AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 7: The Republican Era – Individual Rights

## Business Views on Corporate Personhood

*The Fourteenth Amendment to the U.S. Constitution was adopted in 1868. Its first section declared, "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." The reporter for the U.S. Supreme Court recorded in the headnote to the case* Santa Clara County v. Southern Pacific Railroad Company *(1886) that Chief Justice Waite stopped the attorney for the Southern Pacific Railroad before he began his oral argument and declared, "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does." The Court stated that position more authoritatively in in* Pembina Consolidated Silver Mining Co. v. Pennsylvania *(1888).*

*This theory of "corporate personhood" under the Fourteenth Amendment has been subject to recurrent debate ever since those early decisions. George R. Peck, one of the leading corporate attorneys of the Gilded Age, emphasized to the American Bar Association that, "When these guaranties [against arbitrary government] were thus made uniform in respect to both national and state legislation [by the Fourteenth Amendment], the constitution took a forward step; and when in 1886 the Supreme Court decided that these guaranties extended to every person, natural or artificial, another great advance was made."[1] Conservatives were generally certain that the extension of the protections of the Fourteenth Amendment to corporations was an essential step in recognizing the broad applicability of the Amendment beyond the problems of the former slaves and was a natural application of traditionally recognized rights. Progressives thought that extension was further evidence that courts were controlled by business interests.*

*William W. Finley was the second president of the Southern Railway, a powerful railroad conglomerate put together by the banker J. P. Morgan in the aftermath of the Panic of 1893. A career railroad man, Finley was part of a generation of Southern businessmen that emerged after Reconstruction whip were focused on developing the region's economy and integrating agriculture, industry, and commerce. He was an aggressive public advocate for the railroad, defending it against legislative attacks and arguing for the shared interests of all sectors of the economy in the financial success of the railroads.*

*Roscoe Conkling was one of the leading political figures of the Reconstruction period. A rapidly rising New York attorney, he was active in electoral politics and helped organize the Republican Party out of the ashes of the Whig Party. As a member of the U.S. House of Representatives, he helped draft the Fourteenth Amendment. As a member of the U.S. Senate, he promoted civil rights, hard currency, and the party organization. More than once he declined an appointment to the U.S. Supreme Court. Conkling briefly returned to his roots as a litigator before succumbing to an early death in 1888. His argument to the U.S. Supreme Court on behalf of the Southern Pacific Railroad in an 1883 tax case set the stage for the Court's adoption of the corporate personhood theory.*

*What types of constitutional argument does Conkling offer to support his conclusion that the term "person" in the Fourteenth Amendment includes corporations? To what extent does Conkling need the Court to*

[1] George R. Peck, "The March of the Constitution," *Annual Report of the American Bar Association* 23 (1900): 274.

*depart from the* Slaughter-House Cases *(1873)? Why might the inclusion of corporations be consistent with the historical purposes of the Fourteenth Amendment? Would the case for including corporations in the constitutional protections be as persuasive if the term "person" had been used to refer only to natural persons prior to the Civil War? Does the logic of Conkling's argument extend the protection of a broader range of liberties for corporations, or only to the protection of corporate property? Must police obtain a warrant before searching or seizing corporate property? Is there a constitutional distinction between a partnership and a corporation? What would be the consequence for railroads if corporations were not protected by the Fourteenth Amendment? Could a state confiscate all the assets of a railroad within its jurisdiction? Could railroads viably operate in an organizational form that could not claim constitutional protection?*

*Roscoe Conkling, Argument in the California Railroad Tax Case* (1883) [2]

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[The county tax excluding mortgage deductions on the value of taxable property owned by railroad companies] is a provision for special and excessive taxation of all the property of certain tax payers. The same property possessed by other owners, though used in the same way, escapes the exception.

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I come now to say that the Southern Pacific Railroad Company and its creditors and stockholders, are among the "persons" protected by the Fourteenth Amendment of the Constitution of the United States.

The effect of this amendment, in its requirement of "due process of law," was to subject the States to the restriction which the Fifth Amendment had, for then seventy-eight years, imposed on the General Government. . . .

In view of this identity of adjudged and historic language, it would seem too late to question the scope of the word "persons," that word having been held, by long construction and consent, to include artificial persons – that word, as it stands in the Fifth Amendment, having been decided again and again, and never the contrary, to include corporations as well as natural persons. . . .

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The Fifth Amendment speaking to Congress and operating without let or hindrance . . . whatever the Fifth Amendment would prohibit Congress from doing in dispensing with due process of law, assuredly the same words in the Fourteenth Amendment, speaking to the States, prohibit the States from doing, in dispensing with due process of law. . . . Put these words [the equal protection clause] in the Fifth Amendment, and consider the right of Congress to enact that, in the District of Columbia, on the same species and value of property, in the same locality, devoted to the same use, clothed with the same attributes, full of the same identity, one man or one corporation shall be assessed twice as much as another. . . . Could such an act of Congress endure the gaze of this court? Would such an act seem less evil to the eye of the law, if it fastened its fangs upon persons, or upon certain persons, *associated or incorporated under a general law*?

The idea prevails – it is found in the opinion of the Court in the *Slaughter House cases* (1873) . . . that the Fourteenth Amendment – nay, I might say all three of the latter amendments, the Thirteenth, Fourteenth, and Fifteenth, were conceived in a single, common purpose, and were struck by the same die; that they gave expression to only one single inspiration. The impression seems to be that the Fourteenth Amendment especially, was brought forth in the form in which it was at last ratified by the States, as one entire whole, beginning and ending as to the first section at least, with protection to the freedman of the South.

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[2] Excerpt taken from Roscoe Conkling, *The California Railroad Tax Case: In the Supreme Court of the United States: County of San Mateo v. Southern Pacific Railroad Co.* (Washington, D.C.: Judd & Detweiler, 1883).

The rights and wrongs of the freedmen, were the chief spur and incentive of the occasion. It may be true . . . that but for these considerations this amendment never would have been suggested. What then? A particular grievance, some startling illustration of a grievance, is commonly the spur of agitation, and of popular or legislative action – sometimes of revolution. . . . But what then? Did the logic of events, did the changes in jurisprudence, did the spirit of the age, did the principles established . . . confine themselves to the little cause, to the particular instance, incident, provocation or failure of justice . . . ? . . . The men who wrought out the Fourteenth Amendment were only breaking the way, not for future ages, but for more intrepid legislators; for aftercomers who would march further and with more fearless stride, because supported by more advanced sentiment, gendered by more revealed necessity. . . .

The historic narrative of the *Slaughter House cases*, omits a great fact, and an ardent sentiment which helped to usher in the Fourteenth Amendment. . . . [N]o doubt the regard for the rights of the freedmen was uppermost in public thought. . . . It is also true that the term "carpet-bagger" had been coined. . . . Hostility to the rights of white men, and to their rights of person, property, and abode, was part of the "very age and body of time."

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At this point, it behooves me to maintain that the Fourteenth Amendment operates upon associations of individuals, that is to say upon *corporations*, as well as upon individuals singularly.

The word used to denote those embraced in the amendment, is "persons." This word, as found in the Constitution, and in other solemn instruments, has by long and constant acceptance, and by multiplied judicial construction, had been held to embrace *artificial* persons as well as *natural* persons. Law-givers and law writers of the highest authority have so fixed immemorially the scope of this term.

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The terms "persons," occupiers," "inhabitants," even "individuals," have each been often held to include corporations, or artificial persons.

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The defendant here, in respect of its property, is in law and in fact but the business style of individual owners united and cooperating in a common understanding, and who, as mere method and convenience, conduct business through a corporate agency. Be it a church, a hospital, a library, a hotel, a mill, a factory, a mine, or a railroad, the property and assets of a corporation belong to no one save the creditors and the shareholders.

Suppose in South Carolina, a society of colored men should incorporate themselves and acquire a hospital . . . ; and this property should, by statute, be confiscated, either by discriminating taxation or otherwise, can it be supposed that the fact of their having formed a corporation, rather than a joint stock company or partnership, would exclude them from the protection of the Fourteenth Amendment? Could such a cramped construction be given to this amendment, even if the rule of its construction restricted its operation to only the cases known or foreseen by those who chose the language?

The constituents of the corporation, the men and the women who composed it, would be the real parties in interest, and the Court would deal with them – not with names, but with things.

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I have sought to convince your honors that the men who framed, the Congress which proposed, and the people who through their Legislatures ratified the Fourteenth Amendment, must have known the meaning and force of the term "persons."

. . . . Let me remind you that the scope and effect of a general provision is never to be ascertained by seeking for the particular cases which the author had in thought at the time the provision was drawn or adopted. The court cannot acquit itself as interpreter and expounder by visiting, if the court could visit, the minds, and thoughts and the hopes and fears and doubts and expectations and anticipations of those who took part in devising the Constitution. The true question, in exploring the meaning of the Fourteenth Amendment, is not, in a given case, whether the framers foresaw that particular case and acted in

reference to it – the inquiry is, does the case fall within the expressed intention of the amendment? All cases compassed by the letter of the language, must be included, unless obviously repugnant or foreign to its spirit and purpose.

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All that wisdom and science in legislation can do, is to establish just principles and laws; this done, every case which afterwards falls within them, is a case for which they were established.

. . . . Those who devised the Fourteenth Amendment wrought in grave sincerity. They may have builded better than they knew.

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They builded, not for a day, but for all time; not for a few, or for a race; but for man. . . .

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*W. W. Finley, "Address before the Nashville Board of Trade"* (1907)[3]

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The Constitution of the country, which is the supreme law, and which should be recognized as the supreme expression of the people's will, says that [state legislation imposing excessively low rates] shall not be done in the same solemn terms that it declares that no individual shall be deprived of his property or his liberty without just compensation or without due process of law. If a law were passed by the legislature, contrary to the Constitution, depriving a man of his liberty, there would be no one, thus deprived, who would not ask the protection of the Constitution – the supreme law – for his liberty, and all men who are lovers of liberty and justice would applaud his actions. Likewise, if a law were passed by the legislature, contrary to the Constitution, taking from a man his house, or interfering with his lawful enjoyment of it, there is no one of our fellow-citizens, thus deprived, who would not ask, through the courts, the protection of the Constitution for his lawful rights, and in this case, too, every good man would applaud his action and would uphold his hand. If, however, there is legislation enacted, contrary to the Constitution, taking from a railway company its property or interfering with its lawful enjoyment of it, and an effort is made by those charged with the responsibility for the property to obtain for it in the courts constitutional protection, there are those who declare that is a defiance of the popular will. . . .

I submit to you, my fellow-citizens, that a legislative enactment, which is contrary to the Constitution, is not an expression of the popular will. Under our system of government, the popular will cannot, and ought not to, express itself, except by constitutional methods. Otherwise it would be the mere temporary caprice of the people – the undigested result of successful agitation – that would be our law in the place of our Constitution. . . . Those who applaud an individual for insisting on his constitutional rights and denounce a railway company for doing the same, must seek to justify themselves upon the principle that those of our fellow-citizens who invest their means in providing transportation for the country must, for some reason, be deprived of the measure of protection of the Constitution and the valid laws of the country. Let me ask you seriously to consider where the means to provide the commerce of the country with proper and adequate facilities is to come from. Would you be willing to invest your money, unless your investment is entitled to legal protection? . . . In a very high and a very important sense it is necessary for the railway manager to insist on this constitutional protection for the interests entrusted to his care. It is incumbent upon him, not only in the interest of the owners of the property, but in the interest of the public, to see that this great system of transportation is made useful and efficient; and he cannot accomplish this high duty unless the company is protected as other forms of investment are. . . .

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[3] Excerpt taken from William W. Finley, *Address of W.W. Finley, President, Southern Railway Company, before the Nashville Board of Trade, at Nashville, Tenn., July 17, 1907* (n.p.: 1907).

. . . . It is the right and duty of the government to protect the buyers of transportation from oppression and wrong. It is no less the right and duty of the government to protect the railways from oppression and wrong and to safeguard the property of those who invest their money in railway property as jealously as the farmer, the miner, or the manufacturer is protected in his property. . . .

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When the carrier has complied fully with the requirements that its charges must not be unreasonable or unjustly discriminatory, it has fulfilled every legal obligation with respect to them, and whatever remains to it as compensation for its service, be it much or little, is its private property, which is entitled to the same protection by the law and by public opinion as is freely accorded to property acquired in other forms of business. To deprive the carrier of any of its rights in connection with its property thus acquired would be clearly confiscatory and in violation of its constitutional rights. I believe that when this subject is thoroughly understood, and the rights of the carriers, as well as the interests of the public, are fully appreciated, we will have no reason to fear legislation in the Southern States that will invade the constitutional rights of the railways and tend to make them less efficient agencies for the building up of Southern prosperity.

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