite who had studied under Joseph Story and Simon Greenleaf at Harvard Law School, prided himself on his integrity and impartiality.¹⁹⁵ Sawyer, a “quiet, unassuming man” with a wry insight, was a self-taught farmer turned lawyer turned judge, who was known for being sympathetic to the plight of Chinese immigrants.¹⁹⁶

In their opinions, Hoffman and Sawyer adopted Justice Field’s expansive interpretation of the Fourteenth Amendment.¹⁹⁷ Like the corporate lawyers, Hoffman and Sawyer discussed the Due Process Clause and Equal Protection Clause as a single unit. They held that the constitutional provision was a violation of the equal protection rights of Chinese laborers because it treated them differently than non-Chinese laborers by depriving them of their fundamental right to sell their labor, a form of property. They also held that the provision violated the equal protection rights of corporations because it treated them differently than individuals by denying their fundamental right to use their property as they saw fit.

Citing Field’s previous equal protection cases involving Chinese immigrants, Hoffman and Sawyer concluded that racial distinctions were illegitimate bases for differential treatment. Warning of a slippery slope, Hoffman wrote that if the power to pass such a law exists, “it might equally well have forbidden the employment of Irish, or Germans, or Americans, or persons of color, or it might have required the employment

¹⁹³ *Id.*

¹⁹⁴ At the time, cases in federal circuit court were heard by one circuit court judge, one district court judge, and/or the designated Supreme Court Justice responsible for that circuit. Fritz, *supra* note 119, at 30.

¹⁹⁵ *Id.* at 15, 26, 38; History of the Bar and Bench of California, *supra* note 162, at 472–73.

¹⁹⁶ Oscar T. Shuck, *Bench and Bar in California: History, Anecdotes, Reminiscences* 67, 74 (S.F., The Occident Printing House 1889). Allies of Chinese immigrants praised Sawyer as “maintaining the rights of the Chinese with courage and energy in opposition to a strong current of popular clamor.” McClain, *supra* note 16, 281 n.10; see also Letter from Lorenzo Sawyer to M.P. Deady, *supra* note 132.

¹⁹⁷ As the Supreme Court Justice for the Ninth Circuit, Field was accused of exerting influence over the *Parrott* decision. Kens, *supra* note 16, at 111.

of any of these classes of persons to the exclusion of the rest.”¹⁹⁸ Sawyer concluded in his concurrence that the Equal Protection Clause “places the right of every person within the jurisdiction of the state, be he Christian or heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution.”¹⁹⁹ He explained that under the Amendment, “the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states.”²⁰⁰ These Ninth Circuit judges incorporated Cooley’s prohibition on class legislation into their interpretation of the Fourteenth Amendment. Yet unlike Cooley and the delegates to the California Constitutional Convention, for Hoffman and Sawyer, national origin, religion, and race were all unconstitutional bases for classification. In eroding the boundaries among these groups, these judges expanded Cooley’s prohibition on class legislation to include ethnic and religious minorities within the category of those entitled to the protection of “general” laws—in other words, the right to equal protection.²⁰¹

The law did not only violate the Fourteenth Amendment, the Ninth Circuit held: it also contravened the privileges and immunities that were guaranteed to Chinese immigrants under the United States’ treaty with China. Ignoring the Supreme Court’s limited definition of privileges and immunities in *Slaughter-House*, Hoffman asserted: “No enumeration would, I think, be attempted of the privileges, immunities, and exemptions . . . of man in civilized society, which would exclude the right to labor for a living. It is as inviolable as the right of property, for property is the offspring of labor.”²⁰² Judge Sawyer concurred. Although noting

¹⁹⁸ *In re Tiburcio Parrott*, 1 F. 481, 491 (C.C.D. Cal. 1880).

¹⁹⁹ *Id.* at 509 (Sawyer, J., concurring).

²⁰⁰ *Id.* at 512.

²⁰¹ This analysis complements that made by Naomi Lamoreaux and John Wallis, who have argued that general laws, including general incorporation, served to “level the playing field” in the market somewhat, making the economic and political system more competitive. Lamoreaux & Wallis, *supra* note 78, at 429, 433.

²⁰² *In re Parrott*, 1 F. at 498. The Burlingame Treaty guaranteed Chinese immigrants “the same privileges, immunities, or exemptions, in respect to travel or residence, as may there be enjoyed by the citizens or subjects of the most favored nation.” *Id.* at 504 (Sawyer, J., concurring) (emphasis omitted). Perhaps Hoffman distinguished his interpretation of privileges and immunities on the grounds that the treaty applied to noncitizens, while the Fourteenth Amendment’s privileges and immunities clause was specifically intended for

that the Supreme Court had recently defined “privileges and immunities” and that “the definitions given are equally applicable to the same words as used in the treaty with China,” he nonetheless concluded that both the Fourteenth Amendment and the treaty protected “the right to pursue a lawful employment in a lawful manner, without other restraint than such as equally affects all persons.”²⁰³ He cited the dissenting opinions of Justice Field and Justice Bradley in the *Slaughter-House Cases* in support of this holding, without noting that the majority opinion in *Slaughter-House* had explicitly determined that the “privileges and immunities” protected by the Fourteenth Amendment did not include the right to labor.²⁰⁴ Thus, Hoffman and Sawyer concluded, restricting their right to labor unconstitutionally deprived Chinese workers of their constitutional and treaty rights to the protection of life, liberty, and property.²⁰⁵

Although holding that the provision violated the rights of Chinese immigrants would have been enough to strike it down, the judges then turned to address the rights of corporations. Not only did the provision violate the rights of Chinese immigrants, the court held, but it also violated the rights of corporate shareholders. Ignoring the common law view as well as the two-pronged argument of Parrott’s lawyers regarding the dual nature of the corporation, Hoffman stated that the corporation was purely an aggregate of its members—a sum of its parts. “Behind the artificial or ideal being created by the statute and called a corporation,” he explained, “are the corporators—natural persons” who had purchased shares in the corporation.²⁰⁶ Corporations as such had no identity or interests separate from their shareholders: “The corporation, though it holds the title, is the trustee, agent, and representative of the shareholders, who are the real owners.”²⁰⁷ Erasing the corporate entity’s separate

United States citizens. Or perhaps Field insisted that the circuit court adopt his broader definition of privileges and immunities.

²⁰³ Id. at 504 (emphasis omitted); id. at 505 (quoting *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 97 (1873) (Field, J., dissenting) (emphasis omitted)).

²⁰⁴ Id. at 505–06; *Slaughter-House Cases*, 83 U.S. at 80. Sawyer demurred, “Some of these extracts are from the dissenting opinions, but not upon points where there is any disagreement.” *In re Parrott*, 1 F. at 506 (Sawyer, J., concurring).

²⁰⁵ *In re Parrott*, 1 F. at 510 (Sawyer, J., concurring).

²⁰⁶ Id. at 491 (majority opinion); see Angell & Ames, *supra* note 43, at 1.

²⁰⁷ *In re Parrott*, 1 F. at 491–92. There was precedent for this view. See *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 524–26 (1819) (employing the aggregate view to justify the ability of an eleemosynary corporation to claim rights under the Contract Clause of the Federal Constitution); *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. (11 Peters) 420, 423 (1837) (extending *Dartmouth* to business corporations);

identity, Hoffman reasoned that shareholders' "right to use and enjoy their property is as secure under constitutional guarantees as are the rights of private persons to the property they may own."²⁰⁸

Discrimination on the basis of incorporated status, concluded Hoffman, was no different than discrimination on the basis of race.²⁰⁹ "Such an exercise of legislative power" as this provision, he emphasized, "can only be maintained on the ground *that stockholders of corporations have no rights which the legislature is bound to respect.*"²¹⁰ By invoking the infamous line from *Dred Scott v. Sandford*, just as opponents of railroad regulation had done, Hoffman compared corporate shareholders to former slaves. This acknowledged the master-servant relationship claimed by the State's lawyers but portrayed this status relation as a violation of fundamental rights. Corporations were not "servants" but collections of independent, constitutional-rights-bearing individuals. The concept of the corporation as purely an aggregation of natural persons aided Hoffman in this comparison of shareholders to African Americans; in his understanding, corporate shareholders were a group specially targeted by the law, akin to slaves and their descendants.

Parrott proved the entry point for corporate claims of Fourteenth Amendment rights. In *Parrott*, the Ninth Circuit drew a through-line from African Americans, to Chinese immigrants, to corporate shareholders; all were persecuted groups whose rights were protected by the Fourteenth Amendment. Corporate lawyers swiftly seized this analogy in corporate rights cases, including *Santa Clara*, as Part III will show.

C. "Frankenstein's Baby": The Corporate Child Run Amok

Hoffman's conception of corporations as purely aggregates of rights-bearing individuals was contrary to the imagery surrounding corporations in popular discourse, which increasingly portrayed corporations as single entities—no longer children, but monsters. This alternate view is strikingly apparent in the debates over corporate regulation in the California Constitutional Convention of 1878, which passed the provision

Bank of the U.S. v. Deveaux, 9 U.S. (5 Cranch) 61, 91–92 (1809) (employing the aggregate view for purposes of determining federal diversity jurisdiction). Hoffman's reasoning took this precedent one step farther by using the aggregate view to justify attributing Fourteenth Amendment rights of shareholders to corporations.

²⁰⁸ *In re Parrott*, 1 F. at 492.

²⁰⁹ *Id.* at 491.

²¹⁰ *Id.* (emphasis added).

at issue in *Parrott* and the tax regulation at issue in the *Railroad Tax Cases*, discussed *infra*.²¹¹ A key trope in the debates was Frankenstein's monster. The corporation, like Dr. Frankenstein's creation, was a "child of the state" run amok.²¹² One delegate to the constitutional convention warned of the Central Pacific Railroad: "Like Frankenstein's baby, there was no end to its growing, and no limit to its voracity. And, like that wonderful child, it started in to devour its author."²¹³ As with Frankenstein's monster, these corporate creatures were "godless" and devoid of moral conscience.²¹⁴ "*God made man, and man made corporations,*" emphasized another delegate; "God alone could give us soul, and a spirit, and a conscience, but man has never given conscience, nor soul, nor moral honesty to a corporation yet, and never will."²¹⁵ These soulless corporations possessed the faculties of human persons but employed them to devious ends. One delegate excoriated the Central Pacific Railroad:

We have seen that corporation spreading its arms forth in every direction, monopolizing transportation We have seen it cajoling and corrupting our legislators And we find it, day by day, and hour by hour, increasing in wealth and in power, and having still further opportunities to control and govern and trample on the people.²¹⁶

For this delegate, the railroad corporation was personified, with "arms" to control commerce, a voice to "cajole" elected officials, and feet to "trample" over the people.

²¹¹ 1 Debates, *supra* note 145, at 533 (statement of Clitus Barbour).

²¹² See Mary W. Shelley, *Frankenstein; Or, the Modern Prometheus* (London, Colburn & Bentley 1831).

²¹³ 1 Debates, *supra* note 145, at 533 (statement of Clitus Barbour).

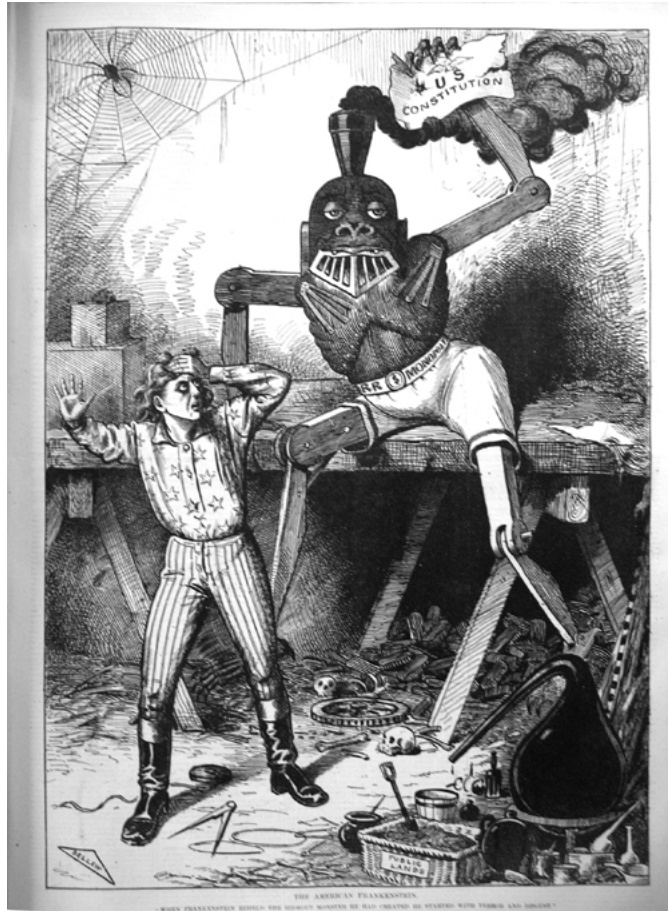
²¹⁴ *Id.* at 386 (statement of Volney E. Howard).

²¹⁵ *Id.* at 417 (emphasis added) (statement of James E. Hale).

²¹⁶ Judge Campbell's Terrific Cannonade, *S.F. Chron.*, Apr. 18, 1879, at 1.

Frank Bellew, “The American Frankenstein,” *Daily Graphic* (Mar. 18, 1873).¹

“When Frankenstein Beheld the Hideous Monster He Had Created He Started with Terror and Disgust.”



¹ In this political cartoon, the “Railroad Monopoly” is personified as a monster arising from the workbench of a haggard Uncle Sam while clutching the U.S. Constitution in its metal claws. The monster’s distorted features and dark face evoke blackface depictions of African Americans. The message is clear: in creating corporations, the country had unwittingly engendered a monster, who, like Black Americans and other racial minorities, was now brandishing the Constitution to demand its legal rights. The cartoon’s caption reads, “When Frankenstein Beheld the Hideous Monster He Had Created He Started with Terror and Disgust.”

Corporations, in this view, were distinct from their shareholders. When convention delegates did discuss local shareholders, they portrayed them as innocent working people, victims of voracious, conscience-less corporations. “Many suppose all stockholders in corporations are capitalists,” argued one delegate, “but such is not the case.”²¹⁷ Inveighing against “stock speculations” and gambling, another delegate bemoaned the sight of the “pale and anxious faces of poor men, in seedy apparel, who, once respectable, honored, prosperous citizens, have been dragged down into this maelstrom of speculation and pollution.”²¹⁸ Even delegate Samuel Wilson, a corporate lawyer and friend of Justice Field, viewed corporations and stockholders as separate, stating, “In a majority of cases, when disaster comes, the stockholder is innocent and has not participated in the management of the affairs of the institution, and is not to blame for the disaster.”²¹⁹ The corporation, in the view of the convention’s delegates, was not an aggregate of individuals but a separate entity, whose interests were potentially adverse to those of its shareholders.

For opponents of corporate power, if the entity of the corporation was identified with any person, it was its president or directors. This was especially true of railroads. When discussing abuses by the Central Pacific Railroad, for instance, opponents of the railroad portrayed the corporation as coextensive with its president, Leland Stanford, and his “corps of trained lieutenants.”²²⁰ They railed against “Stanford and company,” “Stanford and his cohorts and his minions,” and “this railroad king, Stanford.”²²¹ Political cartoons of railroads featured the heads of their presidents and the body of a monster. Corporate directors were not the shareholders’ representatives, but powerful and potentially irresponsible actors unmoored from shareholder oversight.

²¹⁷ 1 Debates, supra note 145, at 385 (statement of John S. Hager).

²¹⁸ Judge Campbell’s Terrific Cannonade, supra note 216.

²¹⁹ 1 Debates, supra note 145, at 384 (statement of Samuel M. Wilson); Swisher, supra note 97, at 214.

²²⁰ Swisher, supra note 159, at 53 (quoting S.F. Chron., Apr. 19, 1878).

²²¹ 1 Debates, supra note 145, at 534 (statement of Clitus Barbour), 550 (statement of Patrick T. Dowling), 551 (Charles C. O’Donnell).

Frederick Keller, “The Curse of California,” *The Wasp* (Aug. 19, 1882).¹



¹ This cartoon depicts the “Railroad Monopoly” as a diabolical, octopus-like monster with the faces of railroad presidents Leland Stanford and Mark Hopkins as its eyes.

As the debates surrounding the California Constitution reveal, Judge Hoffman’s description of the corporation as simply an aggregate of

shareholders, whose rights and interests were coextensive with those of the corporation, conflicted with a particular view of corporations extant in popular discourse. By framing the corporation purely as a collection of rights-bearing individuals, however, Hoffman could justify attributing constitutional rights to corporations on the basis of comparisons to racial minorities; shareholders, like Chinese laborers, were simply a group of persons singled out for unequal treatment that deprived them of their fundamental rights.

III. “THE DESPISED LABORER FROM CHINA, OR THE ENVIED MASTER OF MILLIONS”

A. *The Railroad Tax Cases and the Aggregate Corporate Person*

The same coterie of corporate lawyers wasted no time in building on *In re Tiburcio Parrott* to challenge the taxation provisions of the new California Constitution, which specifically targeted railroad corporations. In the *Railroad Tax Cases*—of which *Santa Clara v. Southern Pacific Railroad* is the most well-known—corporate lawyers and Ninth Circuit judges cemented the expansive interpretation of the Fourteenth Amendment that they had been developing for the past decade.

The “question of taxation,” according to one convention delegate, was “perhaps, of more importance and greater in its bearings” than any other reforms the California Constitutional Convention had been called to address.²²² A central concern was the taxation of mortgaged property. The California Supreme Court had recently determined that debtors could not deduct mortgages from the value of their taxable property, a decision that caused outrage among farmers.²²³ By taxing the borrower of the mortgage on the full value of the property, it was claimed, the decision placed a heavy burden on farmers already barely eking out a living from their mortgaged farms, while allowing capitalists and moneylenders to escape taxation altogether.²²⁴ The 1879 California Constitution, attempting to rectify this “great inequality,”²²⁵ mandated that mortgages be deducted from the value of taxable property, “[e]xcept as to railroad and other quasi[-]public corporations.”²²⁶ One delegate explained that “unless, this

²²² 1 Debates, supra note 145, at 857 (statement of J.A. Filcher).

²²³ *People v. Hibernia Sav. & Loan Soc’y*, 51 Cal. 243 (1876).

²²⁴ Judge Campbell’s Terrific Cannonade, supra note 216.

²²⁵ 1 Debates, supra note 145, at 857 (statement of J.A. Filcher).

²²⁶ Cal. Const. of 1879, art. XIII, § 4.

exception is made, the railroad companies will have a good thing of it," since they would be able to deduct the value of their bonds.²²⁷ Because most railroads were mortgaged to the hilt, this meant they would have very little taxable property left.²²⁸

Railroad corporations were quick to challenge this new tax regime. The Central Pacific Railroad and its subsidiaries, the Southern Pacific Railroad and the Northern Railroad Company, along with other smaller railroads in the state, refused to pay the full assessment of their taxes, claiming that this and other provisions violated their Fourteenth Amendment rights to due process and equal protection. The goal, railroad lawyer Creed Haymond explained, was not just to evade the tax scheme, but to expand the Fourteenth Amendment to cover corporate "persons" as well.²²⁹ Under the Amendment, Haymond claimed, states could not "give to any person rights which under the same terms and conditions were not opened to all persons."²³⁰ Justice Field and Judge Sawyer heard the cases. The question before the court was whether the railroad, "being a corporation," was "a person within the meaning of the fourteenth amendment, so as to be entitled, with respect to its property, to the equal protection of the laws?"²³¹

The cases were understood to be momentous. Not only did they involve "more than a million of dollars of the public revenue," posited the *San Francisco Chronicle*, but they concerned "a new application of that amendment which will revolutionize our system of government."²³² This question was "of the gravest importance to all State Governments," as it threatened the ability of the legislature to regulate corporations.²³³ Judge Sawyer himself acknowledged that "it will be hard on the State, and still harder on the counties" if the new taxation scheme should be found unconstitutional, as "the validity of all the taxes upon railroads in the State" hung in the balance.²³⁴ The case also threatened to prompt a

²²⁷ 1 Debates, supra note 145, at 908 (statement of Henry Edgerton).

²²⁸ Id.

²²⁹ The Railroad Taxes, S.F. Chron., May 11, 1886, at 8.

²³⁰ Id.

²³¹ The Railroad Tax Cases, 13 F. 722, 738 (C.C.D. Cal. 1882).

²³² The Railroad Tax Cases, S.F. Chron., Aug. 13, 1883, at 2.

²³³ Id.

²³⁴ Letter from Lorenzo Sawyer, Cir. J., Cir. Ct. Dist. Cal., to M.P. Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (Aug. 26, 1882) (on file with the Oregon Historical Society); Letter from Lorenzo Sawyer, Cir. J., Cir. Ct. Dist. Cal., to M.P. Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (Sept. 23, 1882) (on file with the Oregon Historical Society).

popular uprising: “If we upset the taxes,” he observed, “won’t there be a howl?”²³⁵ Yet the sympathies of both Sawyer and Field lay with the corporations. Sawyer confided to a fellow judge that he considered agitators from the anti-railroad Workingmen’s Party to be “lunatics.”²³⁶ Field himself was well known to be a good friend of Leland Stanford and other railroad magnates.²³⁷ Additionally, having witnessed the Paris Commune and Communist uprisings in Rome and Vienna during his European travels, Field may have feared that the working-class movement for railroad regulation would lead to a populist uprising if not checked by the Court.²³⁸

It is little known²³⁹ that, early in the *Railroad Tax Cases*, Field and Sawyer issued an opinion in response to a motion to remand to state court, which spelled out a litigation strategy for how corporations could claim protection under the Fourteenth Amendment.²⁴⁰ Although unnecessary to decide the jurisdictional point at issue, Field and Sawyer took this opportunity to expound on their views about why the Fourteenth Amendment might apply to corporations. They relied heavily on Hoffman’s view of corporations as simply aggregates of constitutional-rights-bearing persons, as well as Field’s previous cases involving Chinese immigrants. In so doing, they charted a roadmap for the railroads’ lawyers to follow in future briefs.

²³⁵ Letter from Lorenzo Sawyer, Cir. J., Cir. Ct. Dist. Cal., to M.P. Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (Sept. 23, 1882) (on file with the Oregon Historical Society).

²³⁶ Letter from Lorenzo Sawyer, Cir. J., Cir. Ct. Dist. Cal., to M.P. Deady, Dist. Ct. J., U.S. Dist. Ct. Dist. Or. (June 9, 1880) (on file with the Oregon Historical Society).

²³⁷ Graham, *supra* note 103, at 876.

²³⁸ Howard Graham posits that Field’s experience with radicalism in Europe prompted the pro-individualism, anti-government regulation shift in his jurisprudence during the 1870s-80s. Graham, *supra* note 103, at 857. Carl Brent Swisher attributes Field’s disdain for “the masses” of “undifferentiated citizens” to his perception that they “humiliated him” by failing to support his political ambitions and threatened the property of his powerful industrial friends. Swisher, *supra* note 97, at 428. Charles McCurdy, alternatively, contends that Field was “Jacksonian” in that he supported the rights of individuals to pursue their avocations and enjoy their property with limited legislative interference and feared state grants of monopolistic power to private corporations. McCurdy, *supra* note 124, at 973, 977. In response, Charles J. McClain argues that what motivated Field was not “a desire to protect wealth and property per se,” but an opposition to special legislation “favoring certain individuals and groups at the expense of others.” McClain, *supra* note 16, at 314 n.164.

²³⁹ Howard Graham cites this opinion in a footnote but without discussion. See Graham, *supra* note 10, at 573 n.48.

²⁴⁰ *County of San Mateo v. S. Pac. R.R. Co.*, 13 F. 145 (C.C.D. Cal. 1882).

After denying the motion to remand, Field and Sawyer proceeded to scrutinize the meaning of equal protection. Echoing the broad interpretation put forth in the Chinese immigrant cases and *Parrott*, they explained that the Clause was “designed to cover all cases of possible discriminating and partial legislation against any class Equality of protection is thus made the constitutional right of every person.”²⁴¹ This sweeping definition of equal protection left little room for Cooley’s caveat that treating different classes of persons differently was acceptable. Applied to the current case, they surmised, “[n]o one can, therefore, be arbitrarily taxed upon his property at a different rate from that imposed upon similar property of others, similarly situated, and thus made to bear an unequal share of the public burdens.”²⁴²

Building on Hoffman’s decision in *Parrott*, Field and Sawyer reasoned that if corporations were simply aggregations of rights-bearing persons, the prohibition on unequal taxation would apply to them as well. In other words, corporate shareholders were “similarly situated” to individuals, and so they should be considered members of the same class entitled to the same treatment.²⁴³ Although “it must be admitted” that the Fourteenth Amendment was originally passed to protect “the rights of natural persons,” they suggested, “[i]f it also include[s] artificial persons, as corporations, . . . it must be because the artificial entity is composed of natural persons whose rights are protected in those of the corporation.”²⁴⁴ In this formulation, the corporation simply embodied the collective rights of its shareholders. Yet “[w]e express no opinion” upon whether the Fourteenth Amendment would protect corporations in this particular case, Field and Sawyer took care to caution, “but invite for it the most thoughtful consideration of counsel.”²⁴⁵ This claim was facetious; the opinion clearly laid out the railroad’s argument for a successful Fourteenth Amendment claim.²⁴⁶

²⁴¹ *Id.* at 150.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at 151.

²⁴⁵ *Id.* at 152.

²⁴⁶ Field also communicated with the railroad’s lawyer, John Norton Pomeroy, the next year regarding the Supreme Court’s forthcoming decision in *San Mateo*, passing along “certain memoranda” from two of the Justices that, he counselled Pomeroy, were “intended only for your eye.” Howard Jay Graham, *Four Letters of Mr. Justice Field*, 47 *Yale L.J.* 1100, 1106 (1938).

In their lengthy opinions in the *Railroad Tax Cases*, Field and Sawyer followed the reasoning they had outlined in their ruling on the motion to remand.²⁴⁷ Yet, guided by *Parrott*, they also took their theory of the aggregate nature of the corporation one step farther, to draw an explicit comparison between shareholders and racial minorities. If laws targeting corporations were in effect targeting corporate shareholders, then shareholders were a group singled out for unequal treatment, just as were persecuted racial minorities; all were “persons” protected by the Amendment from unjust discrimination.

In their opinions, Field and Sawyer belabored this analogy. Although “the occasion of the amendment was the supposed denial of rights” to Black Americans, Field stated, “the generality of the language used extends the protection of its provisions to persons of every race and condition against discriminating and hostile state action of any kind.”²⁴⁸ The Fourteenth Amendment thus “stands in the constitution as a perpetual shield against all unequal and partial legislation by the states . . . whether directed against the most humble or the most powerful; against the despised laborer from China, or the envied master of millions.”²⁴⁹ For Field, incorporated status was a “condition” protected against discrimination on par with racial identity. Where property was taxed differently based on the owner of the property rather than the type of property itself, there was necessarily a constitutional violation. “Strangely, indeed,” posed Field,

would the law sound in case it read that in the assessment and taxation of property a deduction should be made for mortgages thereon if the property be owned by white men . . . and not deducted if owned by black men . . . deducted if owned by men doing business alone, not

²⁴⁷ See *The Railroad Taxes Invalid*, S.F. Chron., Sept. 26, 1882, at 4; *Railroad Tax Cases: Decision of the United States Circuit Court Against the Tax Assessment*, Daily Evening Bull. (Cal.), Sept. 25, 1882, at 3.

²⁴⁸ *The Railroad Tax Cases*, 13 F. 722, 740 (C.C.D. Cal. 1882); see also *County of Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385, 397 (C.C.D. Cal. 1883) (opinion of Field, J.) (“[The Amendment] undoubtedly had its origin in a purpose to secure the newly-made citizens in the full enjoyment of their freedom. But it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color . . .”), *aff’d*, 118 U.S. 394 (1886).

²⁴⁹ *The Railroad Tax Cases*, 13 F. at 741.

deducted if owned by men doing business in partnerships or other associations²⁵⁰

Field here deftly elided the difference between African Americans and “men doing business in . . . other associations,” i.e., corporations. Sawyer was more explicit. He stated, “The rights of the negro are, certainly, no more sacred or worthy of protection than . . . the rights of corporations, and, through them, the rights of the real parties,—the corporators.”²⁵¹

While emphasizing the right to equal protection of all racial groups, Field and Sawyer adroitly included the rights of shareholders under the umbrella of the Fourteenth Amendment. For Field, the relative power disparity between “masters of millions” and “despised laborers from China” made no difference; any laws that singled out a particular group for special treatment violated their right to equal protection. Just as Field had noted the “positive hostility” against Chinese immigrants in the Chinese cases, he also framed railroad corporations as a persecuted group.²⁵² The court, Field said, was aware of the profound animosity toward corporations in the state; yet

[w]hatever acts may be imputed justly or unjustly to the corporations, they are entitled when they enter the tribunals of the nation to have the same justice meted out to them which is meted out to the humblest citizen. There cannot be one law for them and another law for others.²⁵³

In Field’s reasoning, Chinese immigrants and corporate shareholders were both despised groups subject to unequal treatment, and so both could claim protection under the Fourteenth Amendment.

Field and Sawyer could obscure the difference between persecuted minorities and corporations because, as their opinion on the motion to remand had dictated, they presented the corporation as a collection of natural persons.²⁵⁴ As Field explained, “Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals

²⁵⁰ *County of Santa Clara*, 18 F. at 396.

²⁵¹ *The Railroad Tax Cases*, 13 F. at 761 (Sawyer, C.J., concurring).

²⁵² *Ho Ah Kow v. Nunan*, 12 F. Cas. 252, 256 (C.C.D. Cal. 1879) (No. 6,546).

²⁵³ *The Railroad Tax Cases*, 13 F. at 730.

²⁵⁴ Gregory Mark and Morton Horwitz have analyzed how Field’s basis for extending constitutional rights to corporations was based on the aggregate theory of corporate personhood but have not explained why Field focused on this theory at the expense of other coexisting understandings of the corporation. This Article builds off their work by revealing that doing so allowed corporate lawyers to analogize groups of shareholders to persecuted minorities. Mark, *supra* note 9, at 1464–65; Horwitz, *supra* note 9, at 178, 181.

united for some legitimate business.”²⁵⁵ Individuals did not lose their constitutional rights when they became stockholders, for “[i]t would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.”²⁵⁶ In this explanation, Field and Sawyer presented the corporation as simply a collection of rights-bearing shareholders.

Yet Field and Sawyer simultaneously discussed the corporation as if it were a distinct rights-bearing legal entity on par with natural persons. Field claimed, questionably, that it was “well established by numerous adjudications of the supreme court of the United States and of the several states” that “[a]ll the guaranties and safeguards of the constitution for the protection of property possessed by individuals may . . . be invoked for the protection of the property of corporations.”²⁵⁷ He concluded that “as no discriminating and partial legislation, imposing unequal burdens upon the property of individuals, would be valid under the fourteenth amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained.”²⁵⁸ As Sawyer summarized, “within the scope of these grand safeguards of private rights, there is no real distinction between artificial persons, or corporations, and natural persons.”²⁵⁹ By switching between the aggregate and entity view of the corporation, Field and Sawyer left ambiguous the question of whether the

²⁵⁵ *The Railroad Tax Cases*, 13 F. at 743.

²⁵⁶ *Id.* at 744.

²⁵⁷ *Id.* at 744, 748. Notably, Field declined to mention that the Supreme Court had explicitly denied corporations’ ability to exercise certain constitutional rights on par with natural persons. In *Paul v. Virginia*—an opinion Field himself had written—the Court had held that corporations could not claim Article IV’s protection of the privileges and immunities of citizenship to combat a discriminatory state tax. 75 U.S. (8 Wall.) 168, 182 (1868). The case involved a corporation chartered in New York that attempted to do business in Virginia without paying the license tax required of foreign corporations. Although the tax law in *Paul* would certainly have been unconstitutional if it had targeted individuals, unlike in the *Railroad Tax Cases*, Field did not find this problematic. Rather, he described the corporation as “the mere creation of local law,” neither an aggregate of rights-bearing citizens nor a distinct constitutional-rights-bearing entity. *Id.* at 181. Yet in the *Railroad Tax Cases*, Field and Sawyer ignored *Paul* and concluded that the tax targeting railroad corporations was unconstitutional.

²⁵⁸ *The Railroad Tax Cases*, 13 F. at 748.

²⁵⁹ *Id.* at 758 (Sawyer, C.J., concurring) (quoting the railroad’s briefing).

rights of the corporation were based on the constitutional rights of its shareholders or whether the corporation itself had constitutional rights.²⁶⁰

Supporters of the new California Constitution condemned the opinions in the *Railroad Tax Cases*, warning they were “of such a character as to create suspicion and excite alarm throughout our whole country.”²⁶¹ The *San Francisco Chronicle* derided the comparison of corporations to persecuted racial minorities as “a piece of nonsense.”²⁶² It opined, “As to the claim that an amendment which was passed wholly and solely for the protection of negroes from oppression by their former masters, can be invoked by a corporation to avoid paying taxes levied under the sovereign authority of the State, it is really too absurd for discussion.”²⁶³ The paper accused Field of “pervert[ing] the Fourteenth Amendment so as to serve his own political purposes.”²⁶⁴ This criticism was bolstered by Field’s well-known friendships with California railroad magnates C.P. Huntington and Leland Stanford.²⁶⁵ Critics hoped that the Supreme Court would overturn Field’s decision; but they feared that “Judge Field exercises an influence over his brethren which is not commensurate either with his standing as a jurist, or his reputation as a fair man.”²⁶⁶

B. Santa Clara and Yick Wo: The Foundation of Equal Protection

The *Railroad Tax Cases* were quickly appealed to the Supreme Court in the cases of *San Mateo County v. Southern Pacific Railroad Co.*, *Santa Clara County v. Southern Pacific Railroad*, and *San Bernardino County v. Southern Pacific Railroad Co.*²⁶⁷ The Court confronted the perennial question: was the corporation a “child of the state,” a separate entity with

²⁶⁰ Field and Sawyer completely declined to address the State’s argument that corporations were distinct entities, creatures of the state who were subject to special public duties, even though the law itself explicitly targeted “railroad and other quasi public corporations.” See William J. Novak, *The Public Utility Idea and the Origins of Modern Business Regulation*, in *Corporations and American Democracy*, supra note 139, at 139, 139.

²⁶¹ *Railroad Tax Cases*, S.F. Chron., Oct. 27, 1883, at 8.

²⁶² *Judge Field Again*, S.F. Chron., Jan. 29, 1885, at 2.

²⁶³ *Id.*

²⁶⁴ *Field’s Conflicting Views*, S.F. Chron., Jan. 27, 1885, at 4.

²⁶⁵ Graham, supra note 103, at 876; see *The Field Faction Scored*, S.F. Chron., Apr. 1, 1885, at 3 (“[T]he Stanford-Huntington-Crocker railroad combination have habitually spent large sums of money, when necessary, to promote Judge Field’s political ends.”).

²⁶⁶ *Field’s Conflicting Views*, supra note 264, at 4.

²⁶⁷ *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885); *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886); *San Bernardino County v. S. Pac. R.R. Co.*, 118 U.S. 417 (1886).

distinct rights and duties to the public? Or was it simply an aggregation of rights-bearing individuals, whose rights became those of the corporation itself?

In their briefs and initial arguments before the Court, the counties' attorneys insisted that corporations were not "persons for all the purposes contemplated by the fourteenth amendment."²⁶⁸ "The rights and liabilities of a corporation are not the mere sum of the rights and liabilities of the individuals constituting the corporation"; rather, the corporation was "the creature of the State, [and] the privileges it enjoys are derived from the State," while "the individual is a creature of God and exercises his inherent rights from Nature."²⁶⁹ The counties' lawyers drew on Cooley's treatise as well as the common law view that corporations exercised special privileges in return for public duties: "The discrimination [in taxation] is a reasonable one, because the persons concerned have been specially favored by the State."²⁷⁰ Although counsel D.M. Delmas applauded the "dream of the statesman" that "throughout the world there should be equality and fraternity between men," he emphatically denied that "corporations—the creatures of man's handiwork—should be placed upon the same plane with the creatures of God."²⁷¹ Rather, invoking the popular view of the corporation as Frankenstein's monster, Delmas opined that the railroads "have grown so great, they have waxed so arrogant, that their creator, the State, our own beautiful California, grovels at the feet of its creatures, bound, shrinking and helpless, a prey to their rapacity, an object of their contempt."²⁷²

In contrast, the corporate lawyers again argued for a conception of the corporation as both the equivalent of a constitutional-rights-bearing person itself and as an aggregate of rights-bearing individuals. Silas Sanderson, the former California Supreme Court justice and now lead counsel for the Central Pacific Railroad, argued in *San Bernardino* that "corporations have been recognized and treated as legal persons, and as having all the rights of natural persons in respect to such property as they

²⁶⁸ Brief for Plaintiff in Error at 45, *Santa Clara County*, 118 U.S. 394 (No. 464); see Delmas' Argument, S.F. Chron., Aug. 3, 1883, at 2. The case was first argued in 1883 and then reargued in 1886.

²⁶⁹ Brief for Plaintiff in Error, supra note 268, at 44; Delmas' Argument, supra note 268, at 2.

²⁷⁰ The Railroad Tax Cases, supra note 232, at 2.

²⁷¹ Delmas' Argument, supra note 268, at 2.

²⁷² *Id.*

may lawfully acquire and possess.”²⁷³ Sanderson ignored the difference between the rights of property that corporations had enjoyed under common law and the constitutional rights to due process and equal protection that his clients now claimed.

In addition to arguing that corporations themselves were constitutional-rights-bearing persons, the railroad lawyers also invoked the aggregate theory of the corporation, just as Field and Sawyer had suggested. In *San Mateo*, John Norton Pomeroy, the eminent legal scholar and railroad attorney, argued in his brief that “*statutes violating [the Fourteenth Amendment’s] prohibitions in dealing with corporations must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guarant[ee]s, corporations cannot be separated from the natural persons who compose them.*”²⁷⁴ Echoing Justice Field’s opinion in the *Railroad Tax Cases*, Sanderson claimed that it would be absurd

to hold that the right of a person in relation to his property should be protected under these provisions of the Constitution and law where he was simply an individual, and the rights of the same person as to property as a member of a corporation should not be protected.²⁷⁵

Sanderson also drew upon racial analogies to make his point. He argued,

A law which taxes *A* upon certain property and does not tax *B* upon the same kind or class of property . . . does not afford to *A* equal protection with *B*. This is self-evident, and if *A* was a negro and *B* a white man such a law, without hesitation, would be declared to be within the inhibition of the equality clause.²⁷⁶

“[U]nless [the Fourteenth Amendment] confers greater rights and privileges upon negroes than are enjoyed by white men,” he exhorted, “it is not easy to perceive why a tax law which imposes a greater burden, under the same conditions, upon one white man than it does upon another, does not equally violate this equality clause.”²⁷⁷ A law that discriminated between men who were incorporated and men who were not violated the

²⁷³ Brief for Defendant at 71, *San Bernardino County v. S. Pac. R.R. Co.*, 118 U.S. 417 (1886) (No. 619).

²⁷⁴ Horwitz, *supra* note 9, at 177 (quoting Argument for Defendant at 12, *The Railroad Tax Cases*, 13 F. 722 (C.C.D. Cal. 1882)).

²⁷⁵ Brief for Defendant, *supra* note 273, at 79–80.

²⁷⁶ *Id.* at 98 (emphasis added).

²⁷⁷ *Id.* at 97.

class legislation principle of treating “likes alike”; incorporated status, like race, was not a legitimate basis for differential legal treatment. To countenance California’s taxation scheme, Sanderson concluded, “is tantamount to saying that corporations are not under the protection of the Fourteenth Amendment; that *they have no rights which legislative or judicial bodies are bound to respect.*”²⁷⁸ Like Judge Hoffman in *Parrott*, Sanderson invoked *Dred Scott v. Sandford*’s specter of inequality and subjugation to argue against a conception of the corporation as the child of the state and to claim that, like African Americans, corporate shareholders were entitled to full protection of their constitutional rights.

Disregarding the extensive briefing on the nature of the corporation and the circuit opinions of Justice Field and Judge Sawyer, however, Chief Justice Morrison Waite famously declined to hear argument on whether the Fourteenth Amendment applied to corporations, stating at the outset of the second round of oral arguments in *Santa Clara*, “We are all of [the] opinion that it does.”²⁷⁹ In a remarkable about-face, the counties’ lawyers conceded the point, perhaps in light of Waite’s unequivocal pronouncement. The attorney for Santa Clara County quickly capitulated, “Of course, corporations are persons, and of course, they are protected by the Fourteenth Amendment. No one, I presume, has ever questioned it.”²⁸⁰

The Supreme Court’s opinion in *Santa Clara v. Southern Pacific Railroad* did not address the issue of whether California’s taxation scheme violated the Fourteenth Amendment rights of corporations.²⁸¹ Concluding that the state board had improperly included the value of fences in their assessment of the railroad’s property, which was sufficient to find for the defendant, the Court determined that “there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below.”²⁸² By refusing to address the equal

²⁷⁸ Brief for Defendants at 34, *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394 (1886) (No. 464) (emphasis added).

²⁷⁹ *Santa Clara County*, 118 U.S. at 396; see *The Railroad Tax Cases: Argument Begun Before the Supreme Court*, S.F. Chron., Jan. 27, 1886, at 2.

²⁸⁰ Argument of D.M. Delmas, Esq., Counsel for Plaintiff at 29, *Santa Clara County*, 118 U.S. 394 (No. 464).

²⁸¹ *Santa Clara County*, 118 U.S. at 411 (concluding that, because the railroad’s property value was improperly assessed, it was unnecessary to reach the constitutional question). The parties in *San Mateo* had agreed that the rule of decision in *Santa Clara* would decide their case as well. *San Mateo County v. S. Pac. R.R. Co.*, 116 U.S. 138, 141 (1885). The judgment in *San Bernardino* was against the plaintiff county for the same reasons as in *Santa Clara*. *San Bernardino County v. S. Pac. R.R. Co.*, 118 U.S. 417, 421 (1886).

²⁸² See *The Railroad Taxes*, supra note 229, at 8.

protection claim, the Court let Justice Field's appellate opinion stand as the most definitive explanation of why the Equal Protection Clause should apply to corporations.²⁸³

Scholars have long speculated about why Waite appeared to accept corporate Fourteenth Amendment rights with no discussion, calling his statement "baffling."²⁸⁴ The answer lies in another case decided the very same day: *Yick Wo v. Hopkins*, also arising from the Ninth Circuit, in which the Court held that a law allowing San Francisco commissioners to discretionarily deny laundry permits violated the Equal Protection Clause when those permits were denied exclusively to Chinese laundry owners.²⁸⁵ Unsurprisingly, *Yick Wo* was represented by a corporate lawyer—Hall McAllister, whose law partner Thomas Bergin had recently represented the Southern Pacific Railroad in the *Railroad Tax Cases*.²⁸⁶

Unlike in *Santa Clara*, the Supreme Court thoroughly addressed the equal protection claim in *Yick Wo*. Departing significantly from the majority opinion in the *Slaughter-House Cases*, the Court for the first time adopted the expansive theory of equal protection that the Ninth Circuit had developed in the Chinese and corporate Fourteenth Amendment cases.²⁸⁷ Following in the footsteps of the Chinese immigrant

²⁸³ Field chastised the Court for not reaching the constitutional question. Citing a Chinese Fourteenth Amendment case, Field warned that the question was "of transcendent importance, and it will come here and continue to come, until it is authoritatively decided in harmony with the great constitutional amendment which insures to every person, whatever his position or association, the equal protection of the laws." *San Bernardino*, 118 U.S. at 423 (Field, J., concurring).

²⁸⁴ Graham, *supra* note 30, at 530. Waite himself insisted that his statement had little importance, as the Court had "avoided meeting the constitutional question in the decision." Graham, *supra* note 10, at 567.

²⁸⁵ *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886).

²⁸⁶ McAllister represented *Yick Wo* in the California Supreme Court and the United States Supreme Court as well as the defendant in *Yick Wo*'s companion case in the federal courts, *In re Wo Lee*. *Id.* at 363; *In re Yick Wo*, 9 P. 139, 139 (Cal. 1885); *In re Wo Lee*, 26 F. 471, 471 (C.C.D. Cal. 1886). Thomas Bergin represented Southern Pacific in the *Railroad Tax Cases*, 13 F. 722, 727 (C.C.D. Cal. 1882) and *County of Santa Clara v. Southern Pacific Railroad Co.*, 18 F. 385, 387 (C.C.D. Cal. 1883), *aff'd*, 118 U.S. 394 (1886).

²⁸⁷ *Yick Wo* also broke ground regarding the right to freely labor as a component of the "liberty" interest protected by the Fourteenth Amendment's Due Process Clause. In contrast to *Slaughter-House*'s holding that the right to labor was not a privilege and immunity of citizenship, the Court in *Yick Wo* held that the right to "the means of living," i.e., labor, was a "material right" and that infringement on this right was "the essence of slavery itself." 118 U.S. at 370. This statement echoed Judge Sawyer's claim in *In re Parrott* that labor was a "fundamental, inalienable right," 1 F. 481, 506 (C.C.D. Cal. 1880) (Sawyer, J.), as well as another case brought by McAllister and Bergin, *In re Quong Woo*, which involved a law conditioning the dispensation of permits to operate a laundry on the approval of twelve citizens

cases, *Parrott*, and the *Railroad Tax Cases*, Justice Stanley Matthews held that the provisions of the Fourteenth Amendment “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.”²⁸⁸ Race, as the corporate lawyers and Ninth Circuit judges had contended, was an illegitimate basis for class legislation. Yet, like the Ninth Circuit, Matthews did not limit the scope of the Equal Protection Clause to prohibiting racial discrimination, proclaiming that when a law made “unjust and illegal discriminations between persons in similar circumstances,” this was a “denial of equal justice . . . within the prohibition of the Constitution.”²⁸⁹ Reading Matthews’ definition of equal protection—identical to that propounded by Justice Field—in light of the preceding decade of Ninth Circuit Fourteenth Amendment jurisprudence, “persons in similar circumstances” would include not just men regardless of race, but men regardless of incorporated status as well. The Court’s reasoning in *Yick Wo* thus presents another explanation for Waite’s statement in *Santa Clara*: taken together, the twin rulings of *Yick Wo* and *Santa Clara* put forth a broad interpretation of the Fourteenth Amendment as applying not just to African Americans, but to all “persons” who suffered unjust discrimination, be they natural or artificial, “despised laborers” or “masters of millions.”

Indeed, the Supreme Court never did issue an opinion explaining why corporations were persons under the Fourteenth Amendment. Two years later, in an opinion written by Justice Field, the Court stated offhand, “It is conceded that corporations are persons within the meaning of the amendment.”²⁹⁰ Field cited to *Santa Clara* for support of this statement, although the actual opinion itself had held no such thing.²⁹¹ That same year, Field, again writing for the majority, elaborated, “Under the

and taxpayers on the block in which the laundry was located. 13 F. 229, 229–30 (C.C.D. Cal. 1882). Justice Field held that the law was unconstitutional because it did not guarantee an impartial process for determining which laundries could obtain a license, which infringed on the fundamental liberty of Chinese launderers to “follow any of the lawful ordinary trades and pursuits of life.” *Id.* at 233; see also Swisher, *supra* note 97, at 424 (summarizing how Field’s unique view of the Fourteenth Amendment’s Due Process Clause gradually supplanted the Supreme Court’s restrictive reading of the Amendment in *Slaughter-House*).

²⁸⁸ *Yick Wo*, 118 U.S. at 369.

²⁸⁹ *Id.* at 374.

²⁹⁰ *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 209 (1888).

²⁹¹ *Id.*

designation of ‘person’” in the Fourteenth Amendment, “there is no doubt that a private corporation is included,” for “[s]uch corporations are merely associations of individuals united for a special purpose”²⁹² In this swift sleight of hand, Field adopted the aggregate theory of corporate personhood and used it to justify the extension of Fourteenth Amendment to corporate persons themselves. Without any detailed explanation of his reasoning and citing to *Santa Clara*, which likewise had offered nothing by way of explanation, Field cemented corporate equal protection rights as the official law of the land.²⁹³ By the end of the nineteenth century, the equal protection rights of corporations were taken as a given; in 1897, the Court stated blithely, “A state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.”²⁹⁴ Through it all, the Court never explained in any detail why the Fourteenth Amendment applied to corporations, even as over time it solidified corporations’ claim to its protection.

C. Corporations and the Fourteenth Amendment in the Era of Jim Crow and Chinese Exclusion

While *Yick Wo* and *Santa Clara* did extend Fourteenth Amendment equal protection rights to all persons, the cases did not provide a shield

²⁹² *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 183, 189 (1888).

²⁹³ After these cases, corporations seized on the Fourteenth Amendment as a shield against state regulation. Charles Wallace Collins, *The Fourteenth Amendment and the States* 129 (1912). Gregory Mark discusses the twentieth-century evolution of the doctrine, Mark, *supra* note 9, at 1441–42, as does Adam Winkler, Winkler, *supra* note 8, at xxi.

²⁹⁴ *Gulf, Colo. & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897); see also *Mo. Pac. Ry. Co. v. Nebraska*, 164 U.S. 403, 417 (1896) (“The taking by a State of the private property of one person or corporation . . . is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.”); *Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U.S. 26, 33 (1889) (holding that applying the Fourteenth Amendment to railroad corporations is “reasonable and just”); *Charlotte, Columbia & Augusta R.R. Co. v. Gibbes*, 142 U.S. 386, 391 (1892) (“Private corporations are persons within the meaning of the [Fourteenth] amendment.”); *Pembina*, 125 U.S. at 188–89 (“Under the [Amendment’s] designation of person there is no doubt that a private corporation is included.”); *Smyth v. Ames*, 169 U.S. 466, 522 (1898) (“That corporations are persons within the meaning of this Amendment is now settled.”); *Ky. Fin. Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550 (1923) (finding that the plaintiff corporation is a person for the purposes of the Fourteenth Amendment). This precedent, however, was circumscribed slightly in *Northwestern National Life Insurance Co. v. Riggs*, in which the Court stated offhandedly and without explanation that “[t]he liberty referred to in that Amendment is the liberty of natural, not artificial persons.” 203 U.S. 243, 255 (1906).

against all state regulation. Although the right to equal treatment protected Chinese immigrants and corporate shareholders against discriminatory state and local laws, those laws were upheld if a state could justify targeted legislation by asserting a valid police power.²⁹⁵ Federal judges, including Justice Field, were willing to permit reasonable regulations that promoted “health and safety” and “the general good,” even when they infringed on constitutional rights.²⁹⁶ Yet Supreme Court decisions regarding corporate Fourteenth Amendment rights continued to espouse Justice Field’s vision of an expansive Equal Protection Clause and a robust corporate constitutional personhood, even in cases where they upheld the challenged regulations.²⁹⁷ For instance, two years after *Santa Clara*, the Court, in an opinion by Field, concluded that special safety regulations for railroads did not violate the Equal Protection Clause.²⁹⁸ However, in the same breath, Field reiterated that “corporations are persons within the meaning of the amendment,” citing to *Santa Clara* without elaboration.²⁹⁹ Even as he recognized public safety as a valid reason for restricting rights, Field cemented corporations’ status as constitutional-rights-bearing persons.

The same exception for laws that were intended to protect the public interest applied to state regulation of Chinese immigrants. Even prior to *Yick Wo*, Field had shown that he was willing to uphold laws that had the effect of discriminating against Chinese immigrants when they applied to all persons within a particular class, were not arbitrary in their application,

²⁹⁵ See Novak, *supra* note 22, at 46 (discussing “public interest” limits on individual rights). Ruth Bloch and Naomi Lamoreaux argue that the protection the Fourteenth Amendment offered to corporations after *Santa Clara* was actually “very limited” on the grounds that corporations were often unsuccessful in their Fourteenth Amendment claims. Bloch & Lamoreaux, *supra* note 139, at 286. However, although the police power restrained Fourteenth Amendment claims, corporations did successfully recast themselves as persons protected by the Amendment, which had important precedent for future claims of corporate rights under other provisions of the Constitution and civil rights statutes. See *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 707–08 (2014) (finding that “person” extends to corporations when guaranteeing religious rights under the Religious Freedom and Restoration Act).

²⁹⁶ McCurdy, *supra* note 124, at 979–81. For instance, the Court regularly held that non-arbitrary safety and administrative regulations did not violate the Fourteenth Amendment. See, e.g., *Beckwith*, 129 U.S. at 35–36; *Gibbes*, 142 U.S. at 387, 394.

²⁹⁷ See, e.g., *Mo. Pac. Ry. Co. v. Mackey*, 127 U.S. 205, 210 (1888); *Ellis*, 165 U.S. at 153–54.

²⁹⁸ *Mackey*, 127 U.S. at 210.

²⁹⁹ *Id.* at 209–10.

and were justified by a legitimate state police power.³⁰⁰ Field also was willing to uphold legislation that had the effect of discriminating against certain classes of Chinese persons. He was careful to justify his opinions on bases other than racial prejudice, explaining that such laws were legitimate exercises of state or federal police power and were not motivated by racism. He noted, “Thoughtful persons who were exempt from race prejudices” favored legislation to curb the immigration of Chinese laborers in the name of public welfare—namely, “to prevent the degradation of white labor, and to preserve to ourselves the inestimable benefits of our Christian civilization.”³⁰¹

By the late 1870s, anti-Chinese sentiment on the West Coast had prompted politicians of all stripes to endorse a more flagrantly anti-immigration agenda.³⁰² In 1880, the United States ratified a treaty with China that gave Congress the power to limit or suspend the immigration of Chinese laborers, while maintaining protections for those already residing in the United States.³⁰³ Congress utilized this power in the Chinese Exclusion Acts—the first meaningful federal restrictions on immigration—by prohibiting new immigration of Chinese laborers for ten years and requiring Chinese immigrants currently residing in the states to

³⁰⁰ For instance, *Barbier v. Connolly* involved a laundry ordinance that required all laundries to obtain a certificate verifying that they met certain fire and public-safety standards and prohibiting the operation of laundries at night. 113 U.S. 27, 30 (1885). Although several of the required safety provisions disproportionately impacted Chinese laundries, as alleged in *Barbier*'s companion case, *Soon Hing v. Crowley*, 113 U.S. 703, 710 (1885), Field held that the law applied equally to all persons and was not arbitrarily administered. It undoubtedly helped that the plaintiff in *Barbier* was a white launderer, as this provided evidence that all persons engaged in laundering were affected, regardless of race. As Field explained, “There is no invidious discrimination against any one [sic] within the prescribed limits by such regulations. . . . All persons engaged in the same business within it are treated alike; are subject to the same restrictions and are entitled to the same privileges under similar conditions.” *Barbier*, 113 U.S. at 30–31. For these reasons, the ordinance differed from that in *Yick Wo*, which was well-known to be targeted at Chinese launderers and where the granting of the license depended on the arbitrary discretion of the city official and the surrounding neighbors. See 118 U.S. 356, 374 (1886).

³⁰¹ *Chew Heong v. United States*, 112 U.S. 536, 569 (1884) (Field, J., dissenting); see also *In re Low Yam Chow (Case of the Chinese Merchant)*, 13 F. 605, 607 (C.C.D. Cal. 1882) (discussing how the citizens of California wanted to restrict immigration to preserve the integrity of labor in the state).

³⁰² Smith, supra note 116, at 227; Qin, supra note 101, at 115.

³⁰³ Lucy E. Salyer, *Laws Harsh as Tigers: Chinese Immigrants and the Shaping of Modern Immigration Law* 14–15 (1995); Qin, supra note 101, at 110; Smith, supra note 116, at 224–26. For a thorough timeline and discussion of the treaties and acts, see *Fong Yue Ting v. United States*, 149 U.S. 698, 715–27 (1893).

obtain a certificate of residence if they wished to leave the country temporarily.³⁰⁴ In 1888 and 1892, Congress further restricted Chinese immigration and imposed burdensome new requirements on Chinese residents.³⁰⁵

Each of these Exclusion Acts gave rise to litigation that flooded federal courts, overwhelming dockets.³⁰⁶ Thomas Bergin and Hall McAllister continued to represent both Chinese immigrants and corporate clients into the early twentieth century.³⁰⁷ Yet although the Ninth Circuit had ruled favorably for Chinese immigrants when the cases involved state and local laws, federal statutes posed new questions: the scope of Congress's power over immigration;³⁰⁸ the constitutional and treaty rights of immigrants in transit and of resident aliens;³⁰⁹ the separation of powers between the judiciary and administrative agencies;³¹⁰ and the interplay between congressional statutes and treaties.³¹¹ Although federal courts at first read the Exclusion Acts narrowly in order to reconcile them with Chinese immigrants' treaty rights,³¹² subsequent legislation made clear that Congress intended to abrogate treaty terms that guaranteed Chinese

³⁰⁴ Salyer, *supra* note 303, at 7; Smith, *supra* note 116, at 228; Qin, *supra* note 101, at 101. For the text of the 1882 and 1884 Chinese Exclusion Laws, see *Chew Heong*, 112 U.S. at 543 n.*. For a sampling of cases interpreting the scope of these laws, see *In re Low Yam Chow*, 13 F. at 608–11; *In re Leong Yick Dew*, 19 F. 490, 491–97 (C.C.D. Cal., 1884); *In re Cheen Heong (Case of Former Residence by a Chinese Laborer)*, 21 F. 791, 791–93 (C.C.D. Cal. 1884); *United States v. Jung Ah Lung*, 124 U.S. 621, 626–35 (1888); *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 589 (1889).

³⁰⁵ Qin, *supra* note 101, at 123; See *Chae Chan Ping*, 130 U.S. at 599; *Lau Ow Bew v. United States*, 144 U.S. 47, 63 (1892); *Fong Yue Ting*, 149 U.S. at 702; *Wong Wing v. United States*, 163 U.S. 228, 229–31 (1896).

³⁰⁶ Judge Hoffman warned that “if the Chinese immigrants come in the future in anything like the number in which they have recently arrived, it will be impossible for the courts to fulfill their ordinary functions if these habeas corpus cases are to be investigated and disposed of by them.” *In re Chow Goo Pooi*, 25 F. 77, 82 (C.C.D. Cal. 1884). The Supreme Court voiced this concern as well. *Lem Moon Sing v. United States*, 158 U.S. 538, 547 (1895).

³⁰⁷ See, e.g., *People v. Lee Chuck*, 15 P. 322, 323 (Cal. 1887); *In re Baldwin*, 27 F. 187, 187 (C.C.D. Cal., 1886); *Baldwin v. Franks*, 120 U.S. 678, 680 (1887); *In re Pac. Mail S.S. Co.*, 130 F. 76, 77 (9th Cir. 1904).

³⁰⁸ See, e.g., *Chew Heong*, 112 U.S. at 537.

³⁰⁹ See, e.g., *In re Ah Ping*, 23 F. 329, 329–30 (C.C.D. Cal. 1885); *Jung Ah Lung*, 124 U.S. at 622.

³¹⁰ See, e.g., *Fong Yue Ting*, 149 U.S. at 705 (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

³¹¹ See, e.g., *In re Chae Chan Ping*, 36 F. 431, 434 (C.C.N.D. Cal. 1888), *aff'd*, 130 U.S. 581 (1889).

³¹² *In re Ah Ping*, 23 F. at 330; *Chew Heong*, 112 U.S. at 549.

immigrants equal treatment.³¹³ As Judge Sawyer explained, somewhat regretfully, it would be “a gross assumption of authority for the court” to overturn a statute that in “clear and unambiguous language” contradicted the terms of a treaty, even if it caused “great hardship” to immigrants and constituted “a violation of the faith of the nation.”³¹⁴ Rather, such a violation could be addressed through diplomatic channels only.³¹⁵ On the Supreme Court, Justice Field continued to assert that the constitutional rights of Chinese residents guarded against egregious due process violations, but he was in the minority.³¹⁶ Given the federal courts’ growing deference to Congress’s power over immigration, an expansive Fourteenth Amendment, which applied only to action by states, offered little protection for Chinese immigrants.³¹⁷

The Court also narrowed the ability of the Reconstruction Amendments to address discrimination against African Americans. Civil rights lawyers continued to bring claims under the Reconstruction Amendments and Civil Rights Acts, but the Court’s interpretation of the Fourteenth Amendment as limited to state action and its endorsement of “separate but equal” doctrine shattered the Amendment’s power to combat Jim

³¹³ *In re Chae Chan Ping*, 36 F. at 432–33.

³¹⁴ *Id.*

³¹⁵ *Id.* at 435.

³¹⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (Field, J., dissenting). The Court, including Justice Field, held that Congress’s power over immigration and the 1882 treaty allowed Congress to prohibit Chinese laborers from entering, regardless of their previous residency in the United States. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889). The Court extended Congress’s power over immigration to include aliens currently residing in the United States, holding that deportation without trial did not violate the immigrants’ right to due process, among others. *Fong Yue Ting*, 149 U.S. at 707. Justice Field, along with Justices Brewer and Fuller, dissented in *Fong Yue Ting*, arguing that the law in question violated the Fifth Amendment’s due process and equal protection principles, citing *Yick Wo* five times. *Id.* at 739, 742, 744 (Brewer, J., dissenting); *id.* at 755 (Field, J., dissenting); *id.* at 762 (Fuller, C.J., dissenting).

³¹⁷ Salyer, *supra* note 303, at 23.

Crow laws.³¹⁸ Women were likewise unsuccessful in claiming the Fourteenth Amendment to protect against gender discrimination.³¹⁹

Yet corporations continued to assert an expansive interpretation of equal protection into the twentieth century. They were the most prolific litigators of the Fourteenth Amendment in the century after its passage.³²⁰ In 1912, one commentator calculated that corporations had brought more than half of all Fourteenth Amendment cases between 1868 and 1912—significantly more than African Americans.³²¹ Even as it crippled the Amendment’s capacity to address racial discrimination, the Supreme Court bolstered its protections of private property for businesses, most notably in the cases of the so-called “*Lochner* Era.”³²² The Supreme Court

³¹⁸ See *United States v. Cruikshank*, 92 U.S. 542, 554–55 (1875); *The Civil Rights Cases*, 109 U.S. 3, 11 (1883); *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896). Eric Foner has said that *Cruikshank* rendered the Fourteenth Amendment “all but meaningless” to African Americans. Foner, *supra* note 87, at 530–31 (2002). For a small sampling of the extensive scholarship on African American civil rights lawyers and their allies, see Risa L. Goluboff, *The Lost Promise of Civil Rights* (2007); Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (2011); Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (2012).

³¹⁹ See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 131, 139 (1872); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874).

³²⁰ For a very small sample of the thousands of Fourteenth Amendment cases brought by corporations between *Santa Clara* and *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), see *State v. Loomis*, 22 S.W. 350, 350–51 (Mo. 1893); *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896); *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 154 (1897); *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 556 (1902); *Power Manufacturing Co. v. Saunders*, 274 U.S. 490, 493 (1927); *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 400 (1928); *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 530 (1933). See also *Holden v. Hardy*, 169 U.S. 366, 382–83 (1898) (noting that, while the primary objective of the Fourteenth Amendment was to secure the political rights of African Americans, the majority of cases brought under that Amendment have actually had little or nothing to do with that issue).

³²¹ Of the 604 cases argued in the Supreme Court involving the Fourteenth Amendment between 1868 and 1912, 312 involved corporations, while only about one per year involved African Americans. Collins, *supra* note 293, at 129.

³²² *Lochner v. New York*, 198 U.S. 45, 64 (1905); see Gary D. Rowe, *Lochner* Revisionism Revisited, 24 L. & Soc. Inquiry 221, 244 (1999). Corporations also faced hurdles in claiming the protection of the Due Process Clause. Earlier cases had indicated that corporations possessed the same right to due process as individuals. See *Peik v. Chicago & Nw. Ry. Co.*, 94 U.S. 164, 175–76 (1876) (allowing corporations to assert Fourteenth Amendment claims without discussion). However, in the early twentieth century, the Court began to distinguish between the due process protection of property and the protection of liberty, with corporations only possessing the former. See *Nw. Nat. Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1906) (“The liberty referred to in that Amendment is the liberty of natural, not artificial persons.”). The Court did not cite any precedent or engage in any discussion to support its statement that corporations possessed no liberty interests.

also continued to rely on *Yick Wo* as well as other Chinese immigrant cases when considering Fourteenth Amendment claims by business entities.³²³ Although analogies between shareholders and racial minorities surfaced occasionally, as decisions upholding Jim Crow legislation inhibited the ability of African Americans to claim substantive equal protection, such analogies vanished.³²⁴ They had done their work.

When the Supreme Court finally retreated from its permissive approach to the Fourteenth Amendment claims of business entities during the New Deal era, it left space for the possibility that the Amendment retained some power to protect “discrete and insular minorities.”³²⁵ As the Civil Rights movement gained momentum, turnover on the bench made the Court more predisposed towards civil rights claims.³²⁶ The holding of the twin cases of *Yick Wo* and *Santa Clara*—that equal protection required

³²³ For a small sampling of business-entity Fourteenth Amendment cases that invoked *Yick Wo*, see *Ellis*, 165 U.S. at 159; *Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 190 (1888); *Holden*, 169 U.S. at 383; *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews*, 174 U.S. 96, 105 (1899); *Connolly*, 184 U.S. at 559; *Cotting v. Kansas City Stock Yards Co.*, 183 U.S. 79, 107 (1901); *Dobbins v. Los Angeles*, 195 U.S. 223, 240 (1904); *German Alliance Insurance Co. v. Hale*, 219 U.S. 307, 319 (1911); *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 246 n.5 (1931); *Michigan Millers' Mutual Fire Ins. Co. v. McDonough*, 193 N.E. 662, 665 (Ill. 1934); *Senn v. Tile Layers Protective Union*, 301 U.S. 468, 491 (1937) (Butler, J., dissenting).

³²⁴ For instance, in a case involving a law that required railroad corporations to pay attorney’s fees if they were the losing party in certain cases but had no such requirement for individual litigants, the Supreme Court explained that such a classification was an unconstitutional violation of the rights of shareholders. *Ellis*, 165 U.S. at 153. Following the template of the *Railroad Tax Cases*, the Court analogized wealthy shareholders to Black men: “The State may not say that all white men shall be subjected to the payment of the attorney’s fees of parties successfully suing them and all black men not,” just as it may not target “all men possessed of a certain wealth.” *Id.* at 155. Interestingly, *Ellis* was decided in 1897, the year after *Plessy v. Ferguson*.

³²⁵ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938). Justice Lewis Powell dubbed footnote four “the most celebrated footnote in constitutional law” because it became a basis of strict scrutiny judicial review in cases involving legislation that infringed on the constitutional rights of minority groups. Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 Colum. L. Rev. 1087, 1087–88 (1982); see also Owen M. Fiss, Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 6 (1979) (“The great and modern charter for ordering the relation between judges and other agencies of government is footnote four of *Carolene Products*.”); Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 Yale L.J. 1287, 1292 (1982) (noting how the footnote highlighted the importance of protecting the political rights of minorities in a democratic and majoritarian system).

³²⁶ See Morton J. Horowitz, The Warren Court and the Pursuit of Justice, 50 Wash. & Lee L. Rev. 5, 8 (1993); Melvin I. Urofsky, The Warren Court: Justices, Rulings, and Legacy 10–11 (2001).

treating all persons, including corporations, uniformly, regardless of any differences—finally allowed disempowered groups to claim the Amendment’s protection as well. During the 1940s–50s, when racial minorities began to successfully invoke *Yick Wo* to combat discrimination in education,³²⁷ property ownership,³²⁸ employment,³²⁹ voting,³³⁰ and interracial relationships,³³¹ the 1960s–70s, when women’s rights activists cited *Yick Wo* to claim reproductive rights,³³² equality in sports,³³³ and equal benefits;³³⁴ and the 1990s–2000s, when gay rights activists relied on *Yick Wo* to advocate for equal treatment under law,³³⁵ these disempowered groups based their claims on the broad interpretation of the Equal Protection Clause established by the Ninth Circuit’s Chinese and corporate Fourteenth Amendment cases.

Yet corporate Fourteenth Amendment litigation also restricted the potential of the Equal Protection Clause to address issues of inequity. Treating all alike, while useful in targeting legislation that singles out a disempowered group for unjust discrimination, has also been used to overturn legislation that aims to rectify past or current inequalities by levelling the playing field, on the grounds that it does not treat historically advantaged groups “like” disempowered ones.³³⁶ Affirmative action in schools provides a contentious example. In the historic case *Regents of University of California v. Bakke*, the Court held an affirmative action policy unconstitutional because it discriminated against white males.³³⁷ Referencing *Yick Wo* a total of five times, Justice Powell explained, “The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.

³²⁷ See, e.g., *Westminster Sch. Dist. v. Mendez*, 161 F.2d 774, 777 & n.5 (9th Cir. 1947); *Pitts v. Bd. of Trs. of De Witt Special Sch. Dist. No. 1*, 84 F. Supp. 975, 983 (E.D. Ark. 1949).

³²⁸ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 21 & n.25 (1948); *Namba v. McCourt*, 204 P.2d 569, 573 (Or. 1949).

³²⁹ See, e.g., *Davis v. Cook*, 80 F. Supp. 443, 452 (N.D. Ga. 1948).

³³⁰ See, e.g., *Davis v. Schnell*, 81 F. Supp. 872, 878 (S.D. Ala. 1949); *Byrd v. Brice*, 104 F. Supp. 442, 444 (W.D. La. 1952), *aff’d*, 201 F.2d 664 (5th Cir. 1953).

³³¹ See, e.g., *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964).

³³² See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 503 (1965) (White, J., concurring).

³³³ See, e.g., *Haas v. S. Bend Cmty. Sch. Corp.*, 289 N.E.2d 495, 499 (Ind. 1972).

³³⁴ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 678, 685 n.14 (1973).

³³⁵ See, e.g., *Romer v. Evans*, 517 U.S. 620, 634–35 (1996).

³³⁶ See Catharine A. MacKinnon, *Toward a Renewed Equal Rights Amendment: Now More Than Ever*, 37 *Harv. J.L. & Gender* 569, 570–71 (2014).

³³⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 319 (1978) (Opinion of Powell, J.). The most recent in the line of cases stemming from *Bakke* is *Fisher v. University of Texas at Austin*, 136 S. Ct. 2198 (2016).

If both are not accorded the same protection, then it is not equal.”³³⁸ The effect of this “formal” over “substantive”³³⁹ equality interpretation of the Equal Protection Clause is to maintain the historical power imbalance between advantaged and disadvantaged groups and to limit the state’s ability to ameliorate the effects of past discrimination.³⁴⁰ This privileging of formal over substantive equality is a direct product of the intertwined Chinese and corporate Fourteenth Amendment cases that developed out of the late nineteenth-century Ninth Circuit. In the formal equality world of Justice Field’s Fourteenth Amendment, the “master of millions” and the “despised laborer” must be treated the same.

CONCLUSION

As this Article has shown, corporate personhood and race have been deeply intertwined since the inception of the Fourteenth Amendment. By drawing analogies between African Americans, Chinese immigrants, and corporate shareholders, corporate lawyers and federal judges were able to establish a broad interpretation of the Fourteenth Amendment’s Equal Protection Clause as defending all persons singled out for differential treatment, not just the formerly enslaved persons and their descendants that the Amendment was originally intended to protect. This expansive interpretation of the Equal Protection Clause laid the groundwork for the civil rights claims of other groups experiencing discrimination, including women and LGBTQ persons, going into the twenty-first century.

This is not to argue that corporate litigation was a “but-for” cause of contemporary equal protection jurisprudence; the Supreme Court certainly could have arrived at the modern understanding of equal protection via other paths. What this Article does show is that corporate Fourteenth Amendment litigation, in combination with litigation involving Chinese immigrants, is the path that the development of the

³³⁸ *Bakke*, 438 U.S. at 289–90, 289 n.27, 292–94, 298 n.37.

³³⁹ See *supra* note 29.

³⁴⁰ Colker, *supra* note 29, at 1091 (“Formal equality has become a political and litigation tool for some white parents to derail an attempt by school districts to create an educational program that is likely to be more successful for minority children.”); MacKinnon, *supra* note 336, at 571 (explaining that the result of a formal equality approach “is that imposed inequalities . . . are at best ignored or are denigratingly compensated for, in order to try to produce equal results”); Crenshaw, *supra* note 29, at 1345 (stating that the “equality as process” approach makes “no sense at all in a society in which identifiable groups had actually been treated differently historically and in which the effects of this difference in treatment continued into the present”).

doctrine did take, with specific ramifications. Corporate litigation created a template and a structure with both benefits and limits on which future civil rights claimants could draw to expand the Equal Protection Clause to other disadvantaged groups as well. The assumption that corporations are entitled to equal treatment has also spread to other areas of law; in *Citizens United*, the Court rejected the argument “that political speech of corporations . . . should be treated differently under the First Amendment simply because such associations are not ‘natural persons.’”³⁴¹

This history reveals a complicated legacy that presents two possible responses. The first is a pragmatic approach to contemporary corporate constitutional litigation that recognizes the seminal role corporations have played and continue to play in advancing doctrines that also protect the civil rights of minority groups. Litigation over the racial identity of corporations in claims under Section 1981 of the 1866 Civil Rights Act, which prohibits racial discrimination in contracting, provides an important example.³⁴² The second approach is to rethink the ironies of the Fourteenth Amendment in light of how early corporate litigation both opened and foreclosed possibilities for disadvantaged groups under the Equal Protection Clause. This might prompt us to reassess doctrines that created strong constitutional rights for corporations but also limited the ability of “discrete and insular minorities” to achieve substantively equal rights.

Regardless, contemporary discussions of corporate constitutional personhood are not complete without understanding the historical

³⁴¹ *Citizens United v. FEC*, 558 U.S. 310, 343 (2010).

³⁴² 42 U.S.C. § 1981(a). Corporations have become a key vehicle for litigating claims for discrimination in the making or enforcement of contracts under § 1981 of the 1866 Civil Rights Act. Courts interpreting § 1981 have held that only the parties to the contract have standing to bring suit for racial discrimination under the statute. See *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 479–80 (2006); *Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc.*, 368 F.3d 1053, 1060 (9th Cir. 2004). This means that where the contractual parties are corporations, which is not uncommon, the corporation is the only “person” that can allege racial discrimination. Unless courts accept the racialized corporation in this context, the real persons who suffered racial discrimination—the corporation’s directors, shareholders, consumers, or employees—will be without redress. For cases considering corporate § 1981 claims, see *Howard Security Services, Inc. v. Johns Hopkins Hospital*, 516 F. Supp. 508 (D. Md. 1981); *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982); *Gersman v. Group Health Association, Inc.*, 931 F.2d 1565 (D.C. Cir. 1991); *Danco, Inc. v. Wal-Mart Stores, Inc.*, 178 F.3d 8 (1st Cir. 1999); *Guides, Ltd. v. Yarmouth Group Property Management, Inc.*, 295 F.3d 1065 (10th Cir. 2002); *McClain v. Avis Rent A Car System, Inc.*, 648 F. App’x 218 (3d Cir. 2016); *Woods v. City of Greensboro*, 855 F.3d 639 (4th Cir. 2017); *White Glove Staffing, Inc. v. Methodist Hospitals of Dallas*, 947 F.3d 301 (5th Cir. 2020).

importance of constitutional litigation by corporations to both expanding and limiting modern civil rights claims, as well as the role of race in the creation of corporate constitutional rights. Perhaps it is time to rethink modern Fourteenth Amendment doctrine and the practicality as well as the perils of corporate constitutional personhood.