1

The Climate of Corporate Personhood

James[4] and Tomilea Allison[5]

December 21, 2010

Corporations have no rights under the Constitution or its amendments. However, their constitutional rights as granted by the Supreme Court have multiplied like rabbits since the *Santa Clara* decision in 1886, and the end is not in sight.

The Supreme Court ". . . avoided meeting the constitutional question [of corporate personhood] in the [*Santa Clara*] decision." (Morrison Waite, Chief Justice, U.S. Supreme Court, to his Court Reporter, 1886.) Nevertheless, the Court has repeatedly misused this decision as precedent for bestowing constitutional rights on corporations.

Summary

How the fiction of corporate personhood arose in the 1880s, perhaps based on a deliberate lie about the intent of those who drafted the Fourteenth Amendment. How a Supreme Court adjudicated railroad cases while being showered with major gifts from railroads. How the Court played fast and loose with Court records. How a Court Reporter's notes passed as official Supreme Court opinion. How the Court declared a precedent that wasn't, as the media slept through it all. How the story played out against a background of unregulated speculation, the ensuing Panic of 1873, and fervent class conflict. How the present Court used the very same fiction to renew the subversion of democratic government at the hands of wealthy corporate CEOs. How to put things right.

2

Introduction

The election season of November, 2010, was wracked by a flood of corporate money, the biggest ever seen in American history. The dam broke early that year when the Supreme Court handed down its 5-4 decision in *Citizens United v. Federal Election Commission*. That decision rested on the notion that a corporation, an artificial creature of the government, has the same constitutional rights as a natural born person. Such rights would include freedom of speech, given that corporate money is somehow equivalent to human speech. Here we challenge the legitimacy of these curious notions, as they ignore a preponderance of constitutional case law, and rest on a constitutional precedent both widely and wrongly traced to the Supreme Court decision in *Santa Clara County v. Southern Pacific Railroad Company* (1886).

Historical Background

Our Revolutionary War was in no small part a strike against the arrogance of corporate power. The most famous provocation came from the British East India Company, with its highhanded dumping of goods in fragile colonial markets. No wonder Thomas Jefferson thought so ill of corporations: "I hope we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength, and bid defiance to the laws of our country." (Letter to Tom Logan, Nov. 1816.)

Jefferson notwithstanding, the founders believed that the holders of corporations could help build the new country. Accordingly, they sought a way to enable corporations while keeping their size and political power in check. They considered Federal control, but thought it too apt to foster an American-style East India Company--a privileged arrangement, easily abused, of which they had already seen too much at the hands of the British crown.

At last they decided for local control. They would let the state legislatures handle the chartering and oversight of corporations. Charters would be issued

sparingly, for limited purposes, a limited time, and always in some public interest, never for purely private gain. Accordingly, the holders of corporations pooled their resources to build roads, bridges and canals. They operated wharves and piers, organized fisheries, provided fire insurance, and conducted trade. If they misbehaved or abused their privileges the state legislature could, and sometimes did, revoke their charters and sell the corporate assets. Examples would be a New York turnpike corporation that failed to keep its roads in repair, or an Ohio bank that followed financially unsound practices. The threat was not an empty one. When a charter ran out it could be renewed, but renewal was not automatic. And let it be clear that the word "corporation" does not appear in the Constitution.

Exactly what was a corporation? As conceived by James Madison, John Marshall and other founders, it was an artificial creature of the law, with no other features than its charter said it had. It had special privileges, such as limited liability, to serve special purposes. However, the inherent rights acknowledged in the Constitution were those of natural persons. As for artificial creatures of the law, it made no sense to think of them as exercising such personal rights as freedom of speech, religion or assembly, or the right to keep and bear arms.

Nevertheless, any special privilege was suspect of enabling the rich and powerful to gain more wealth and power. None was more sensitive to the possible threat than President Andrew Jackson, as he showed in his determined attack on the corporate charter of the Second Bank of the United States. The lesson was clear: If special corporate privileges be necessary, then government must regulate corporate behavior with the most scrupulous care.

An early example of the Supreme Court's view is *Bank of Augusta v. Earle* (1839). Here the Court ruled that corporations might be treated as "citizens" in federal court so as to hold them accountable for wrongs, but they were not entitled to the constitutional privileges and immunities of citizens. They could not claim both the special corporate privileges denied to ordinary citizens, such as limited liability, and the constitutional rights of living persons--they could not have their cake and eat it too.

This and many other decisions of that time established a core set of principles:

Corporations are to be treated as mere creatures of state statutory law, not as people within the meaning of the Constitution; they can be sued in federal court, as living citizens would be sued for their wrongs against other living persons; corporations lack the protections the Constitution confers on citizens; and while corporations can invoke certain protective limitations on government interference, government retains the power to regulate corporations--in order to protect citizens and discourage corporate abuse of privileges granted by the state.

The Fourteenth Amendment

After the Civil War the Fourteenth Amendment, passed to guarantee full and equal citizenship to all Americans, used language entirely consonant with *Earle*. As the amendment applied to "All persons born or naturalized in the United States . . . ," it plainly denied its protection to corporations, which can be neither born nor naturalized. The amendment's authors, well acquainted with corporations, made no reference to them. The surrounding debates referred to natural persons, not corporations. And the authors' discussions made it clear that when they said a state would deprive no person of life, liberty, or property without due process of law, and deny no person the equal protection of the law, by "person" they meant human being, both citizen and alien. They did not mean "corporation."

As corporations grew in number and prosperity, their holders began to resent all outside interference and sought to slip the bonds of state government. They sought charters in states with the least restrictive regulations. Delaware soon became the choice for incorporation and continues to be the state where most corporations make their home.

Flush with enormous Civil War profits, the corporate owners of railroads led a powerful legal assault. In the aftermath of the war, railroad lawyers saw their chance in the Fourteenth Amendment, ratified in 1868. As we have seen, Congress framed the amendment to protect freed slaves from abuse by southern legislatures. It was not meant to protect corporate owners from state regulation. Nevertheless, corporate lawyers heard a sweet siren song in its wording.

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

Lawyers thought they recognized a shield custom-made for corporate use. If they could only persuade the courts to declare that corporations are persons, they could evade state control under Fourteenth Amendment protections that any natural person could claim against state laws.

Starting as early as *Paul v. Virginia* (1869), which reaffirmed *Earle,* the Supreme Court again rejected the corporate claim to Fourteenth Amendment protections. Time after time, the claim resurfaced. It came up again in 1872 (*Tomlinson v. Jessup*), when the Court reaffirmed the states' ability to regulate corporations by altering or amending their charters; again in 1878 (the *Sinking Fund Cases*), when the Court saw no constitutional reason a corporation could not be made to set some income aside to meet certain debts; and in 1880 (*Stone v. Mississippi*), when the Court upheld a state's right to ban lotteries.

Santa Clara

The day finally came in 1886, a banner year in the ascent of corporate power. Together with Jefferson, Abraham Lincoln had seen it coming: "As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed." (Letter to Col. William F. Elkins, Nov. 21, 1864.)

A great puzzle for students of the U.S. Supreme Court is its sudden about-face in 1886 on the question of corporate personhood. The landmark decision, it is widely thought, was in *Santa Clara County v. Southern Pacific Railroad Company*.

That was the case cited three years later as a precedent for corporate personhood. It was that precedent that extended to corporations the constitutional protections intended for freed slaves when Congress wrote the Fourteenth Amendment. It was that precedent that enabled the owners of corporations to break free of regulations and acquire the vast economic power with which they now dominate our government, if not American culture itself.

Careful study shows that the Court's opinion in *Santa Clara County v. Southern Pacific Railroad Company* actually contained no such precedent. Indeed, Chief Justice Morrison Remick Waite said at the time that the case had settled no constitutional issues. He had told counsel that the Court wished to hear no arguments about corporate personhood. Unfortunately, he had also said, *obiter dictum*, that all of the Justices thought that corporations were entitled to Fourteenth Amendment personhood protections. Although it was not part of the written opinion, which dealt only with state taxes on railroad fences, the Court Reporter, J. C. Bancroft Davis, took it upon himself to put that unanimous thought into the headnotes. Headnotes function as a handy summary of each case. Thus, a careless lawyer, reading the headnotes in lieu of the full opinion, might well conclude, quite wrongly, that the Court had ruled in favor of corporations on the constitutional issue of corporate personhood.

The corporate "person" was born on May 25, 1886, in this note from Court Reporter J. C. Bancroft Davis: "Dear Chief Justice

I have a memorandum in the California Cases Santa Clara County v Southern Pacific rr co as follows.

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

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

Yours truly

JCB Davis" (Madison Library of Congress, Morrison R. Waite Papers, Box 23, Folder 2.)

Here is Waite's reply. "I think your mem. in the California Railroad Tax cases

expresses with sufficient accuracy what was said before the argument began. I leave it to you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision." (Graham, 1968.)

Given *Santa Clara's* mythical place in history, the substance of the case may seem trivial. It boiled down to a dispute about California's practice of taxing a corporation's property at a higher rate than that imposed on an individual's property. The railroad won the suit on the narrowest of grounds. What the Court actually found, in a unanimous decision written by Harlan, was that the state had acted illegally when it included the fences running beside the tracks. Santa Clara County could not collect from Southern Pacific taxes to which it was not entitled.

But what could possibly explain the Court's about-face in its manifest sentiment about corporate personhood, if not its manifest opinion?

Railroad lawyers pulled some stunning shenanigans in their pursuit of corporate personhood. Most bizarre was the example of Roscoe Conkling--lawyer, Congressman, Senator, two-time Supreme Court nominee, Republican party leader, member of a scandalous marital triangle. Nace (2003) contends that it was Conkling's argument in 1882, in a case similar to *Santa Clara* (*San Mateo County v. Southern Pacific Railroad Company*), that turned the Court in favor of corporate personhood.

Conkling was a surviving member of the Congressional committee that had drafted the Fourteenth Amendment. In the pay of Southern Pacific Railroad, he parlayed that status into the role of an authority on Congressional intent. During his argument he flourished what he called a journal of the drafting committee and claimed that the committee had wavered, draft after draft, between "person" and "citizen," finally choosing "'person" as the word more inclusive of corporations. Conkling's story was plausible, but seemed to go for naught: The Court made no decision, as the case was rendered moot when the railroad paid some of the taxes claimed by San Mateo County.

The flourished journal disappeared after Conkling's Court appearance. It turned up in 1914, but was not closely examined until Howard Jay Graham, a

Stanford law librarian, took a look at it twenty years later (Graham, 1968). What he discovered was that Conkling's plausible argument was a complete fabrication. There had been no switching back and forth between "person" and "citizen." All drafts of the amendment had used the word "person." The Joint Committee on Reconstruction had never meant to protect corporations under the Fourteenth Amendment. But Conkling had certainly earned his $10,000 retainer if, as Nace contends, Conkling's false argument had a residual effect that appeared four years later in the *Santa Clara* headnotes. (In Conkling's day the annual wage of an average worker was about $500.)

The *Santa Clara* decision was enshrined in 1889 when, three years after it was handed down, it was first cited in a majority opinion as a precedent. Because Chief Justice Waite died in 1888, he was not on hand to admonish Associate Justice Stephen J. Field--as he likely would have done--when Field, writing the Court's unanimous opinion about three hogs killed by a train, cited *Santa Clara County v. Southern Pacific Railroad Company* as a precedent for corporate personhood (*Minneapolis & St. Louis Railway Company v. Beckwith* (1889)).

The decision about Beckwith's hogs actually had no bearing on corporate personhood, which Field seems to have thrown in incidentally. The railroad lawyers had challenged Iowa's imposition of punitive damages for harm resulting from railroad negligence, but the Court rejected the challenge: The state's right to impose such damages had been recognized repeatedly for more than a century. Then what are we to think of Field's gratuitous insertion of *Santa Clara* into the case?

Field happened to be a good friend of Southern Pacific Railroad magnate Leland Stanford, as well as an Associate Justice in the Court that adjudicated *Santa Clara County v. Southern Pacific Railroad Company*. As they learn of that connection, modern readers may think the Court more casual in those days about conflict of interest. Be that as it may, Field would have known that the *Santa Clara* opinion had settled no constitutional issues--although, as we show later, he surely wished that it had. But Field was not alone. In 1889, sitting on the Court that pondered Beckwith's three hogs, he shared that guilty knowledge of *Santa Clara's* irrelevance with six fellow veterans of the 1886 Court (Miller, Bradley, Harlan, Matthews, Gray

and Blatchford).

Did they truly believe that a head-noted *obiter dictum* carried the same legal weight as a written Court opinion? If so, how many legal experts of their day would have agreed? No one knows. The Court did not decide that issue until 1906, in *United States v. Detroit Timber and Lumber Co.*, when it dismissed the thought that headnotes carried any legal weight at all. Headnotes were obviously the work of the Court Reporter, and not the Court.[1] (The vote in that decision was 7-2. Curiously, one of the two dissenters was Justice Harlan, a Supreme Court veteran of both *Santa Clara* and *Minneapolis & St. Louis Railway Company v. Beckwith*, each dependent on the legal validity of headnotes. Students of Court psychodynamics, take note.)

Many readers may conclude at this point that nothing further need be said about corporate personhood and the Fourteenth Amendment. Its constitutionality is not settled law, never has been, and ought to be cashiered as a Gilded Age example of corruption, chicanery, and carelessness at the highest judicial level. It is a flagrant error that the U.S. Supreme Court ought to reverse, but probably will not. It is more likely be reversed through constitutional amendment by public reaction to a fresh judicial outrage, another deliberate Supreme Court boost of corporate power. We mean *Citizens United v. Federal Election Commission* (2010). This ruling, in our very own time, threw our elections wide open to the influence of corporate money and gave our nation another shove away from democracy and toward plutocracy, all under the false flag of corporate personhood. If you relish judicial irony you should examine Justice Thomas' defense of the *Citizens United* decision. His defense rests squarely on the constitutional protections that flow from the fiction of corporate personhood (*The New York Times*, Feb. 4, 2010.).

Supremely useful to corporations, corporate personhood is a silly construct with no rational basis in law. It was established through phony legal maneuvers because the Court's best effort could find no rational basis. Waite wanted nothing to do with it in adjudicating *Santa Clara*. Nevertheless, the cultural milieu of the Court can help us understand how it acted as it did in that crucial decade of the 1880s. Until then, settled law held that corporations were so obviously not persons

that it was patently absurd to claim on their behalf any constitutional protection a person might claim. What moved the Court to turn that stance on its head?

In a recent TV program on PBS, Associate Justice Stephen Breyer (a dissenter in *Citizens United*) led us on a tour of today's Supreme Court. He looked the camera straight on and swore that the Court would never issue a conclusion without the support of a carefully reasoned opinion. The Court simply does not issue edicts, he said. He should take a close look at *Santa Clara County v. Southern Pacific Railroad Company*.

Railroad Largess

The 1880s were a momentous decade for the U.S. Supreme Court and its impact on U.S. institutions. In hope of learning more about the judicial culture of the *Santa Clara* decision we visited Washington in June, 2010, where we spent four days in the Madison Library of Congress among the papers of Morrison Waite from the period 1884-1888. One of the first things we learned was how common it was for railroads to provide free services, often quite valuable, to Waite and other judges, even as they adjudicated railroad cases.

It was the iconic Gilded Ager himself, President Grant, who appointed Waite Chief Justice. He was not Grant's first choice. He was Grant's seventh choice, an Ohio lawyer educated at Yale (Phi Beta Kappa, Skull and Bones), with no judicial experience. Hartmann (2002) describes Waite as one who had made a specialty of the defense of railroads and big corporations. He had won national recognition in 1871 as a participant in a successful suit against the British government, worth $15.5 million, for having helped to provide the Confederates with a famous warship, the *Alabama*.

As Chief Justice, Waite soon gained repute as a quick study, honest and industrious to a fault. The Waite Court ran from 1874 to 1888, the year of his sudden death, when the nation's mourning revealed his popularity. We were struck by the number of ordinary citizens who wrote personal letters to Waite in appeal for help or sympathy. They included several widows of Civil War veterans who sought

government pensions as a desperate last resort.

Some of Waite's supplicants were questionable. On March 18, 1885, Henry Newbegin, of the Baltimore & Ohio Railroad Company, wrote to Waite about an opening for Chief Justice of the Supreme Court of Ohio. He wanted Waite to help him secure this position behind the scenes; he did not want to apply or run for the position. But Waite had his scruples: On March 23, 1885, he replied that he wished not to do such a thing. Newbegin responded with a long letter that came down to a denial that he had asked Waite for any favor. (Morrison R. Waite Papers, Box 23, Folder 9.)

Hartmann's impression, based on Waite's Supreme Court record, is that Waite strove to be impartial (Hartmann, 2002, p. 96). Our study of his papers left a less favorable impression. While sitting in judgment of railroad cases, Waite partook quite freely of railroad largess in the form of annual railroad passes for himself and his family. Strive as one might, such favors must harm the appearance of impartiality, if not its substance.[2]

It seemed to be an established custom for railroads, early in January of each year, to send Waite and other luminaries a free pass for that year. When Waite took a long trip, he traveled by rail and often had a private Pullman car at his disposal that would be handed from one railroad company to the next, according to the route. Waite never troubled himself with the mundane details of trip planning or railroad arrangements. He left those to his son, C. C., himself a railroad executive, who always handled the myriad details personally.

This occurred at a time when railroad cases were regular fare on the Supreme Court menu. The Justices, many of them former railroad lawyers, seemed to see no flagrant conflict of interest in their acceptance of railroad favors, but others did. Eventually Congress took a dim view of such amenities, and passed legislation that put a stop to them (the Interstate Commerce Act, approved February 4, 1887). In 1887 the annual rush of railroad greetings and free passes came to a grinding halt. Some examples follow.

In January, 1884, the Chief Justice and his family received annual passes from

two railroads, the Louisville, New Albany and Chicago, and the Wheeling & Lake Erie. (Morrison R. Waite Papers, Box 23, Folders 2 and 4.) The following December Waite received a card for free travel from the Baltimore & Ohio, and a letter from H. L. Bond to say that his car was at the service of the Chief Justice and his family; he would see that everything was arranged to make his journey as comfortable as a railroad could. (Morrison R. Waite Papers, Box 23, Folder 2.)

The favors continued in January, 1885, with an annual pass from Lake Shore & Michigan Southern Railway Company, Cleveland. J. H. Devereaux, President of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad, sent Waite a personal message, enclosing an annual pass on his railroad for 1885, and sending best wishes for the new year. Son C. C. Waite, Vice President of the Cincinnati, Hamilton & Dayton Railroad, arranged for a railroad car for Justice Matthews. (Morrison R. Waite Papers, Box 23, Folder 5.) He also sent his father a long letter about railroad passes and the arrangement of private car transportation between railroads, including transportation by Pullman car. (Morrison R. Waite Papers, Box 23, Folder 4.) Steamship companies chipped in: C. C. wrote to arrange for his father river steamship transportation on the DeBary-Baya Merchants Line. Strings were pulled: C. C. wrote to arrange a meeting between his father and W. O. Hughart, a railroad president. (Morrison R. Waite Papers, Box 23, Folder 5.)

There was more of the same in February. While Waite was in Florida, C. C. offered to arrange a "run" to New Orleans, then Cincinnati. Returns were expected: J. H. Devereaux, President of the Cleveland, Columbus, Cincinnati & Indianapolis Railroad, asked Waite for the bona fides of a person who had come to the attention of Devereaux. (Morrison R. Waite Papers, Box 23, Folder 6.) C. C. made travel arrangements and solicited passes for Waite from two railroads. (Morrison R. Waite Papers, Box 23, Folder 5.)

The following January, 1886, Waite received three more railroad passes from railroads or their law offices. (Morrison R. Waite Papers, Box 24, Folder 10.) In the

same month the Court heard arguments in *Santa Clara County v. Southern Pacific Railroad Company.* The decision came on May 10, 1886.

Ten days after the *Santa Clara* decision, as Chief Justice Waite and his daughter prepared for a trip to Alaska, a letter came to U.S. Senator Joseph N. Dolph, of Oregon. In response to Dolph's request, the Oregon Railway & Navigation Company offered free transportation to Waite and his daughter. (Morrison R. Waite Papers, Box 25, Folder 2.) (Dolph represented this and other railroads during his career.)

It was only a few days later, on May 25, when Court Reporter J. C. Bancroft Davis wrote his query to Waite about the applicability of the Fourteenth Amendment to corporations.

As he arranged the Alaska trip for his father and sister in 1886, C. C. Waite, taking care of passes, had a favorable reply from Central Pacific Railroad Company, San Francisco. The message, dated June 6, bore the words "Southern Pacific" stamped in red. (Morrison R. Waite Papers, Box 25, Folder 5.) On August 18 the Oregon California Railroad wrote to another railroad about passes for the next stage of the trip. (Morrison R. Waite Papers, Box 25, Folder 6.)

Several days later, in the Golden State, Leland Stanford--President of Southern Pacific Railroad, U. S. Senator from California, and former California Governor--arranged for Waite and several California judges to make an excursion to Monterey. In a letter dated September 3, Waite's description of the excursion referred to a private railroad car and abundant Chinese servants everywhere they went. (Morrison R. Waite Papers, Box 25, Folder 10.) On September 15 he noted more railroad travel in California, northeast from San Francisco to Truckee, in the company of many luminaries of law, government and the Mormon Church.

We cannot tote up the exact value of the Waites' free trip to Alaska, but we

can approximate a significant portion from records in the Central Pacific Railroad Photographic History Museum. In 1882 the first class one-way fare from Omaha to San Francisco, half the distance from Washington, D.C., was $100--about 20% of the average annual wage. The steamship fare, cabin class, from San Francisco to Sitka, was $55. Extrapolation places a round-trip cost for two persons at $1,020, or 204% of the average annual wage. The reader may imagine the additional cost of a private Pullman car, which often came with a kitchen, a cook, and one or two servants. We cannot approximate the cost to Leland Stanford of those side trips to Truckee and Monterey.

Lest we sneer at these touches as tawdry Gilded Age practice, let us note their resemblance to corporate largess of our time: executive jet travel, private hunting lodges, sojourns at the Bohemian Grove, and corporate junkets for judges.

The New Year's Railroad Pass tradition came to an end in 1887, the year after *Santa Clara*. We can see its demise in a letter to Waite, dated March 19, 1887, from John Newell, President of the Lake Shore and Michigan Southern Railroad Company.

"My Dear Sir,

By the terms of the Inter-State Commerce Law it is made unlawful for this Co. to permit the use of a pass issued to you after the 4th day of April next.

Will you, therefore, kindly return the same on or before that day?

In accordance with the law, conductors will be instructed to refuse to honor any Interstate passes after the 4th day of April, except such as appear upon their face to have been issued to officers or employees of this or other railroad companies." [Note: This letter was printed, not hand written. "Pass" letters had typically been hand written.] (Morrison R. Waite Papers, Box 26, Folder 8.)

Newell's mention of the "Inter-State Commerce Law" reminds us that the great social pressures of the day were not only corporate; some were populist. It was largely public and agrarian demand that inspired Congress to pass the Interstate Commerce Act of 1887, which made railroads the first industry subject to federal

regulation. But things were probably more complicated than that. The railroad barons were thought to prefer federal regulation to the more restrictive state laws.

Railroads Rise to Power

The railroads had brought much of their disfavor upon themselves. The Civil War had left them wealthy, privately owned, monopolistic in areas they serviced, and with little effective regulation. They set prices, excluded competition, and controlled markets. There was some competition in long-haul routes, but not in short-haul routes. There was price discrimination, with big players getting rebates denied to farmers and other small-volume customers. Waite's papers include several letters from settlers who thought the railroads had taken unfair advantage of them in real estate transactions, felt unprotected by the courts, and asked Waite's help in seeking legal redress.

The 1870s saw political push back from the Granger movement, which had started by providing benefits to isolated rural areas. Later came Granger-controlled legislatures in southern and western states, but state regulators of railroads proved weak or corruptible. Still, the Supreme Court upheld state regulation of grain elevator rates and railroad rates in *Munn v. Illinois* (1877).

At that time the nation was in a deep economic crisis made with the help of railroads. The "panic"--what we would now call the "depression"--of 1873 followed a burst of economic growth driven by rabid speculation in a bubble inflated by huge government subsidies to railroads. The fearsome deflation started with the catastrophic failure of a top banking firm, Jay Cooke & Co. Credit vanished, foreclosures sprang up everywhere, factories and businesses closed. Railroads went bankrupt by the dozen. Wages were cut, but the massive unemployment only grew worse.

In 1877 further wage cuts provoked widespread strikes against the railroads. Reluctant state militia, forced to act as strikebreakers, fought pitched battles with mobs angered all the more by government support of the railroads.

Courts warned the strikers and issued injunctions. Violence in St. Louis,

Chicago, Pittsburgh, Reading, Philadelphia and Baltimore spread to smaller cities and towns. Coal miners struck in sympathy with railroaders.

Mayors sent in the police and encouraged vigilantes to suppress the strikers. President Hayes dispatched federal troops. Strikers cornered militia in rail yards, where they burned buildings, destroyed millions of dollars in railroad equipment, and sabotaged rail operations. Soldiers attacked with rifles and bayonets. Both sides suffered scores of dead and wounded, but the strikers got the worst of it.

Federal troops went from town to town, restoring order as they went. After six weeks the Great Railroad Strike of 1877 was over. The bosses blamed socialists, communists, and immigrants. Labor blamed the bosses, government, and the courts. Labor unions improved their organization and staged more strikes than ever.

There was more bloody conflict out west. The Mussel Slough Tragedy of 1880 involved a land title dispute in California's San Joaquin Valley between settlers and Southern Pacific Railroad. On a farm near Hanford seven died in a gun fight, with casualties on both sides. The details remain uncertain, but the prevailing sentiment inclined to vilify the railroads. So did Frank Norris, in *The Octopus: A Story of California*, his 1901 novel based on Mussel Slough--although his portrayal of a railroad mogul was surprisingly sympathetic.

These and other such terrifying events reflected two major forces in the passionate conflicts of the day, the labor and agrarian movements.

The Knights of Labor started as a small secret society in 1869, and peaked in the 1880s at more than 700,000 members. They denied membership to doctors, lawyers, distillers, bankers, and gamblers as unproductive segments of society. They denied Asians as too willing to work for low wages. They favored an 8-hour work day and abolition of child labor. They wanted to abolish convict contract labor as an exploitation of prisoners in the capitalist quest for cheap labor. They advocated equal pay for equal work, and co-ops. They thought the government should own the railroad and telegraph systems, impose a graduated income tax, and create a public land policy for the benefit of settlers, not speculators.

Membership grew as the Knights won major railroad strikes, but began a sharp decline in 1886. A signal occasion that year was the failure of an important strike

against Jay Gould's railroads. Another was the Haymarket Riot, in which the Knights actually had no involvement. However, the Haymarket Riot happened to coincide with a Knights' strike in Chicago and tarred most unionists, guilty or not, with the horrid brush of anarchism (see Note 2). Troubled too by internal divisions between skilled and unskilled labor, the Knights were soon supplanted in the U.S. by the American Federation of Labor, which rejected radicalism and organized workers by crafts.

Preceded by the Grangers, the biggest agrarian organization, with 750,000 members at its peak, was the National Farmers' Alliance, founded in 1880. Alliance farmers wanted higher commodity prices. They also sought protection from hostile public officials and the capitalistic powers of industry and railroads. They pushed for property tax reform, an income tax, the abolition of free travel passes for public officials, and Congressional regulation of interstate commerce. Their cooperative commodity model was eventually destroyed by commodity brokers. After the Alliance failed, its policies were adopted by the more politically active Populist Party, founded in 1890.

In the midst of this turmoil, the Supreme Court tilted mostly toward the railroads. In 1886, just before *Santa Clara*, the "Wabash Case" barred state control of interstate commerce, overturning *Munn v. Illinois*. However, it paved the way to the creation of the Interstate Commerce Commission by ruling that only the federal government could regulate interstate commerce (*Wabash, St. Louis & Pacific Railway Company v. Illinois* (1886)). Waite was among the three dissenters in that ruling; note that he could not always be counted on the side of the railroads, unlike Justice Field.

The Interstate Commerce Act, supported by both parties, introduced several regulatory reforms. It created the Interstate Commerce Commission to monitor railroads' compliance with new market standards: publication of shipping rates, no price discrimination against small markets, uniform rates for short hauling and long. It required just and reasonable rates and prohibited special rates. It established a five-member Interstate Commerce Commission that became the model for future federal

regulation of private business. The law proved less effective than hoped, but it was a start. And it did put an end to free railroad passes for Supreme Court Justices.

1886 and 1889: Where Were The Media?

In 1886 the *Santa Clara* decision received little notice in the major media of the day, perhaps because it was thought to have settled no great issues. However, it was closely attended by readers of the *Daily Evening Expositor*, a newspaper in Fresno, a small farm community a stone's throw from the Mussel Slough Tragedy only six years before. A letter to the editor in 1884, "To the Farmers of Fresno County," reeks of political strife:

"Let us reason together and judge fairly and dispassionately in which party we most safely put our trust to rid us of the incubus of railroad and other monopolies that are now crushing us down, and taxing us ten times more than the whole government, national, State and county combined, that they may become millionaires, while we are little better than serfs on the land, working for their benefit. Who were the men that went in palace cars to Chicago at railroad expense, pledged to nominate Blaine [for President]? Why, Crocker, Pixley, McClure--the whole delegation, railroad men to the backbone." The writer goes on with a list of railroad men--Huntington, Vanderbilt, Gould, Leland Stanford and Crocker--who were spending big money to elect Blaine. The writer proceeds to excoriate the U.S. Senate for thwarting House legislation meant to protect the people from predatory railroad practices, such as fencing public land. The letter is signed "J. N. A., Dry Creek, August 14, 1884." (Dry Creek was a tiny farm community northeast of Fresno.)

When the *Santa Clara* decision came along, the editor of the *Daily Evening Expositor* informed his readers right away, saying what he thought of the Court and the legislature. In his editorial of May 12, 1886, "IT WAS THE FENCE," he wrote:

"Our first dispatches gave only the fact that the railroad tax cases had been decided, without furnishing the grounds of the decision. Later news showed that

the Court had evaded the main questions at issue, and based its reasons for the decision on technical grounds, or reasons that to the ordinary human seem frivolous. The Court holds that, the assessments cannot be the valid basis for a judgment against the Company. The main point made is that the State Board of Equalization erred in assessing with the roadway, the fences supposed to be built on each side of the road; the value of which was fixed at $300 per mile. The Court holds that this item should have been assessed as improvements and as there was no way to eliminate the illegal assessments from the legal, the whole assessment must fall."

"Justice Field in a separate decision [sic] states his regrets that the Court had not seen fit to consider the Constitutional questions involved. The people generally feel with Justice Field, that the decision should have been made on broader grounds, so that the State might be guided as to the proper steps to take in future."

"The general impression with the leading lawyers is, that there is now known no proper method for assessing the railroads, and that an extra session of the Legislature will have to be called to remedy the defect. And thus is another calamity threatened us. An extra session of the Legislature would be about as great an affliction as the loss of a year's taxes from the railroad people."

It speaks volumes that in the decision itself the editor saw no ruling about corporate personhood. On the contrary, "IT WAS THE FENCE." Not even Justice Field, a tireless advocate of corporate personhood, saw anything in the decision that touched on the personhood issue. Indeed, he regretted having seen no such thing.

The reason none saw it is that it was not there. It did not surface until later, in the headnotes written by Court Reporter J. C. Bancroft Davis, that related the Court's unanimous thoughts about corporate personhood. The *Daily Evening Expositor* made no further reference to *Santa Clara* during the rest of the year.

Also below the media radar, three years later, was Field's citation of *Santa Clara* as precedent (*Minneapolis & St. Louis Railway Company v. Beckwith* (1889)). The only mention we have found was in *The Washington Post*, January 8, 1889.

The *Post* reporter seemed to find it curious that a railroad would take a case about three hogs all the way to the Supreme Court. Why spend thousands to litigate a $24 fine? But note carefully the language used in the *Post* article:

"An Iowa statute provides that if a railroad company fails to pay the damages caused to stock, by reason of non-fencing of its road, within thirty days after claim is made, the company shall pay twice the amount of the value of the stock. The various State and circuit courts sustained the statute. The company appealed on the ground of its unconstitutionality by subjecting the company to a penalty different from that to which other persons are subjected."

Notice how easily the *Post* reporter swallowed that personhood camel: " . . . a penalty different from that to which *other persons* are subjected." (Italics added.)

Owners of corporations had reason to celebrate. With one stroke Field and his colleagues had made the railroad corporation pay that $24 fine, but had also made the corporation a person in that precedential citation o*f Santa Clara*, relevant or not.

The media slept through it all. What little reporting they did managed to miss the point.

And Waite was dead.

You Call That Reporting?

Who was John Chandler Bancroft Davis? Son of a Massachusetts governor and brother of a congressman, he would have been at home among the nation's founders: well bred, well read, well fed, and well wed.

Born in Worcester in 1822, he was educated at Harvard and admitted to the Massachusetts bar. He started his practice in New York City around 1845. When poor health intervened he changed course and began a diplomatic career as Secretary to the U.S. Legation in London, 1849-1852.

He returned to the practice of law in New York City, served the London *Times* as its American correspondent, and in 1857 married Frederica Gore King. Her grandfather, Rufus King, was a signatory of the U.S. Constitution.

In 1868 Davis won election to the New York state legislature. Perhaps more important, in August of that year he became President, Board of Directors, of the Newburgh and New York Railroad Company.

He resumed his rise in foreign service as Assistant Secretary of State, 1869-1871. In 1871 he took a big step up as the American agent for the *Alabama* claims at the Geneva Arbitration Tribunal in Switzerland. As Morrison Waite was one of the three American lawyers, he and Davis worked together on the case that brought Waite national attention. Davis prepared and presented the case, and Waite served as counsel.

Appointed again as Assistant Secretary of State, 1873-1874, Davis was Minister to Germany from 1874-1877, but gravitated to law once more. Judge on the U.S. Court of Claims from 1878-1883, his next appointment became the greatest one of his life, notwithstanding its modest title: Reporter, U.S. Supreme Court, 1883-1902. He died in Washington, D.C., in 1907.

There has been much creative speculation about Davis' reason for his insertion of corporate personhood into his *Santa Clara* headnotes (see Hartmann, 2002). Perhaps it was entirely innocent; perhaps it was somehow complicit with railroad interests. No one knows, but some one might find out. The Library of Congress has a large but little disturbed collection of Davis' papers and correspondence that might reward a close examination.

What we can say for certain is that Waite's papers contained some alarming reports about the accuracy of Supreme Court records. One was dated July 7, 1885, two years after Davis took up his duties as Reporter. From J. E. Briggs, of the Lawyers' Co-operative Publishing Co., the letter concerns his company's reports of Supreme Court decisions. Briggs indicates that the Court had suffered for some years from slipshod reporting of its opinions. One of the clerks involved had complained about discrepancies between the transcripts for which his firm was responsible, and the "reporting" of the Court's opinions, for which another agency was responsible.

Ironically, in less than a year after Briggs' letter Supreme Court Reporter J. C.

Bancroft Davis would write the famous headnote that implied, mistakenly, that the Court had issued an opinion on the question of corporate personhood. If Briggs aimed to improve the accuracy of Court records, he seems to have missed the target. Briggs' letter appears in full as Note 3.

That was not the end of the Waite Court's trouble with records. Waite received an alarming suggestion in a query from the U.S. Senate's Joint Committee on Printing dated March 17, 1888:

"Mr. Chief Justice Waite,

1415 I st. N.W.

Dear Sir: The Committee on printing have under consideration H.R. 1860, an act to amend section 683 of the Revised Statutes. To help the Committee to a better understanding of the subject presented by the proposed amendment, will you be kind enough to communicate your views in writing on the wisdom of the proposed amendment, and what amendments should be made by the Committee to House act.

If it is proper will you also express an opinion on the following suggestion which has been made to the committee: It has been suggested to the committee that the official Reports of the decisions of the Supreme Court of the United States do not contain 250 cases, many [illegible] as shown by citations by the Supreme Court of the U.S. A list of these cases has been filed with the Committee by the publishers of the Lawyer's Edition, published in Rochester, N.Y.

If this be true would it not be desirable to place sets of both the official reports and Lawyer's Edition in the depositories proposed in the act?

According to the best information now in the possession of the Committee there are about ten sets of the Lawyer's Edition in circulation to one of the official edition. Would not the plan suggested be one that would be greatly in the line of convenience to the lawyers of the entire country, as well as to supply the 250 cases not reported in the official reports?

The Committee would be greatly obliged with as full information on these

points as you may find it convenient to give.

With much respect, I am, sir, your ob'd't servant

W. H. Michael,

Clerk of Printing Records."

(Morrison R. Waite Papers, Box 27, Folder 10.)

Waite had no chance to answer the Senate about the 250 cases missing from the official Court reports, as he suddenly died of pneumonia on March 23, 1888.

The Railroad Justice

Stephen Johnson Field was born in Connecticut in 1816, grew up in Massachusetts and was educated at Williams College, where he co-founded Delta Upsilon Fraternity. His father was a Congregational minister, one brother promoted the first transatlantic cable, and another counseled railroad barons Gould and Fisk. He clerked in his brother's law firm and toured Europe in its tumultuous year of 1848. In 1849 he joined the Gold Rush to California. On his third day in Marysville he was elected alcalde, a combination of mayor and justice of the peace. As alcalde he dealt with lynch mobs, knife fights, pistols drawn in court rooms, gold dust currency, and booze-bought elections. He instituted the whipping post in hope of reducing the number of hangings. A domineering hothead, he was right at home.

Field was elected to the state assembly in 1850, failed in a run for the senate, and returned to a successful law practice. Elected to the California Supreme Court in 1857, he soon became chief justice and a leading candidate for the Pacific Court of Appeals when Congress created that new federal court in 1863. California Governor Leland Stanford recommended his good friend Field, whom President Lincoln nominated to the U.S. Supreme Court as an antislavery, free-soil Democrat. Upon Field's confirmation Lincoln appointed him in addition to what became the Ninth Circuit Court (California, Nevada and Oregon). Later Stanford headed Southern Pacific Railroad, founded Stanford University, and made Field a university trustee. And who else but Field, in 1889, would have been assaulted by a former colleague

on the California Supreme Court? Field's body guard, a Deputy U.S. Marshal, killed the assailant. Field served on the Court from 1863 until 1897, two years before his death.

There is no question about Field's role on the Supreme Court as a strong railroad sympathizer. His advocacy often embarrassed his more reticent colleagues. The latter included Waite, annoyed by Field's frequent requests that he, Field, write majority railroad decisions. In 1875 Waite sent him a note of explanation: The majority opinion in *United States v. Union Pacific* should not be written by one known as a personal friend of the railroad lawyers or managers. It would not look right. Waite knew his man. Field had provided railroad counsel with internal Court memoranda. In 1878 the *San Francisco Chronicle* printed letters exchanged among railroad lawyers in discussion of how best to deploy their Justice Field (Nace, 2003).

How did he get that way?

Evidently the older Field differed greatly from the one on the California bench in 1857-1863. Young Field seemed to espouse liberal views. He defended Chinese immigrants. He favored frequent elections as the only real protection against abusive legislation. He applauded the role of law in the restraint of the power of capital. He thought due process was not supposed to thwart taxation as a tool of social policy. But the older Field opposed such positions in the 1870s and 1880s, when he embraced individualism, laissez faire, the rights of property and corporations, and judicial frustration of paternalistic government. He assailed taxation as an assault on property. The erstwhile friend of Chinese immigrants grew anti-Chinese on the Supreme Court and supported Jim Crow in *Plessy v. Ferguson* (1896).

A biographer, Carl Swisher, speculates that the change might have come from Field's aversion to communism and socialism. There was sudden horrific news from Europe, printed in our newspapers with a striking new immediacy, thanks to his brother's transatlantic cable. A shocking example was the spontaneous uprising of the Paris Commune in March, 1871, followed by its bloody suppression. In America, newspaper exaggerations fed an hysterical conservative reaction against Granger and labor movements as conspiratorial threats to property. He had seen similar uprisings in his European tour of 1848. Worse still, the disease seemed to have crossed the

oceans to San Francisco, where he arrived to find a miners' strike in July, 1871. Workers in the Amador mines, seeking in vain a $3 wage and something shorter than a 12-hour day, had stopped the pumps at a cost of $100,000 in property damage. One can only imagine the effect upon Field the jurist as strikers battled the troops sent in to pacify them (Graham, 1968). And there were the Great Railroad Strike of 1877, the Mussel Slough Tragedy of 1880, and the Haymarket Riot of 1886.

Field had company in his advocacy of the Fourteenth Amendment for corporations. A most important companion was his close friend and political supporter, John Norton Pomeroy, a University of California Professor of Municipal Law at Hastings Law College, San Francisco. It was Pomeroy to whom Field had given internal Court memoranda after he had urged his railroad friends to retain Pomeroy's services--which they did, at a very high rate (Nace, 2003, p. 249).

Field's circuit court opinions on corporate personhood had used Pomeroy's briefs. In a brief for the railroads in 1881 Pomeroy argued that its framers had meant the Fourteenth Amendment to protect not only freed slaves, but also the property of all persons, natural or legal. His argument: Once the Court in subsequent cases had extended Fourteenth Amendment protections to Chinese railroad workers, any narrow interpretation was history, and the sky was the limit. We quote Pomeroy: "The Fourteenth Amendment may prove to be the only bulwark and safeguard by which to protect the great railroad systems of the country against the spirit of communism which is everywhere threatening their destruction or confiscation." (Graham, 1968.)

Field found little support for such views in mainstream American law. Still, he pushed them vigorously in dissenting opinions for the Ninth Circuit Court. Detractors called them "Ninth Circuit law." However, his views won favor among business leaders and southerners. Some went so far as to stage a Field Presidential boomlet at the Democratic Convention in 1880. But his Ninth Circuit law caught up with him four years later, when California agrarians and laborers inserted a plank in the state platform "expressly repudiating the Presidential aspirations of Stephen J. Field" (Graham, 1968). Nevertheless, Field continued to peddle his Ninth Circuit law, even as he moved up to the U.S. Supreme Court.

As precedent *Santa Clara* was phony through and through, and Field knew it. But he saw his chance three years later, and took it. We quote his majority opinion in *Minneapolis*: "It is contended by counsel as the basis of his argument, and we admit the soundness of his position, that corporations are persons within the meaning of the clause in question [the Fourteenth Amendment]. It was so held in *Santa Clara County v. Southern Pacific Railroad Co.*, 118 U. S. 394, 118 U. S. 396, . . ." (*Minneapolis & St. Louis Ry. Co. v. Beckwith*, 129 U. S. 26 (1889))**.**

With Waite's death Stephen J. Field hoped to become Chief Justice, but it was not to be. He had made too many enemies. He did manage a final ambition, to outdo John Marshall's record of longevity on the Court, fulfilled at 33 years. But even that was marred by his colleagues' complaint: Senility had impaired his work; he should not have stayed on so long.

After *Santa Clara*

For several years the Court went along with the state regulation of corporations, as if *Santa Clara* had never happened. The pendulum finally swung in the late 1890s, with new judges on the bench and a growing fear that Populist and Progressive reforms against the power of money had become a dangerous assault on capital. The Court reacted with a flurry of decisions typified by *Gulf, Colorado and Santa Fe Railway Company v. Ellis* (1897). There the Court called corporate personhood "well settled," and cited *Santa Clara.* It went on to claim Fourteenth Amendment protections in ruling that a state had violated the equal protection clause with a law that would have made railroads pay attorneys' fees in certain cases. It could hardly be more ironic that one year before, in *Plessy v. Ferguson*, the same Court gutted the equal protection clause as applied to racial minorities (Gans & Kendall, 2010).

The case that gave its name to this era of anti-progressive decisions was *Lochner v. New York* (1905). In a 5-4 decision the Court struck down a state law that limited the number of hours a baker could work (10 hours/day, 60/week). This and similar decisions came with dissenting minority opinions based on well settled law

that affirmed the government's power to regulate corporations in the public interest. The majority opinions were widely seen as distortions of first principles. How could our vast store of constitutional imperatives, established by decades of case law, suddenly compel us to defend corporate property at the expense of individual life and liberty?

Just as the *Lochner* era seemed at or near its end, Warren Harding became president in 1920. He soon reminded the nation of the close link between politics and law when he installed four new Justices and a solid conservative majority. Overnight the new Court revived *Lochner*-like protection of corporate liberty at the expense of the public good. Again there were strong dissents, but the minority views of such Justices as Holmes and Brandeis would not rise to majority until the dawn of a new political era, the New Deal. President Roosevelt, stymied by a hostile judiciary, failed in his threat to enlarge the Court in 1937. However, the same year produced a "spontaneous" shift favorable to New Deal policies when Justice Owen Roberts suddenly joined the four New Deal dissenters (Hughes, Brandeis, Cardozo and Stone). This time the *Lochner* vampire slept for several decades. It was an age of first principles and government regulation to prevent corporate abuse of state-granted privileges.

It too came to an end. The 1970s brought in a flock of federal regulations about clean air and water, pollution, occupational safety, and other matters beneficial to the public. Upset about compliance costs and frightened by the likes of reformer Ralph Nader, corporations sought the advice of Lewis Powell through the auspices of the U.S. Chamber of Commerce. Powell, a corporate lawyer and soon-to-be Supreme Court Justice, advised them to seek recourse in the law. "American business and the enterprise system have been affected as much by courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change." (Nace, 2003, p. 156.)

With Powell on the bench, after confirmation hearings in which he portrayed himself as a moderate, the Court turned right in *First National Bank of Boston v.*

Bellotti (1978). Writing for the majority, Powell opined that a bank had a Fourteenth Amendment right to use its treasury funds to oppose a state referendum for a state income tax. To limit the political speech of a corporation would be to violate the First Amendment, because the latter was meant to protect political speech, whether the speaker was a natural person or a corporation. The important thing was to protect the listener's right to hear a vigorous debate. As far as corporations were concerned, that was what the First Amendment was about.

Powell did not explain why it was not sufficient to protect the free speech of corporate officers as ordinary individuals. He did not explain why my listener's right to receive information should give a corporate director the right to take from shareholders the money needed to send me that information.

The dissenters were strong and clear, but only dissenters. Powell and his four colleagues ignored nearly 200 years of constitutional limits on corporate participation in elections because they chose to do so. However, they did not go all the way: They withheld their blessing from corporate interference in the election of candidates for political office. Referenda were fair game, but candidates taboo.

The Court went back and forth on this issue for several years, until another election installed another conservative president, who turned the Court hard right with two new appointments. The president was George W. Bush; the appointments, John Roberts and Samuel Alito. This new Court headed off toward the U.S. Chamber of Commerce and its own *Lochner* era (Constitutional Accountability Center, 2010). It crossed the line in 2010 with its *Citizens United* decision.

The new era started in the 2008 primary season with a video-on-demand movie against Hillary Clinton. Citizens United was the corporation that planned to release the film. The impediment was the Bipartisan Campaign Reform Act (BCRA), which kept corporations from spending treasury funds on corporate electioneering ads for broadcast shortly before any federal election. In court, Citizens United asked that its anti-Hillary film be exempted as a feature-length movie seen only by those willing to pay. The case made its way to the U.S. Supreme Court.

The Court could have ruled narrowly, as it usually prefers to do, by ruling the

film an exception to the BCRA. However, the majority saw a chance to outdo Powell with a constitutional right to transmute corporate gold into political power.

Dissenter Justice Stevens thought the majority had changed the facts of the case itself so as to make new law. Nevertheless, the majority, including Chief Justice John Roberts, who had seemed so respectful of precedent during his confirmation hearings, went ahead and made new law. They simply denied any radical departure from constitutional case law, and ruled that corporations are associations of citizens entitled to full constitutional protection. Accordingly, campaign laws that target corporations for special treatment violate the First Amendment. Critics saw the ruling as an open door to foreign corporations willing to buy influence in American elections.

For the majority, Justice Kennedy offered four justifications. Gans and Kendall (2010) list and counter each one, as follows:

First: The First Amendment covers freedom of speech, and is not restricted to people or citizens. Counter: As far back as John Marshall and the *Dartmouth* contracts decision, the Court has distinguished people from corporations and permitted special rules for corporate charters. Political speech is uniquely human, and the identity of the speaker has always been relevant: In World War 2 a broadcast to U.S. troops by Tokyo Rose would not have had the same treatment as one by President Roosevelt.

Second: As corporations are associations of citizens, and citizens can spend money on elections, so can corporations. Counter: They are not mere associations of citizens. Government gives them special privileges, such as limited liability and perpetual life, for special advantage in the amassing of wealth. A handful of officers command the corporate ship; the others are investors along for the cruise and a share of the profits.

Third: Unlimited corporate expenditures are a necessary means of protecting the rights of the listeners, the voters. Counter: Corporation officers, as individuals, already have the same freedom to spend as anyone else. In addition, corporations already pump millions of dollars into our elections through corporate PACs (Political Action Committees). As for voters, they have repeatedly expressed their fear that

corporate spending will overpower the voice of the people.

Fourth: Because media corporations have First Amendment protections, so must all corporations. Counter: The First Amendment specifies "the press" for its unique role. For good reason, the press is the only private business with explicit constitutional protection: It has a fiduciary responsibility to the public.

The ruling in *Citizens United v. Federal Election Commission* (2010) appears to be weak in logic and bereft of constitutional tradition. It is Ninth Circuit law, vintage Justice Field. As such, it is nothing new. Perhaps we are fortunate to have seen no more than we have of political decisions, dressed up as law, adopted by some Court majority simply because it is a Court majority. But we have seen it before and may well see it again from the Roberts Court: As we still ban corporations from direct campaign contributions, much good law remains to be undone.

Santa Clara v. Southern Pacific **Today**

And there it sits. It permeates the literature, waiting for rediscovery by every fresh crop of Supreme Court clerks. We mean that counterfeit precedent of corporate personhood, re-minted and passed off as genuine by generation upon generation of constitutional law professors, even now. From a present day authority on constitutional law: "In 1886, in *Santa Clara County v. Southern Pacific Railroad Company*, the Supreme Court held that corporations fell within the protections of the Fourteenth Amendment. The Chief Justice, Morrison Waite, waved off lawyers who would have debated the issue, saying the Court was unanimously of the opinion that 'the Fourteenth Amendment . . . applies to these corporations'." (Friedman, 2009.)

In truth, corporations have no rights under the Constitution or its amendments. However, their constitutional rights as granted by the Supreme Court have multiplied like rabbits since the *Santa Clara* decision in 1886, and the end is not in sight.

In theory, the Court could put things right by treating the precedential use of *Santa Clara* as reversible error. As the Court made and compounded this mess, why

should it not clean it up? Nevertheless, such action by the present Court seems most unlikely. Perhaps it could be prompted to act by a state legislature prepared to pass an amendment to the state constitution that expressly denies to corporations the constitutional protections of the Fourteenth Amendment. Vermont comes to mind.

A citizen initiative, already under way, could move for such an amendment to the U.S. Constitution (see www.movetoamend.org). The Constitution permits, but cannot be said to encourage, this avenue of reform. Article 5 spells out two alternative routes to a proposal. First, Congress shall propose such an amendment when approved by 2/3 of both houses. Alternatively, if 2/3 of the state legislatures apply, Congress shall call a convention to propose amendments. As Congressional campaigns already live on corporate wealth, it will be hard to persuade 2/3 of Congress to vote against a corporate interest so entwined with its own, namely reelection. The second alternative seems no more promising, unless state legislatures be less susceptible than Congress to the corrosive power of corporate wealth. It could all come down to which looms larger in the candidate's imagination, the voter who feels sold out, or the campaign chest.

If Congress or the state legislatures actually proposed such an amendment, the final step would be ratification. Article 5 specifies two alternative routes to ratification, the choice between them left to Congress: ratification by 3/4 of the state legislatures, or ratification by special conventions in 3/4 of the states.

Reformers need to know what a fine job the Constitution does of protecting the Court from the public. We cannot vote its members out, and it is usually too late to take electoral vengeance on the president who appointed or the senators who confirmed them.

Still, in theory they can be removed. According to Article 3, federal judges "shall hold their offices during good behavior." Federal judges thought to have behaved badly can be impeached by the House of Representatives, convicted by the Senate, and consequently removed from office. The event is rare, but not unknown. It has never happened in Supreme Court history, but Samuel Chase came close. Chase was a Federalist Justice who ran afoul of the Jefferson

administration. Impeached by the House in 1804, he was acquitted by the Senate in 1805, and stayed on the Court until his death in 1811.

Those who might like to dock their pay cannot: Article 3 says so. However, it does not forbid a salary freeze, general or selective. Neither does it specify the size of the Court: Franklin D. Roosevelt's attempt to enlarge the Court was perfectly constitutional; the common allusion to "Court packing" is a value judgment.

Finally, citizens might challenge the Court's power to judge the constitutionality of legislative action. It was surely not the Constitution that made the Court supreme. Did it declare itself supreme in a soft seizure of power called *Marbury v. Madison* (1803)? But that is another story.

History shows frequent Court swings between two extremes: judicial limits on the political power of wealth, and a free rein come what may. The Court's embrace of either of those extremes can raise enough opposition to correct the imbalance through a change in the Court's composition or sentiment. We take heart from the Great Depression year of 1937, when one Associate Justice broke the Court's intransigeance toward New Deal policies. Such change is not without cause. We think a better understanding of the story of corporate personhood can help any American to become in his or her own way, large or small, an agent in defense of the republic.

Notes

[1]One can find living law professors who argue in print that headnotes should have precedential value. The rationale seems to be that Supreme Court opinions have become so long-winded and arcane that no one can be expected to read them, and a quick glance at the headnotes ought to be enough for anybody. Nevertheless, *United States v. Detroit Timber & Lumber Co.* (1906) appears to be the last word from the Supreme Court on the precedential value of headnotes. You can find it in

the headnotes to the opinion.

[2]We were also unfavorably impressed with Waite's judicial resolution of the Haymarket affair, which in historical perspective looks more like a police riot than an anarchist provocation.

It began with an anarchist rally at Chicago's Haymarket Square on May 4, 1886, six days before the *Santa Clara* decision. Its outlandish purpose was to advocate the 8-hour work day. At first all was peaceful. Even the mayor attended without incident, and left before the trouble started. Around 10:20 p.m. the police ordered the rally to disperse, then formed up and marched toward the speakers' wagon. A bomb exploded at the police line and killed Officer Degen, whereupon many officers opened fire, and perhaps some workers. The five-minute battle that ensued killed eight policemen and four workers, and wounded many more on each side. Most of the police were hit by friendly fire. It was never discovered who threw the bomb.

Eight anarchists were arrested and charged with Degen's murder. Their trial, which began June 21, took place in an atmosphere, whipped up by the media, of intense public hostility toward the defendants. Although prosecutors failed to connect the defendants with the bombing, remote association was all the jury needed to pronounce all eight guilty. Seven received the death sentence, one a 15-year prison sentence. The result outraged workers, and evoked worldwide protest.

The Illinois governor commuted two of the seven death sentences to life in prison. The case was appealed to the Illinois Supreme Court, which upheld the trial verdict unanimously on September 14, 1887. A petition went to the U.S. Supreme Court, and Waite announced its denial on Nov. 2, 1887.

One of the five committed suicide as he waited on death row; the remaining four were hanged on Nov. 11. According to horrorstricken eyewitness accounts, "strangled" would have been more accurate than "hanged."

The three sent to prison were pardoned by Illinois Governor John Peter Altgeld on June 26, 1893. The electorate, not so forgiving, promptly ended his

political career.

In 1938 the Fair Labor Standards Act made 8 hours the legal work day in the U.S.

[3]"Office, The Lawyers' Co-Operative Publishing Company, Newark, Wayne County, N. Y., July 7th 1885

Hon Morrison R. Waite
Chief Justice, Supreme Court U.S.
Washington D.C.

My Dear Sir:

It is with regret that we trouble you upon the subject of our rereporting the decisions of the Supreme Court, but after much study of the situation and a careful estimate of the consequences, we deem it but justice to yourself as head of the Court, as well as to our own ideas of true reporting to address you personally with the result of our investigations and ask your preference so far as you may deem it proper to give it.

I have already communicated with Mr. Justice Feild [sic] in regard to two certain opinions of the Court delivered by Mr. Justice Davis in 1875 term. In the reporting these opinions were considerably changed from the record while the two dissenting opinions of Mr. J. Field in the same cases were reported verbatim as we find them upon the record. In answer I was advised by Judge F. to communicate with Mr. McKenny the clerk which I did. My question was substantially whether the records in case of discrepancy between them and the opinions as reported would be considered the only authentic version, and I am answered in the affirmative.

I find on further investigation however, by comparison of our copies of opinions taken from the records with the same as reported by Mr. Otto for the years 1875-6 that there are something over twenty cases, the opinions in which are so changed as inevitably to attract attention. In the years 1878-9-80 & '81 comparison shows many similar changes, some very marked.

In order to fortify ourselves against the charge of careless or untruthful reporting, after much discussion, and upon the advice of eminent counsel interested in their use, we came to think our true way was to obtain the clerks certificate to the correctness of our transcripts & print the certifs.

We regret exceedingly the necessity of protecting ourselves and our reputation for truth by such unusual means, but see as yet, no other way.

Our theory of the duties of a voluntary editer [sic], not to say official reporter of such decisions, is, that there should be no assumption of unnecessary responsibility, by the slightest departure from a truthful reproduction of the records.

Mr. Williams and his assistants, of whom I am one, feel that they are in no sense authors, unless it be of the foot notes--and that even their head notes and indexes must be confined as strictly as possible to excerpts from the opinions and furthermore that the statements of facts where written by the Court should stand in the report accredited thereto, and be reported as recorded, only changing to correct palpable slips of the pen or typographical errors.

We of course carefully test every citation of authorities and correct errors in them in both briefs and opinions. Aside from these we have not felt at liberty to undertake any improvements upon the work of the Court in either arrangement or choice of words or otherwise.

Now as to these certificates to opinions which do not seem yet to have been technically truly reported we desire that perfect truthfulness of our work should seem to come as little in conflict with the official reports as possible, at the same time realizing that the permanent and paramount value of our edition will always depend upon the result of a crucial test of its truth. As yet we see no way, in which at a glance to fully vindicate our conscientious reproduction of the records, where discrepancies must appear, but to take the course indicated above and in any event we shall hope to be credited with an earnest desire to more fully establish and perfect the dignity and value of this the most valuable series of decisions of this or any country. We beg to assure you that whatever we do will be done without the slightest wish to detract from the work of others.

Believing that you will appreciate our motives and position and hoping that if

you and your associates should chance to have preference for some other plan, than ours as proposed & if so will find some proper way of indicating it,

We have the honor to remain Sir
Your Obt Servants
J. E. Briggs
Pres. S.C.P.Co. and
Assistant Ed.U.S.S.Ct.Rep"

(Morrison R. Waite Papers, Box 23.)

[4] Professor Emeritus, Psychology, Indiana University.

[5] Mayor, City of Bloomington, Indiana, 1983-1995.

References

Constitutional Accountability Center (2010). A tale of two courts: Comparing corporate rulings by the Roberts and Burger courts. 1200 18th Street, N.W., Suite 1002, Washington, D.C. 20036. www.theusconstitution.org.

Barry Friedman (2009). The story of ex parte Young: Once controversial, now canon. New York University School of Law, New York University Public Law and Legal Theory Working Papers, NELLCO Year 2009. barry.friedman@nyu.edu. (Friedman is Fuchsberg Professor of Law and Vice Dean, New York University School of Law. B.A., University of Chicago, 1978; J.D., Georgetown University Law Center, 1982. His faculty biography calls him a leading authority on constitutional law.)

David H. Gans & Douglas T. Kendall (2010). A capitalist joker: The strange origins, disturbing past and uncertain future of corporate personhood in American law. Constitutional Accountability Center. www.theusconstitution.org.

Howard Jay Graham (1968). *Every man's constitution*. Madison, Wisconsin: State Historical Society of Wisconsin.

Thom Hartmann (2002). *Unequal protection: The rise of corporate dominance and the theft of human rights.* Rodale.

Ted Nace (2003). *Gangs of America*: *The rise of corporate power and the disabling of democracy.* San Francisco: Berrrett-Koehler, 2003.