AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 7: The Republican Era – Individual Rights

Progressive Views of 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 its opinion 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. As the Kansas lawyer and politician F. Dumont Smith contended, both the origins and structure of the Fourteenth Amendment suggest that its protections were meant to apply to "natural persons" not "artificial persons."[1] Progressives were generally critical of the extension of constitutional rights to corporations, but they were less certain about whether such rights had in fact been extended by the Fourteenth Amendment. Conservatives were far more enthusiastic about corporate personhood, claiming that such decisions provided appropriate constitutional protections for business enterprises. The constitutional rights at stake in these debates primarily involved the protection of property.

Seymour D. Thompson fought with the Union Army in the Civil War and died during the presidency of Theodore Roosevelt. He served as the editor of several leading law journals of the late nineteenth century and as a state judge Thompson developed particular expertise in the law of corporations. In this speech to the Kansas State Bar Association, Thompson defended the farm-state Granger laws capping railroad rates and called for further state and federal regulation of corporate business practices. In doing so, he criticized the ways in which the federal judiciary had protected corporations from state regulation, while admitting that corporations enjoyed the same constitutional protections as individuals.

Although Arthur Twining Hadley began his career, like his father, as a tutor in Greek at Yale University, he soon moved into the study of political science and political economy. He became a leading authority on railroad economics before taking up the duties of the presidency of Yale in 1899. During his tenure as president, he helped shape national regulatory policy and joined the boards of directors of two railroads. His lectures at the University of Berlin sought to explain the exceptional protections for property rights and corporations that existed in the United States compared to Europe. But, as Hadley later emphasized, the maintenance of constitutional protections for property and corporations depended on favorable public opinion, and "the intensely democratic America" appeared to "rest satisfied with constitutional provisions regarding property rights."[2]

[1] F. Dumont Smith, "Decisive Battles of Constitutional Law," *American Bar Association Journal* 10 (1924): 509.
[2] Arthur Twining Hadley, *Undercurrents in American Politics* (New Haven: Yale University Press, 1915), 47.

Charles Wallace Collins was a Progressive Alabama lawyer with an active career in the federal government in the early twentieth century, including a stint as the librarian for the U.S. Supreme Court. In later years, he became a key figure in the Dixiecrat revolt against Northern Democratic leadership of the New Deal. In the Progressive era, he was a staunch opponent of the corporations and federal intervention in state economic policymaking. His study of the Fourteenth Amendment concluded that in practice the Amendment had primarily served as a vehicle for corporate obstruction of state regulation, a result that he thought followed naturally from the language and structure of the Amendment and the judicial process. He thought the U.S. Supreme Court had been fairly restrained in its interpretation of the Fourteenth Amendment, but more extreme interpretations were certainly possible. The drafters of the Amendment were (inadvertently) to blame for the empowerment of the corporations. Regarding repeal of the Amendment as impractical, Collins called for a sharp statutory curtailment of federal jurisdiction so that the state judiciaries would serve as the courts of last resort for considering most federal constitutional claims.

Was Collins right to be pessimistic about the implications of the Fourteenth Amendment? Were these critics too realistic about the legal process or not realistic enough? Would they have been justified in calling for the repeal of the Fourteenth Amendment, given the experience with that text to that time? Given their sympathies, why did these reformers not question the legitimacy of corporate personhood under the Fourteenth Amendment? What did they tend to view as the central problem with the state of the law? Why did they focus on this problem? Are there reasons to think that property rights of corporations should be treated differently than (1) other rights that might receive Fourteenth Amendment protection[3] and (2) the property rights of other businesses?

Seymour D. Thompson, "Abuses of Corporate Privileges" (1892)[4]

For many years the question has been addressing itself to the American people, and pressing with more and more earnestness for a decision – whether the corporation is to rule the State, or the State the corporation. Corporations have been multiplying with an accelerated rapidity and invading and appropriating every field of industry. Their promoters have purchased, by bribery and corruption, exclusive privileges from the temporary tenants of legislative power, and judicial casuistry has made these privileges irrepealable and endowed them with immortality. . . . At every step in this baleful progress they have had the aid of the only branch of our national government which is non-elective, which is in no practical sense responsible to the people or to any one for its acts, and which is totally out of touch with the people in its sympathies – the Federal judiciary. . . .

And yet we must have corporations. Like the poor they are always with us, and always will be. The industrial development which has amazed the nations and made our country the prodigy of history could never have been attained without them. . . .

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On the very points of their bayonets [the Union Army] thrust into the constitution a new charter of liberty, the Fourteenth Amendment. In doing that they supposed that they were merely providing a safeguard for the newly emancipated slave, and for the rights of the scattered Union men of the South against hostile and tyrannical majorities. They did not suppose that they were erecting another Federal barrier around corporate oppression and power. But, as was suggested in the argument of a distinguished lawyer before the Supreme Court of the United States, "they builded wiser than they knew." Indeed they did. . . . They ought, then, easily to have foreseen that a court which had already declared that a corporation was a "citizen" [for purposes of diversity jurisdiction in federal courts] would find no difficulty in declaring that it was a "person."

[3] The appropriateness of corporate personhood was often taken for granted by legal commentators, but whether corporations could claim due process protections for "liberty" as well as "property" was the topic of more substantial debate in this period. See, e.g., "Is a Corporation Always Entitled to 'Due Process of Law'?" *Georgetown Law Journal* 26 (1937): 132.

[4] Seymour D. Thompson, "Abuses of Corporate Privileges," *American Law Review* 26 (1892): 169.

But what if it did? The new charter of liberty declared that no State should deprive any *person* of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What if the judicial interpretation should apply this prohibition to the protection to those artificial persons called corporations? Surely no corporation ought to be deprived of life, liberty or property without due process of law, nor ought it to be denied the equal protection of the laws. But that was not the point. There was nothing new in this amendment, except that it turned a provision which had always existed in the Magna Charta, and which was to be found, in some form of expression or other, in the constitution of every State of the Union, into a Federal prohibition against the several States. . . . But surely the new amendment did not intend to make that due process of law which had never been due process of law before.

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But you ask me, what is the drift of this argument? . . . No State ought to recall its own grant duly and properly made. No State ought to deny to an incorporated body of men the equal protection of its laws. No State ought to deprive them of life, liberty or property without due process of law. I grant all this. Every lawyer grants it. Every citizen grants it. No one denies it. But that is not the question. The question is whether the superintendence of corporations shall be taken from the State jurisdiction, and vested entirely, or substantially, in the Federal judicatories [through the expansion of the jurisdiction of the federal courts]. . . .

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Arthur Twining Hadley, "The Constitutional Position of Property in America" (1908)[5]

European observers who study either the specific industrial questions which have come before the American people for their solution, or the general relation between the industrial activity of the Government and that of private individuals, are surprised at a certain weakness of public action in all these matters. . . .

The fact is, that private property in the United States, in spite of all the dangers of unintelligent legislation, is constitutionally in a stronger position, as against the Government and the Government authority, than is the case in any country in Europe. . . .

In the American colonies. . . where the public law of the United States first took its rise, conditions were wholly different [from those in Europe]. People wanted no military chieftain to protect them, no overlord to rule them. Each man was familiar with the use of a gun. . . . There was plenty of land for all – plenty of opportunity for the exercise of labor and the use of capital. That man did the most for society who worked hardest and saved most. Under such circumstances the laws were so framed and interpreted as to give the maximum stimulus to labor and the maximum rights to capital. . . .

At the time, therefore, when the United States separated from England, respect for industrial property rights was a fundamental principle in the law and public opinion of the land. It was natural enough that this should be so at a period when every man either held property or hoped to do so. The strange thing is that this principle should have survived with so little change down to the present day. . . . [T]he adoption of the Constitution of the United States . . . provided for the perpetuation of this state of things [and] made it difficult for public opinion in another and later age, when property holding was less widely distributed, to alter the legal conditions of the earlier period.

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The rights of individual [property] owners against legislative interference were thus most fully protected. But how was it when property was in the hands of the corporations?

Here also the power of control by the Government was weakened and the rights and immunities of the property holders correspondingly strengthened by two events, whose effect upon the modern

[5] Arthur Twining Hadley, "The Constitutional Position of Property in America," *The Independent* (April 16, 1908), 834.

industrial situation may be fairly characterized as fortuitous. One of these was the decision in the celebrated *Dartmouth College* case in 1819; the other was the passage of the Fourteenth Amendment to the Constitution of the United States in 1868.

I call their effect fortuitous, because neither the judges who decided the *Dartmouth College* case nor the legislators who passed the Fourteenth Amendment had any idea how these things would affect the modern industrial situation. The *Dartmouth College* case dealt with an education institution, not with an industrial enterprise. The Fourteenth Amendment was framed to protect the negroes from oppression by the whites, not to protect corporations from oppression by the legislature. . . . Yet the two together have had the effect of placing the modern industrial corporation in an almost impregnable constitutional position.

. . . . Whether the court would have taken so broad a position [as it did in *Dartmouth College*] if the matter had come before it thirty or forty years later, when the abuses of ill-judged industrial charters had become more fully manifest, is not sure; but, having once taken this position and maintained it in a series of decisions, the court could not well recede from it. Inasmuch as many of the corporate charters had an unlimited period to run, the theory that these instruments were contracts binding the State for all time had a very important bearing in limiting the field within which a legislature could regulate the activity of such a body. . . .

Again, by the Fourteenth Amendment . . . every State was forbidden to interfere with the civil rights of any person or to treat different persons in an unequal way. . . . A number of years elapsed before the effect of this amendment upon the constitutional position of railroad and industrial corporations seems to have been fully realized. . . . A corporation . . . under the law of the United States, is entitled to the same immunities as any other person; and, since the charter creating it is a contract, whose obligation cannot be impaired by the one-sided act of the legislature, its constitutional position as a property holder is much stronger than anywhere in Europe.

Under these circumstances, it is evident that large powers and privileges have been constitutionally delegated to private property in general and to corporate private property in particular. I do not mean that property owners, and specifically the owners of corporate property, have more *practical* freedom from interference in the United States than they do in some other countries, notably in England. Probably they do not have as much. But their theoretical position . . . is far stronger in the United States. . . .

When it is said, as it commonly is, that the fundamental division of powers in the modern State is into legislative, executive, and judicial, the student of American institutions may fairly note an exception. The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. The forces of democracy on one side . . . are set over against the forces of property on the other side, with the judiciary as arbiter between them. . . .

This theory of American politics has not often been stated. But it has been universally acted upon. . . . It has had the most fundamental and far-reaching effects upon the policy of the country. To mention but one thing among many, it has allowed the experiment of universal suffrage to be tried under conditions essentially different from those which led to its ruin in Athens or in Rome. The voter was omnipotent – within a limited area. . . . Democracy was complete as far as it went, but constitutionally it was bound to stop short of *social* democracy. . . .

Charles Wallace Collins, "The Fourteenth Amendment and the States" (1912)[6]

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[6] Excerpt taken from Charles Wallace Collins, *The Fourteenth Amendment and the States* (Boston: Little, Brown, and Company, 1912).

The great problems facing the nation when the Fourteenth Amendment was being adopted were social and political rather than economic in the narrower sense of the word. . . . [The Amendment] was a part of the great problem of reconstruction and had for its immediate purpose social and political readjustment in the South according to the theories of the party in power. It was a war amendment in that it attempted to conserve the results of the victory.

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There were no great corporation problems before the nation forty-five years ago. There were, of course, corporations and great activity in railroad building, but these economic movements were then in their infancy. . . .

The actual operation of the Amendment reveals many interesting and startling facts. . . . In 1886, the Supreme Court declared a corporation to be a person within the meaning of the equal protection clause of the Amendment. . . . These cases . . . mark one of the most important developments in our constitutional history. . . . They opened the door for organized capital to contest whatever laws of the State it considered disadvantageous.

It will be noticed that out of six hundred and four opinions handed down under the Amendment, three hundred and twelve have involved a corporation as the principal party. . . . Corporations as parties seeking relief have increased in number until now more than two-thirds of all litigation under the Amendment is instituted on their behalf. On the other hand, questions involving the negro race, although never large, have dwindled down to an average of about one case each year.

Nearly all the important cases under the Amendment are in some way concerned with the question of State regulation of the corporations. During the life of the Amendment there have been fifty-five cases decided adversely to the States. Thirty-nine of these instances of Federal intervention have been in favor of a corporation; that is to say, about seventy-eight percent. . . . It will thus be seen that the Amendment has taken on a new vitality within recent years. It has become a part of the great question of the day, What shall we do with the corporations?

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. . . . Nine times out of ten the decision of the Supreme Court of the United States will be adverse to the corporation seeking relief and in favor of the validity of the State law in question. Nevertheless, the corporation has had the advantage of several years of delay. . . .

This phase of the operation of the Amendment works almost wholly to the benefit of the corporations and individuals of considerable wealth. A poor man cannot afford to claim protection under the Amendment. It is too expensive a process. This situation exists to the embarrassment . . . of the State. . . .

The Fourteenth Amendment in its practical operation gives to the Federal Government no power of control. . . . It does, however, give the Federal Government through the Supreme Court almost unlimited power of intervention. . . . This intervention under the Amendment has a very remarkable effect. The State is checked or restrained along a certain line of activity. The Federal Government is powerless to go any further. Having restrained the State from acting, its authority ceases absolutely. Within the particular sphere of controversy, the State is also rendered powerless. Thus there is created a field in which business operations may be carried on over which neither the Federal Government nor the State can take any affirmative action. This has been fittingly called the Twilight Zone. . . . Beyond the pale of the law there is seen a shadowy realm in which the powers of wealth may move to and fro unhampered by the will of the people.

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Thus we see that the Fourteenth Amendment, although a humanitarian measure in origin and purpose, has been within recent years practically appropriated by the corporations. It was aimed at restraining and checking the powers of wealth and privilege. It was to be a charter of liberty for human rights against property rights. . . . It operates today to protect the rights of property to the detriment of the rights of man. It has become the Magna Charta of accumulated and organized capital.

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The Fourteenth Amendment expressed no new ideals of law and justice. The guarantees of its first section are as old as the Magna Charta. They were embodied in the State constitutions before the original Federal Constitution was adopted. . . . The one new thing about the Amendment in this particular was that it shifted the guarantor from the State to the Federal Government. . . . Whether such a step was then justified need not now be questioned, but whether it is valid for our own day is a matter of present interest.

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. . . . [The Fourteenth Amendment] makes the duty of [the U.S. Supreme Court] to pass judgment upon every form of State activity – legislative, executive, administrative, or judicial – which may be brought into question by any person. It is not required that such a person be a citizen of the State. A foreign corporation comes under this provision. This is carrying Federal supervision to an extreme unthinkable to the founders of our government and is detrimental to the normal development of our people. It is too great an inroad on the police power of the State. Local self-government lies at the very foundation of a free country. The private affairs of a community should be regulated by that community without interference from the Federal Government so long as national interests are not directly affected. . . .

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In conclusion, we ask the question, Does the operation of the Fourteenth Amendment measure up to the American ideal of efficiency? Its adoption set in operation a vast amount of governmental machinery. For forty-three years it has been before the American courts. Its judicial history is an open book. Has the effort been worthwhile? Does it serve to promote the peace and prosperity of the republic? Our study has shown that these questions must be answered in the negative. The amount of governmental activity under the Amendment is too great to justify the small results obtained. . . . Nine persons out of every ten fail to gain the relief sought under the Amendment. This tenth person is usually a corporation, as are also five of the other nine. . . .

It has cost the American people a large amount of time and money to obtain these meager results. It is doubtful whether any good was accomplished. . . .