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Rights Without Obligation:

Corporate Personhood and the Shifting Allocation of Responsibility

in American Constitutional Law, 1873-2010

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ABSTRACT

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Responsibility in American Constitutional Law, 1873-2010**

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The question of what corporations owe the public has never been settled in American law. This thesis argues that the doctrine of corporate personhood has always carried a dual potential: it can function as a mechanism of accountability, making corporations legally imputable and subject to public obligation, or it can function as a platform for constitutional protection, insulating corporations from regulatory interference. What has changed across time is not the concept of corporate personhood itself, but the doctrinal emphasis that courts have placed on it. The central argument of this study is that American courts have repeatedly reoriented the baseline from which regulation must justify itself, swinging a historical pendulum between an understanding of corporations as public-serving institutions bound by obligation and an understanding of corporations as constitutional rights-bearers entitled to resist state interference.

This thesis traces that transformation chronologically, from the post-emancipation period and the drafting of the Fourteenth Amendment through the *Lochner* era, the New Deal, and the modern resurgence of corporate constitutional rights culminating in *Citizens United v. Federal Election Commission* (2010) and the rise of mass tort bankruptcy strategies. Each chapter

examines a moment when the doctrinal balance shifted: how free labor ideology and contract formalism opened space for corporate constitutional claims; how Justice Stephen J. Field's natural-law jurisprudence provided the intellectual architecture for treating corporations as rights-bearing persons; how the *Lochner* era consolidated that architecture while simultaneously redirecting responsibility for industrial harm onto individual workers; how the New Deal recalibrated the relationship between rights and obligation without resolving it; and how the late twentieth century saw a return to rights-maximizing logic, now paired with increasingly sophisticated tools of entity structuring and strategic bankruptcy that allow corporations to invoke constitutional protections while distributing the costs of harmful conduct away from themselves.

The primary sources at the center of this study are Supreme Court and selected lower federal court opinions, read as intellectual-historical texts that reveal how judges conceptualized the corporation and constructed arguments about liberty, property, and regulation. This study also draws on George C. Gorham's contemporaneous account of Justice Field's jurisprudence, archival correspondence from the Collis P. Huntington Papers at Syracuse University, and contemporaneous legal periodicals that document how practitioners understood doctrinal developments as they unfolded. Secondary literature in legal history, constitutional theory, and corporate law provides the interpretive framework throughout.

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Introduction

From the late nineteenth century through the mid-twentieth centuries, men, women, and children were exposed to toxic white lead pigment inside their own homes. Infants chewed on painted window sills. Workers inhaled fine lead dust in factories and on construction sites. Families lived for years in houses where the paint slowly deteriorated into powder. The effects were catastrophic. Lead poisoning causes seizures, organ failure, permanent neurological damage, developmental delay, and in severe cases, death. By the early twentieth century, physicians had already documented its toxicity. By the 1920s and 1930s, industry actors had internal knowledge of the risks. Yet production continued, and the industry publicly minimized the danger, going so far as to publish medical reports discrediting the harms.¹

In 2014, after more than a decade of litigation, a California Superior Court found several lead pigment manufacturers liable for creating a public nuisance, a legal classification that includes "anything which is injurious to health."² The court ordered them to fund a \$1.15 billion remediation program to remove lead paint from homes in affected counties.³ The decision was upheld on appeal in 2017, though the damages were reduced to \$405 million.⁴ In response, the industry supported a ballot initiative in 2018, marketed as the "Healthy Homes and Schools Act," which would have eliminated their liability and shifted the financial burden of remediation to California taxpayers. The measure failed. But the effort itself revealed something else entirely:

¹ Gerald Markowitz and David Rosner, *Deceit and Denial: The Deadly Politics of Industrial Pollution* (Berkeley: University of California Press, 2013), 1-15.

²"Public Nuisance," Wex, Legal Information Institute, Cornell Law School, accessed November 23, 2025, https://www.law.cornell.edu/wex/public_nuisance.

³*People v. Atlantic Richfield Co.*, No. 1-00-CV-788657 (Cal. Super. Ct. Santa Clara Cty. Jan. 7, 2014).

⁴*People v. ConAgra Grocery Products Co.*, 17 Cal. App. 5th 51 (Cal. Ct. App. 2017).

even after judicial findings of responsibility, corporate actors continued to seek structural means to diffuse or relocate the costs of harm.

The story of lead paint is not simply a story of corporate misconduct with devastating consequences. It forces a harder question: how does a legal system define what responsibilities corporations owe to the public? And how has the language and development of corporate "personhood" shaped that answer?

This thesis traces the development of corporate personhood in American law and jurisprudence as a history of shifting allocations of responsibility. Corporate personhood has always carried a dual potential. While it can function as a mechanism of accountability, making corporations legally imputable and subject to duties, it can also function as a platform for constitutional protection, placing corporations as bearers of rights against state regulation. The central argument of this study is that what changes over time is not the existence of corporate personhood itself, but rather the doctrinal emphasis that courts place on it. In some periods, personhood exposes corporations to public obligation. In others, it fortifies them as rights-bearing constitutional actors at the expense of individual rights. It is a reorientation of the threshold from which states require regulation to justify itself.

Recent scholarship has unsettled the older narrative that corporate personhood simply empowered corporations at the expense of regulation. Jared Berkowitz challenges that assumption directly. In his account of the antebellum period, corporate personhood often operated as a liability rather than a shield.⁵ Courts invoked personhood to impose duties, prevent fraud, and ensure that incorporated entities could not evade creditor claims. Personhood made corporations legible as accountable actors. It did not automatically insulate them.

⁵ Jared Berkowitz, *Creature of Capitalism: A Legal History of Corporate Personhood, 1790-1890* (Ph.D. diss., Brandeis University, 2023).

Lyman Johnson's work similarly resists the view that corporate personhood is inherently deregulatory.⁶ Johnson argues that recognition of corporate personhood historically intensified debates over corporate responsibility. If corporations are real actors in law, then they can be morally and politically judged. Johnson's analysis of corporate entity theory shows that the meaning of corporate personhood has always been tied to larger theoretical commitments: whether the corporation is understood as a creature of the state, a real social organism, or a nexus of contracts affects how responsibility is assigned. Johnson argues that modern corporate theory often accepts personhood while diffusing responsibility through contractual fragmentation.

Daniel Lipton's scholarship deepens this point by demonstrating that courts have never adhered consistently to one theory of corporateness. Artificial entity, aggregate, and real entity theories appear opportunistically across doctrinal contexts. Personhood is not a stable metaphysical claim; it is a doctrinal tool. That flexibility explains why corporate constitutional rights could expand without a single theoretical revolution.

Evelyn Atkinson situates the emergence of corporate Fourteenth Amendment litigation within Reconstruction politics.⁷ Her work reveals that corporate constitutional claims were intertwined with racial subordination, labor control, and postwar political economy. Corporate use of equal protection and due process developed within a constitutional framework originally designed to secure the rights of freedpeople. Atkinson argues that expansion of corporate constitutional standing cannot be separated from those debates over citizenship and freedom.

⁶Lyman W. Johnson, "Corporate Responsibility and Corporate Personhood," *Seattle University Law Review* 35 (2012): 1521-1562.

⁷Evelyn Atkinson, "Slaves, Coolies, and Shareholders: Corporations Claim the Fourteenth Amendment," *Journal of the Civil War Era* 10, no. 1 (2020): 54-80.

Elizabeth Pollman focuses on the trajectory of corporate constitutional rights into the modern period.⁸ She shows that early corporate constitutional protections were grounded in property and contract logic, while later expansions into speech and religious liberty raise more difficult questions about doctrinal coherence. Pollman's account highlights the cumulative nature of corporate rights development and the way earlier property-based reasoning provided a foundation for broader claims.

William Novak's work on police power provides the regulatory counterpoint to these studies.⁹ Novak demonstrates that nineteenth-century governance was far more regulatory than later laissez-faire narratives suggest. The police power was once understood as an ordinary and expansive attribute of sovereignty. Its narrowing in the late nineteenth and early twentieth centuries was therefore not a natural development, but a redefinition.

This scholarship, read as a whole, reveals important tensions. Berkowitz and Johnson emphasize that personhood could heighten responsibility rather than simply protecting corporate interests, while Pollman and Lipton demonstrate how doctrinal expansion made corporations increasingly effective rights claimants. Atkinson shows that these developments were deeply intertwined with Reconstruction's racial and economic politics. Novak reminds us that the regulatory state once operated on a broader footing than *Lochner*-era jurisprudence would later permit.

What remains under explored is how these strands interact across time. Corporate personhood scholarship often treats responsibility and rights as separate questions. Police power scholarship reconstructs regulatory authority without fully integrating the simultaneous

⁸Elizabeth Pollman, "Reconceiving Corporate Personhood," *Utah Law Review* (2011): 1620-1670.

⁹ William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996).

expansion of corporate constitutionalization. *Lochner* scholarship debates whether the liberty of contract doctrine was divergent from or consistent with earlier constitutional traditions, but less often connects that debate to corporate entity theory. By tracing these developments together, this study argues that corporate personhood is best understood as a shifting site of allocation: at different moments, courts emphasize its capacity to impose obligation or its capacity to protect autonomy. The pendulum does not swing because personhood itself changes all that much. It swings because courts redefine the baseline from which regulation must justify itself.

This thesis builds on that body of work while extending it forward in time. Rather than isolating one era, it traces how courts gradually reoriented corporate personhood toward constitutional liberty during the late nineteenth and early twentieth centuries, through the New Deal recalibration, and into the modern period's renewed expansion of corporate constitutional rights. At each stage, the same tension recurs: personhood can bind corporations to public obligation or shield them from it. This study insists on keeping both dimensions in view simultaneously, because the relationship between them is the central analytical problem.

The primary sources at the center of this study are judicial opinions of the Supreme Court and selected lower federal courts, spanning from the *Slaughter-House Cases* (1873) through *Citizens United v. Federal Election Commission* (2010). These opinions are read not only as legal holdings but as texts that reveal how judges conceptualized the corporation, constructed arguments about liberty and regulation, and positioned corporate actors within the constitutional order. This study also draws on two categories of primary source that illuminate the social and institutional context in which those opinions were produced. First, George C. Gorham's *Some Account of the Work of Stephen J. Field* (1881) with its introductory sketch by John Norton Pomeroy offers a contemporaneous account of Field's constitutional method and the ideological

commitments that shaped it. Second, archival correspondence from the Collis P. Huntington Papers at Syracuse University, including letters between Central Pacific Railroad associates and corporate agents, reveals how railroad interests understood and sought to influence legal and political outcomes during the critical period in which corporate constitutional doctrine was being formed. Where relevant, the study also draws on legal periodicals and law review commentary published during the periods under examination, which provide evidence of how contemporaries understood the doctrinal developments as they unfolded. Secondary literature in legal history, constitutional theory, and corporate law provides the interpretive framework throughout.

In the Field era and the *Lochner* period, corporate litigants increasingly invoked the Fourteenth Amendment to challenge regulation and secure constitutional protections. Liberty was defined, both by the courts and by the broader public, in economic terms. Police power did not disappear entirely, but it was reconceived as a boundary that required heightened justification against a background presumption of protected economic activity. Corporations did not cease to bear responsibilities, but doctrinal emphasis shifted decidedly toward protecting property and contract as constitutional norms.

The New Deal did not erase the powers afforded through corporate personhood. Instead, it recalibrated the relationship between rights and regulation. Courts accepted broader exercises of police power, upheld labor protections, and legitimized collective bargaining through unions. Corporate rights persisted, but they coexisted with an expanded understanding of corporate responsibility to workers and the public. In this sense, however, the New Deal may be an anomaly, as the late twentieth century witnessed a renewed emphasis on constitutional protections for corporations, from political speech to religious exercise, alongside the increasing sophistication of entity structuring and liability management strategies.

Understanding contemporary controversies such as *Citizens United v. Federal Election Commission* (2010), in which the Supreme Court held that corporations possess First Amendment rights to spend money in political campaigns, or the use of mass tort bankruptcy to shield corporations from liability, requires more than attention to individual cases alone. It requires tracing the doctrinal lineage that positioned corporations as constitutional actors and awarded them those protections. When courts recognize corporate speech, religious exercise, or due process rights, they draw on a long history of personhood discourse and precedent. When corporations simultaneously deploy limited liability, subsidiary partitioning, or bankruptcy strategies to manage risk, they operate within a legal framework that treats the corporate entity as distinct and insulated in particular ways.

The struggle to determine the appropriate balance between corporate rights and corporate responsibilities has never reached a resolution. Instead, it has continued to shift through the terrain of each era. The *Lochner* era framed the conflict in terms of liberty of contract and the limits of police power. The New Deal reframed it around collective bargaining, economic security, and regulatory authority. The contemporary period often frames it around speech, religious liberty, and market efficiency. But beneath each of these doctrinal battles lies the same underlying question: what does it mean to recognize a corporation as a "person" within a constitutional order?

This study proceeds chronologically. Chapter One examines the establishment of the Fourteenth Amendment and the post-emancipation period, when personhood frequently operated as a source of accountability rather than insulation. Chapter Two traces the transformation of corporate constitutional doctrine in the late nineteenth century, focusing on the Fourteenth Amendment and the gradual redefinition of economic liberty. Chapter Three analyzes the

Lochner era in depth, situating railroad litigation, labor cases, and corporate constitutional protections within broader theoretical debates about the nature of the corporation. Chapter Four turns to the New Deal, exploring how regulatory power and corporate responsibility were recalibrated without abandoning personhood. The final chapter examines the modern resurgence of corporate constitutional rights and considers how entity structuring and doctrinal developments shape contemporary struggles over accountability.

The history of corporate personhood is therefore not a story of a doctrine suddenly invented in *Santa Clara*, nor is it a straight line from Reconstruction to *Citizens United*. It is a history of competing visions of corporateness and of recurring debates over who bears the costs of economic activity. The lead paint litigation that opened this introduction is one episode in that longer story. It serves as an example of what is at stake when courts answer these questions. But the doctrinal environment in which such disputes unfold was constructed across more than a century of constitutional interpretation. To understand why corporate actors can invoke constitutional protections while simultaneously diffusing responsibility, one must look backward, to the moments when courts redefined what corporate personhood meant and what it was for.

Chapter One

Reconstructing Personhood Before Doctrine: The Fourteenth Amendment and Post-Emancipation Constitutional Thought

The Fourteenth Amendment and the Problem of Constitutional Language

The Fourteenth Amendment opens with a sweeping declaration: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States."¹⁰ It then prohibits states from abridging the privileges or immunities of citizens, depriving "any person of life, liberty, or property, without due process of law," or denying "any person...the equal protection of the laws."¹¹ The language looks straightforward. In practice, it was anything but. In the decades after ratification, courts struggled to define what counted as a "person," what "liberty" protected, and what "property" required. Those were not abstract questions. They were disputes produced by the challenges of emancipation, racial hierarchy, and a rapidly changing economy.

The Fourteenth Amendment was ratified on July 9, 1868, as part of the broader program of Radical Reconstruction. It was written in response to the abolition of slavery, not merely its end as an institution, but the effort to define what freedom would mean in law and practice. Historian Eric Foner emphasizes that the postwar period turned on "a profound debate over the meaning of freedom."¹² Abolition removed the legal status of property from human beings. Emancipation was the political and social process of determining what would replace it. The

¹⁰U.S. Const. amend. XIV, §1.

¹¹ U.S. Const. amend. XIV, §1.

¹² Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863–1877* (New York: Harper & Row, 1988), xxv–xxvi.

Fourteenth Amendment was an answer to that second, harder question. Its architects, most notably Congressman John A. Bingham of Ohio and Senator Jacob Howard of Michigan, understood the Amendment as a protection for formerly enslaved people and other vulnerable groups against state-sponsored racial hierarchy. The debates over ratification focused on the condition of freedpeople, civil rights in the former Confederate states, and the power of states to discriminate by race.

The Amendment's language, however, was deliberately broad. It neither listed a closed set of rights nor defined its core terms. That breadth created flexibility, but it also created room for interpretation. Constitutional historian Howard Gillman argues that the Fourteenth Amendment entered American law as an "open-textured" provision whose content would be built through litigation rather than fixed at ratification.¹³ Courts would have to decide what the Amendment's guarantees meant in practice, case by case. Judges had to give meaning to "liberty" and "equal protection" while deciding concrete disputes about labor, property, and regulation.

This interpretive space mattered for an additional reason. The text draws a distinction between citizenship and personhood. The first sentence defines citizenship, but the Due Process and Equal Protection Clauses protect "any person." The Amendment does not specify whether personhood tracks political membership, moral status, or legal capacity. Gillman's larger point is that Reconstruction constitutionalism created new possibilities without supplying clear limits.¹⁴ Courts would have to decide which claims fell inside the Amendment's protective sphere and which did not. That openness, created in response to one historical emergency, would later be exploited in contexts its framers never contemplated.

¹³ Howard Gillman, *The Constitution Besieged* (Durham: Duke University Press, 1993), 33–36.

¹⁴ Gillman, *The Constitution Besieged*, 40–44.

The postwar economy complicated these questions further. The decades after the Civil War saw industrial growth, wage labor expansion, and the rise of large enterprises. Legal categories like liberty and property were being applied to new social realities. Legal historian Morton J. Horwitz describes this period as one in which courts increasingly treated economic relations as matters of neutral legal principle rather than relationships shaped by unequal power.¹⁵ That shift mattered for Fourteenth Amendment interpretation, pushing courts toward formal categories of labor and contract and away from social conditions, especially when the dispute involved economic regulation.

This chapter begins from that instability. The Fourteenth Amendment promised universal protection, but its meaning depended on how courts defined personhood, liberty, and equality in the years after emancipation. The Amendment could be read narrowly as a response to slavery and racial oppression. It could also be read more broadly as a general protection for liberty and property against state interference. The rest of the chapter shows how early courts tested those possibilities, and how constitutional personhood began to take shape before it hardened into doctrine.

Emancipation, Free Labor, and the Reordering of Citizenship

The uncertainty surrounding the Fourteenth Amendment cannot be separated from emancipation itself. Slavery ended, but the legal meaning of freedom did not arrive fully formed. Reconstruction forced Americans to confront what it would mean to live in a society without slavery and what rights and protections would define that society, particularly for the formerly enslaved. Foner emphasizes that emancipation opened a sustained struggle over freedom's

¹⁵ Morton J. Horwitz, *The Transformation of American Law, 1870–1960* (Cambridge: Harvard University Press, 1992), 65–72.

meaning. Reconstruction, in his account, was driven by disputes about whether freedom meant only the end of ownership or also required protections that could make freedom real in practice.¹⁶ That debate shaped constitutional conflict at every level, from federal policy to local governance to judicial interpretation.

For Americans after the Civil War, the task of conceptualizing and redefining freedom involved multiple competing frameworks. Free labor ideology was the dominant one in legal and political culture, with contracts becoming a "dominant metaphor for social relations and the very symbol of freedom."¹⁷ Within this framework, one dimension of freedom was the right to own one's own labor and thus the liberty to contract one's wages, a replacement, in some sense, for land ownership as a marker of full citizenship under the older republican tradition. The freedom to contract was not simply a legal technicality; it carried moral weight as the antithesis of slavery, which had denied enslaved people any claim over their own bodies, labor, or contracts. But freedom itself had many dimensions. The formerly enslaved also sought land ownership, freedom from physical violence, and civic recognition that went beyond formal contractual capacity. Free labor ideology prevailed as the dominant legal framework nonetheless, in part because it offered a vocabulary that reconciled universal freedom with the persistence of economic inequality.

While this idea dominated public and legal discourse, it did not do so without contradiction. Foner notes that free labor language promised equal opportunity through formal legal status and market participation, yet he also emphasizes its limits.¹⁸ The rhetoric of free labor often assumed conditions of equality that did not exist. Formerly enslaved people entered

¹⁶ Foner, *Reconstruction*, 198–205.

¹⁷ Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (Cambridge: Cambridge University Press, 1998), Preface, x.

¹⁸ Foner, *Reconstruction*, 70–72.

Reconstruction without land, capital, or security, and freedom defined through contract could not address those structural conditions on its own.

Free labor ideology had taken root well before the war, embedded in Republican Party thought and in the legal culture of the free states. Its dominance in the postwar period shaped how judges read constitutional language. If freedom meant the capacity to sell one's labor, state interference with labor arrangements became describable as a deprivation of liberty, and the Fourteenth Amendment's broad terms made that reading available. Prevailing ideas about what freedom meant shaped how formal legal structures were interpreted and applied, without being codified as statute.

The coercive uses of contractual freedom became apparent almost immediately after the war's end.¹⁹ Southern states enacted Black Codes that used vagrancy laws and apprenticeship statutes to bind formerly enslaved people to labor under conditions that closely resembled slavery. A person deemed "vagrant", meaning without a labor contract, could be arrested and hired out. Sharecropping and debt peonage extended this logic over subsequent decades, developing systems in which indebtedness to landlords and merchants effectively restricted freedom of movement and choice. The law's insistence on formal contractual freedom coexisted with structural conditions that made that freedom thin.

This context shapes the chapters that follow. When courts interpreted "person," "liberty," and "equal protection," they did so within a culture that increasingly treated market participation and contract as central to freedom. That did not determine the future of corporate rights. It did,

however, make it easier to imagine constitutional injury in economic terms, and it made personhood more flexible than a citizenship-centered reading would suggest.

Competing Meanings of "Person" in Early Fourteenth Amendment Litigation

The Fourteenth Amendment's protection of "any person" forced courts to answer a basic question: who is a constitutional person, and what makes someone one?²⁰ Early Fourteenth Amendment cases therefore became sites where personhood was tested rather than assumed.

In the years after Reconstruction, litigants outside the Amendment's most obvious historical subjects brought Fourteenth Amendment claims. Formerly enslaved people were central to the Amendment's purpose, but they were not the only claimants. Immigrants, wage workers, and other marginalized groups challenged laws that restricted their ability to work, contract, and participate in economic life. These cases pushed courts to work out a set of distinctions that the text left open: constitutional protection was not simply a function of citizenship, but of the nature of the right claimed and the type of state action challenged. The cases of this period reveal that personhood, citizenship, and constitutional protection were distinct categories courts had to define in relation to each other.

A revealing example is *In re Tiburcio Parrott* (1880), a California federal circuit case involving a provision of the California Constitution that prohibited corporations from employing Chinese laborers. Chinese immigrants occupied a particularly constrained legal position: the Naturalization Act of 1790 limited naturalized citizenship to "free white" persons, which courts interpreted to exclude the Chinese, meaning that Chinese residents in California could not become citizens regardless of their length of residence or legal conduct. Anti-Chinese sentiment

²⁰U.S. Const. amend. XIV, §1.

in California created sustained pressure to restrict Chinese work and residence. Yet the constitutional reasoning in *Parrott* turned on something more general than racial hostility. The court's reasoning framed the issue through liberty and contract, treating Chinese workers as persons whose ability to labor and contract deserved constitutional protection, not as citizens, but as persons within the territorial jurisdiction.

This was incidentally the same framework the prosecution invoked, pointing to Chinese "coolieism", a system in which Chinese laborers were contracted to pay off their passage to the United States by surrendering a portion of their wages, to argue that Chinese labor was incompatible with free labor and thus should be excluded.²¹ Certain public perceptions, as seen in the *San Francisco Chronicle*, placed blame for this arrangement on the "great corporations," suggesting that all companies who "imported such labor" should be subject to the same penalties as importers of African slaves. As freedom was defined through the comparison between free labor and slavery, the proponents of the anti-Chinese provision argued that Chinese coolieism threatened to "reduce white men to slavlike status," as their own wages would be undercut by comparably cheap Chinese labor.²²

Historian Evelyn Atkinson argues that *Parrott* "made contract, rather than citizenship, the basis of constitutional protection."²³ Contract was the dominant but not exclusive framework: the court drew on equal protection reasoning as well, but contract and labor capacity provided the operative terms of constitutional injury. The harm, in the court's reasoning, was not exclusion from political community or denial of civic membership. It was interference with labor and contract, which directly violated the Fourteenth Amendment's equal protection and due process

²¹Evelyn Atkinson, "Slaves, Coolies, and Shareholders," *Journal of the Civil War Era* 10, no. 1 (2020): 58.

²²Atkinson, "Slaves, Coolies, and Shareholders," 59.

²³Atkinson, "Slaves, Coolies, and Shareholders," 58–60.

clauses. The opinion's language reflects that framing, including its attention to "the right to labor for a living."²⁴ The Ninth Circuit further grounded its holding in a comparison between Chinese laborers and corporate shareholders, ruling that both were entitled to freely contract their own labor. Personhood here is not citizenship. It is legal subjecthood tied to the capacity to work and contract, and the foundation of corporate personhood is laid in this case through a legal logic that aligned Chinese workers and corporate entities as analogous constitutional claimants.

Atkinson's account of continuity across different kinds of Fourteenth Amendment claimants deepens this point substantially. The lawyers who argued Fourteenth Amendment cases for Chinese immigrants were often the same lawyers who later represented corporations, and they relied on "the same constitutional logic of liberty, equality, and non-discrimination."²⁵ This was not incidental. It was a deliberate strategy of constitutional construction: the same attorneys, working across successive cases, built a body of precedent in which constitutional personhood attached to economic function and legal capacity rather than to citizenship or moral standing. When those lawyers later appeared in court representing railroads and other corporations, they did not need to invent new arguments. They transposed the same framework, liberty as freedom from interference with economic activity, onto a new class of litigants. The Fourteenth Amendment's language had been interpreted, in these earlier cases, in ways that made corporations' later constitutional claims not merely plausible but doctrinally prepared.

A similar logic appears in *Yick Wo v. Hopkins* (1886), where the Supreme Court struck down a facially neutral ordinance enforced almost exclusively against Chinese laundry owners. The Court emphasized the universality of the Amendment's protections: its guarantees "are universal in their application, to all persons within the territorial jurisdiction, without regard to

²⁴*In re Tiburcio Parrott*, 1 F. 481, 499 (C.C.D. Cal. 1880).

²⁵Atkinson, "Slaves, Coolies, and Shareholders," 63–65.

any differences of race, of color, or of nationality."²⁶ The Court grounded its holding in unequal enforcement, and the language is notably broad. It confirms that constitutional protection did not depend on citizenship or race. At the same time, it is worth noting what *Yick Wo* did not extend: full citizenship in the richest sense, encompassing suffrage rights, social equality, and political participation, was something that courts and legislatures explicitly denied to Chinese immigrants throughout this period. Constitutional protection in the economic sphere coexisted with exclusion from civic and political life. Personhood could be partial.

Both cases show that early Fourteenth Amendment jurisprudence recognized noncitizens as constitutional persons in meaningful but limited ways. Courts extended protection where state action interfered with contract, work, or equal legal application, while that recognition coexisted with broader systems of exclusion. The Amendment's universal language made this partial recognition possible. Personhood could follow legal capacity rather than political membership, and that doctrinal move would later prove available to corporate litigants as well.

Freedom, Consent, and Contract After Emancipation

The litigation traced in the previous section unfolded within a broader shift in how Americans defined freedom. After emancipation, contract and consent became the central legal markers of liberty, which is why constitutional arguments about personhood so often moved through labor and economic capacity.

Stanley captures the scale of this transformation by treating contracts as more than a technical legal instrument. As she writes, "this is a study, then, of contract as a worldview."²⁷ Contract became a way of imagining social order after slavery, a vocabulary that could describe

²⁶*Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

²⁷ Stanley, *From Bondage to Contract*, Preface, x.

freedom as choice, exchange, and consent. Stanley's key insight is that emancipation changed the opposite of slavery. Freedom came to be expressed less through civic status and more through contract. "The antithesis of slave status," she explains, "came to be expressed less in terms of civic equality than in the language of contract."²⁸ If you owned yourself, you could contract your wages. Wage labor replaced land ownership as the marker of civic and economic independence in the dominant legal culture of the period. That shift reorganized legal attention: it made labor and consent central sites where freedom would be claimed and contested, and it made contract the vocabulary through which formal legal statutes would define liberty.

This contract-centered view of liberty narrowed what law could recognize as coercion. Once labor relations were framed as agreements between parties, courts often treated consent as legally decisive. Stanley shows how contract culture could treat a "freely" made agreement as presumptively fair, even when bargaining power was unequal.²⁹ The presumption allowed law to mark freedom through formal choice while ignoring the economic conditions shaping that choice. Consider the position of an immigrant worker seeking employment from a large industrial enterprise. The worker was formally free to accept or decline any offered contract. But in practice, he had no power to set wages, hours, or safety conditions; he faced competitors for the same job; and the alternative to accepting the offered terms might be destitution. Liberal theorists and classical economists of the period, following what they understood as the laws of nature in economic life, characterized this as a freely negotiated agreement. That agreement imposed the onus of poverty on those earning the least, treating the outcome of structurally unequal negotiations as the product of voluntary choice.

²⁸ Stanley, *From Bondage to Contract*, xi.

²⁹ Stanley, *From Bondage to Contract*, 60–62.

Stanley also emphasizes that contract worked as more than legal doctrine. It worked as a moral language. Contract "became a dominant metaphor for social relations,"³⁰ a way to narrate dependence as voluntary and inequality as exchange. That metaphor helped reconcile universal freedom with unequal reality. If liberty is understood through contract, interference with contract becomes a deprivation of liberty. If equality is understood through formal capacity and neutral legal treatment, regulation is assessed by whether it imposes unequal burdens rather than whether it remedies structural inequality. Stanley's analysis clarifies why Fourteenth Amendment litigation often treated economic interference and discriminatory application as central injuries, and why the constitutional language built up in cases about Chinese laborers and immigrant workers would later prove available to corporate litigants. Corporations were also formal contractors, equally capable of asserting that state interference with their economic activity violated constitutional liberty.

Stanley is clear that this legal imagination was contested. Reformers and workers argued that freedom required more than formal contract. Yet, as she notes, "once freedom was defined as contract, the law was poorly equipped to recognize coercion that operated through economic necessity rather than legal compulsion."³¹ That limitation shaped the kinds of claims courts could hear and the kinds of injuries they could recognize. It would shape constitutional development throughout the period this thesis examines, from the *Lochner* era's constitutionalization of liberty of contract, which we will examine in Chapter Three, to the New Deal's partial recalibration of that framework.

³⁰ Stanley, *From Bondage to Contract*, Preface, x.

³¹ Stanley, *From Bondage to Contract*, 7–9.

Police Power, Regulation, and the Fracturing of Reconstruction Liberty: *The Slaughter-House Cases*

By the early 1870s, courts were forced to confront a problem the Fourteenth Amendment did not solve: how far could states regulate economic life without violating constitutional liberty? Police power was well-established despite lacking formal definition. While the term "police power" grew in use throughout the nineteenth century, it was not defined in Bouvier's Law Dictionary, the standard legal reference of the time, until an 1883 edition.³² Its use was "frequently discussed and often legitimated in the nineteenth century in terms of a law of 'overruling necessity' and 'salus populi,'" meaning the safety or welfare of the people as supreme law.³³ States in the nineteenth century regulated labor, public health, and markets to protect the public welfare. The Tenth Amendment reserved these powers to the states in the constitutional scheme.³⁴ The Fourteenth Amendment, however, introduced new constraints. Courts now had to decide how liberty and equality would interact with regulation.

Gillman argues that this period was shaped by judicial hostility to "partial" or "class" legislation.³⁵ In the Gilded Age legal context, "class legislation" referred to laws that appeared to benefit or burden particular groups, specific occupations, industries, or social classes, rather than applying generally to all persons similarly situated. The concern had roots that predated the Fourteenth Amendment: a long tradition in American constitutional thought held that legitimate law must be general and impartial, not an instrument of faction or special interest. Courts increasingly evaluated laws by asking whether they operated generally and neutrally on persons

³²Stephen R. Miller, "Community Rights and the Municipal Police Power," *Santa Clara Law Review* 55 (2015): 686.

³³William J. Novak, "The American Law of Overruling Necessity," in *States of Exception in American History* (Chicago: University of Chicago Press, 2020), 98.

³⁴U.S. Const. amend. X.

³⁵ Gillman, *The Constitution Besieged*, 59.

"similarly situated", meaning, whether they applied to everyone in comparable circumstances rather than singling out particular actors for special treatment or special burdens.³⁶ Critically, this concern cut in multiple directions. During Reconstruction, Radical Republicans also used the language of class legislation to argue that the Black Codes were illegitimate precisely because they singled out a class of people for discriminatory treatment and denial of legal protection. The concept was available both to protect vulnerable groups from abuse and to challenge regulatory legislation that appeared to burden particular economic actors. The Fourteenth Amendment's open-textured language made both uses possible.

Gillman reads this resistance not as a break from American constitutional tradition but as a continuation of a long-standing commitment to neutral, general law, in which the state could not legitimately favor or burden particular classes of legal actors. That commitment made certain kinds of economic regulation constitutionally vulnerable, especially when a statute appeared to single out specific occupations or groups. A law limiting bakers' hours could be characterized not as a general health measure but as legislation directed at a particular trade, raising the question of whether its singling out of that group was constitutionally permissible.

That tension came into sharp focus in 1872 with the *Slaughter-House Cases*, the Supreme Court's first major interpretation of the Fourteenth Amendment. Louisiana had granted one corporation exclusive rights to operate slaughterhouses in New Orleans, requiring independent butchers to use its facilities. The state defended the law as a health measure, invoking the long-standing authority to regulate unwholesome trades in the public interest. The butchers argued that the monopoly deprived them of the ability to pursue their trade, citing the Fourteenth

³⁶ Gillman, *The Constitution Besieged*, 59.

Amendment's Privileges or Immunities Clause as protecting them from the resulting "involuntary servitude."³⁷

Justice Samuel Miller's majority opinion upheld the statute and narrowed the Fourteenth Amendment significantly. Miller drew a distinction between state and federal citizenship, ruling that the Privileges or Immunities Clause protected only the rights of national citizenship, a narrow category of federally derived rights such as access to federal offices, navigation of navigable waters, and protection on the high seas, and not the broad range of civil rights associated with state citizenship, including the right to pursue a lawful occupation.³⁸ This distinction mattered enormously. By confining the Clause's protections to federal citizenship rights, Miller effectively took the most potent provision of the Amendment off the table as a vehicle for challenging state economic regulation. The right to earn a livelihood in one's chosen calling, which the butchers claimed, was in Miller's view a right of state citizenship, and thus not protected by the Fourteenth Amendment's Privileges or Immunities Clause against state interference.

Miller's concern was federalism. He worried that an expansive reading of the Privileges or Immunities Clause would transform the federal judiciary into a permanent supervisor of state economic and social legislation, fundamentally altering the balance between federal and state authority that the constitutional structure was designed to maintain. He warned that an expansive reading would "radically change the whole theory of the relations of the State and Federal governments to each other."³⁹ Notably, nothing in the congressional debates over the Fourteenth Amendment suggested that the framers imagined it would apply to corporations or to business

³⁷*Slaughter-House Cases*, 83 U.S. 36, 83 (1873).

³⁸The *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 74–79 (1873).

³⁹*Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 78 (1873).

regulation more broadly. The debates focused on the condition of freedpeople, civil rights in the former Confederate states, and the power of states to discriminate by race. The extension of the Amendment to business and corporate claims was a later development, one that Miller's narrowing sought, unsuccessfully, to forestall.

Constitutional scholar Richard L. Aynes argues that Miller's opinion did more than interpret the Amendment, it deliberately constrained it. Aynes explains that Miller "deliberately limited the reach of the Fourteenth Amendment" to prevent it from becoming a broad restraint on state economic regulation.⁴⁰ The identity of the plaintiffs was not accidental; it was, Aynes suggests, a deliberate political strategy. The butchers were white businessmen, not formerly enslaved people. That mattered. The case let Miller argue for a narrow Amendment interpretation without appearing to deny its role in protecting Black freedom. As Aynes notes, it offered Miller space to reject the idea that the Fourteenth Amendment constitutionalized "the right of every citizen to pursue any lawful calling free from all regulation."^{41,42}

Scholars have questioned whether this narrowing reflected the framers' design. Aynes bases his argument on Reconstruction legislative debates and the Civil Rights Act of 1866, where members of Congress such as Bingham repeatedly framed the Amendment as protecting fundamental civil rights. As noted above, Bingham indicated in at least three speeches that he intended the Bill of Rights to be enforceable against the states, and "neither of these spokesmen was contradicted by any other Representative or Senator."⁴³ Aynes emphasizes, however, that the

⁴⁰Richard L. Aynes, "Constricting the Laws of Freedom: Justice Miller and the *Slaughter-House Cases*," *Chicago-Kent Law Review* 70 (1994): 627–630.

⁴¹Aynes, "Constricting the Laws of Freedom," 632–634.

⁴²Michael A. Ross, *Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court During the Civil War Era* (Baton Rouge: Louisiana State University Press, 2003), 201–215.

⁴³Charles Fairman, "What Makes a Great Justice? Mr. Justice Bradley and the Supreme Court, 1870–1892," 30 *B.U. L. Rev.* 49, 77 (1950), quoted in Aynes, "Constricting the Laws of Freedom," 4.

framers did not wish to "establish" new substantive rights; they meant for the Amendment to enforce existing substantive rights already recognized by law.⁴⁴

The *Slaughter-House* dissents show how contested Miller's narrowing was. Justice Joseph P. Bradley rejected the majority's reading of the Privileges or Immunities Clause and insisted that liberty in a free government included "the right of personal security, the right of personal liberty, and the right of private property."⁴⁵ Bradley's dissent should be understood carefully: he was not a Radical Republican, and his later ruling in the Civil Rights Cases (1883) would sharply limit congressional power to protect Black Americans from private discrimination. The distinction between his *Slaughter-House* position and his Civil Rights Cases position lies in the nature of the rights at stake. In *Slaughter-House*, Bradley objected that Miller's ruling limited the substantive (natural) rights that the federal government could force states to recognize to an unreasonably narrow set. In the Civil Rights Cases, he held that Congress could not force recognition of what he called "social rights", rights defined by people in everyday social life rather than by law. The two rulings are consistent within Bradley's own framework, but they reflect a Reconstruction jurisprudence that was unstable even among those who opposed Miller's narrowing. Justice Noah Haynes Swayne offered a different emphasis, describing the Reconstruction Amendments as "a new departure" that placed persons "upon a footing of legal equality" and constrained state authority more deeply than the majority allowed.⁴⁶ Both dissents offered a competing constitutional vision, one that treated occupational freedom and economic participation as central to liberty, but they did so for reasons that were not identical, and that would diverge significantly in subsequent decades.

⁴⁴Aynes, "On Misreading John Bingham and the Fourteenth Amendment," 103 Yale L.J. 57, 73 (1993), cited in Aynes, "Constricting the Laws of Freedom," 2.

⁴⁵*Slaughter-House Cases*, 83 U.S. at 115–116 (Bradley, J., dissenting).

⁴⁶*Slaughter-House Cases*, 83 U.S. at 122–124 (Swayne, J., dissenting).

Aynes also emphasizes that contemporaries criticized Miller's interpretation as a contraction of the Amendment's plain language, specifically its protection of "any person", which Miller effectively narrowed by substituting the language of "citizen," using the distinction between state and national citizenship to limit the Privileges or Immunities Clause.⁴⁷ That criticism matters because it highlights what *Slaughter-House* did not do. The decision narrowed one path, but it did not eliminate alternatives. The dissents remained available as interpretive resources, and the Amendment's universal language continued to invite broader readings.

Slaughter-House therefore marks an incident of doctrinal restraint without doctrinal closure. The Court attempted to contain the Fourteenth Amendment within the slavery-centered narrative. Yet the dissents showed how easily liberty could be read as substantive and economic. The case did not resolve the tension between regulation and constitutional protection. It instead embedded that tension in Fourteenth Amendment interpretation.

Conclusion: Constitutional Openness Without Closure

The Fourteenth Amendment entered constitutional law during a period of deep uncertainty. It was written in response to slavery and emancipation, but its language was universal and abstract. That combination created possibilities and invited conflict. Courts had to decide what liberty, equality, and personhood would mean in a post-slavery society, and they did so in a legal culture increasingly shaped by free labor ideology, contract, market participation, and skepticism of "partial" legislation.

The early case law did not produce a stable theory of personhood. Instead, it produced interpretive experiments. Courts extended protection to noncitizens and racialized laborers in

⁴⁷Aynes, "Constricting the Laws of Freedom," 645; *Slaughter-House Cases*, 83 U.S. 36 (1873).

limited contexts such as *In re Tiburcio Parrott* and *Yick Wo v. Hopkins*, often grounding liberty in contract and equality in neutral legal application. Courts nonetheless preserved broad state police power by treating general regulation as legitimate and by narrowing the Fourteenth Amendment's reach in decisions like *Slaughter-House*. The result was coexistence rather than coherence. Competing visions of constitutional liberty remained plausible within the same text.

The Slaughter-House Cases captured this tension without resolving it. Miller's majority opinion narrowed the Amendment's scope, but the dissents demonstrated how readily its language could support a broader, economic understanding of liberty. The decision institutionalized doctrinal restraint, but it did not foreclose alternative paths. While *Slaughter-House* has never officially been overturned, the door was not closed to the Fourteenth Amendment's eventual extension to corporations and to economic rights more broadly.

This chapter's contribution is therefore not a claim that corporate personhood was inevitable or already present in the Fourteenth Amendment's words. It is a claim about the building tensions of interpretation and the laying of groundwork. The Fourteenth Amendment created a framework in which personhood, liberty, and equality could be reconstructed through interpretation. That reconstruction occurred through incremental choices about what counts as coercion, what counts as injury, and which actors merit constitutional protection.

What remains to be explained is how one interpretive path gained dominance. The Fourteenth Amendment's openness alone does not account for the consolidation of economic liberty doctrine or for the later extension of constitutional protection to corporations. That consolidation required a jurisprudential method capable of translating the Amendment's broad language into durable doctrine, one capable of making generally applicable constitutional protections available to corporate litigants as well as to natural persons. The next chapter turns to

Justice Stephen J. Field, whose dissents, circuit opinions, and constitutional reasoning supplied that method and moved the pendulum decisively toward rights-bearing, market-centered constitutionalism and away from the obligation side of corporate personhood.

Chapter Two

Stephen J. Field, Economic Liberty, and the Reorientation of the Fourteenth Amendment

Stephen J. Field and the Abstraction of Constitutional Personhood

By the early 1870s, Justice Stephen J. Field had emerged as a prominent voice in cases addressing the limits of state power and the meaning of constitutional liberty. This chapter argues that Field did more than any other jurist of his generation to reorient the Fourteenth Amendment away from its Reconstruction origins and toward a broad guarantee of economic liberty. Field fused natural-law ideas with the period's rising free-labor ideology and contract formalism to construct a constitutional language in which economic liberty became the core of individual freedom. In doing so, he laid the intellectual and doctrinal groundwork for treating corporations as "persons" within the meaning of the Amendment, well before the corporate-rights cases of the 1880s and 1890s made that interpretation seem natural.

As established in the previous chapter, the post-emancipation moment is not merely background; it is the conceptual birthplace of corporate personhood. This foundation is necessary to understand why Field consistently extended constitutional protections to economic entities, and why corporations would later benefit from that doctrinal logic. Field did not originate these ideas. His significance lies in the way he consolidated them into a coherent constitutional method and applied that method to the Fourteenth Amendment, producing an increasingly abstract conception of the legal person.

An examination of a contemporaneous account of Field's work helps clarify how this approach was understood at the time. In 1881, George C. Gorham published *Some Account of the*

Work of Stephen J. Field, with an introductory essay by legal theorist John Norton Pomeroy.

Written less than two decades after ratification of the Fourteenth Amendment, the book reflects the intellectual climate of the early Gilded Age, when courts were grappling with industrial expansion and economic consolidation. Pomeroy described Field as a jurist committed to universal principles of justice rather than contingent policy judgments, emphasizing that constitutional rights were recognitions of preexisting liberties rather than grants of legislative favor.

Gorham's authorship was not disinterested, however; as Gorham studied under Field and during the mid-1860s, thanks to Justice Field, he served as clerk of the U.S. circuit court in San Francisco. He became one of eight owners of the Central Pacific Railroad in the 1860s.⁴⁸ As an open supporter of Field and his policies, Gorham's personal interests benefited from Field's abstract conceptual framework regarding legal persons. Central correspondence letters written between Vice President Collis P. Huntington in New York City and his Central Pacific associates in Sacramento, California, provide further confirmation of Field's ideological leanings.⁴⁹ Pacific attorney Edward Bryant Crocker reported on a June 1867 Sacramento nominating convention for the Union Republican Party in which George C. Gorham was chosen as the party's candidate for governor: "Gorham is the man for us. [John] Bidwell would have been controlled by the hue and cry of newspapers against corporations. Gorham knows his friends and will be true to them."⁵⁰ While Field's ideological framework was aligned with popular sentiments of free labor ideology, it is evident that both he and Gorham harbored bias towards advancing corporate interests.

⁴⁸"About the Secretary of the Senate: George C. Gorham, 1868-1879," U.S. Senate, accessed February 12, 2025, <https://www.senate.gov/about/officers-staff/secretary-of-the-senate/gorham-george.htm>.

⁴⁹ Leland K. Wood, *Journalism When the Locomotive Puffs: Corporate Public Relations of the First Transcontinental Railroad Builders, 1863-69* (Ph.D. diss., August 2009), 88.

⁵⁰E. B. Crocker to Huntington, July 10, 1867, Series 1, Box 1, Collis P. Huntington Papers, Special Collections Research Center, Syracuse University Library.

Stephen J. Field served on the Supreme Court from 1863 to 1897, spanning the Civil War, Reconstruction, and the early Gilded Age. Prior to his appointment, he sat on the California Supreme Court, where he developed a jurisprudence skeptical of legislative interference with property and economic activity. By the time Fourteenth Amendment cases reached the Supreme Court, Field had articulated a consistent view: liberty and property were natural rights that existed prior to government, and legislation interfering with those rights demanded constitutional justification.

Justice Field was uniquely poised to translate these ideological shifts into constitutional law. As John Norton Pomeroy described in his introductory sketch to Gorham's *Some Account of the Work of Stephen J. Field*, Field's jurisprudence rested on the premise that rights were grounded in "the great principles of natural justice" rather than in historical accident.⁵¹ Pomeroy and Field both held that certain liberties, especially property and contract, were universal, pre-political, and discoverable by reason. This natural-law framework allowed Field to read the Fourteenth Amendment not as a narrow set of protections for formerly enslaved people, but as a broad guarantee of economic liberty. This constitutional method is visible in cases discussed in Chapter One involving state regulation of occupations and economic activity such as *In re Tiburcio Parrott*. In these disputes, Field framed constitutional questions around the right to pursue lawful economic activity. Rather than asking whether regulation served the public good, he asked whether it imposed arbitrary or unequal restraints on liberty. This shift in emphasis placed the burden of justification on the state and treated regulation as constitutionally suspect by default.

⁵¹ John Norton Pomeroy, in George C. Gorham, *Some Account of the Work of Stephen J. Field, as a Legislator, State Judge, and Judge of the Supreme Court of the United States* (Washington, D.C.: W. H. & O. H. Morrison, 1881), 6-10.

Gorham's later chapters reinforce this point. Field consistently interpreted constitutional "liberty" to include the right to pursue one's calling without arbitrary interference.⁵² He viewed markets as morally significant spaces where individuals exercised their autonomy. To regulate economic life too aggressively was not simply bad policy; it violated the Constitution by undermining natural rights. This worldview helps explain why Field is central to the story of corporate personhood: if constitutional liberty protects economic activity because it expresses human autonomy, then businesses engaged in that activity can plausibly claim constitutional protection.

This natural-law orientation shaped Field's reading of the Fourteenth Amendment's reference to "any person." While other members of the Court emphasized the Amendment's origins in the aftermath of slavery, Field treated its language as deliberately broad. Constitutional protection attached to liberty and property as attributes of personhood, not to particular historical or civic statuses. By defining liberty in economic terms and grounding constitutional meaning in abstract principle, Field loosened the connection between personhood and civic or moral obligation. At this stage, Field did not argue explicitly that corporations were constitutional persons. But his method rendered that conclusion increasingly plausible by treating personhood as a formal legal category defined by rights-bearing capacity.

Redefining Liberty After Reconstruction

The interpretive importance of *The Slaughter-House Cases* lies less in the outcome of the dispute than in the competing definitions of liberty articulated by the Court. Decided in 1873, *Slaughter-House* marked the first sustained effort to interpret the Fourteenth Amendment. The

⁵² Gorham, *Some Account of the Work of Stephen J. Field*, later judicial chapters.

disagreement between the majority and the dissent reflected a broader uncertainty about how liberty would be understood in a post-emancipation constitutional order.

Justice Samuel Miller's majority opinion sought to limit the scope of the Fourteenth Amendment by anchoring it to the specific historical project of Reconstruction. Miller warned that treating the Amendment as a general guarantee of economic liberty would transform the Court into a supervisor of ordinary state legislation governing labor and property. Liberty, in Miller's formulation, remained historically situated and compatible with broad exercises of state police power.

He wrote that the Amendment was not created merely to confer citizenship on formerly enslaved people, but to protect fundamental rights that belonged to all individuals in the nation.⁵³ For Field, these rights included the ability to pursue a lawful occupation on equal terms and to enjoy property without unequal or arbitrary restrictions. By reading the Amendment in this universalist way, Field set the stage for a constitutional doctrine in which economic regulations were subject to strict scrutiny if they appeared to burden some groups more than others.

Field's dissent in *Slaughter-House* also reveals his early development of an anti-class legislation principle.⁵⁴ His reasoning held that if a law singled out one group of people for burdens not placed on others, it violated the basic promise of equal protection. This concept was initially tied to economic discrimination among natural persons, but it soon became a doctrinal tool for corporations that argued they were unfairly burdened by taxes, rate regulations, or licensing schemes.

Field's dissent advanced a different conception. He argued that the Fourteenth Amendment protected fundamental rights inherent in personhood, including the right to pursue a

⁵³*The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 96-97 (1873) (Field, J., dissenting).

⁵⁴*The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 100-101 (1873) (Field, J., dissenting).

lawful calling and to use property without arbitrary restraint. Liberty, in this framework, was not primarily political or civic. It was economic. Field's formulation did not depend on the particular vulnerability of the claimants in *Slaughter-House*. Instead, it rested on a universal conception of rights applicable to all persons capable of economic self-direction.

This redefinition of liberty altered the structure of constitutional analysis. Rather than asking whether legislation served the public good, Field's dissent asked whether it interfered with individual rights. Regulation became constitutionally relevant not because of its purpose, but because of its effect on liberty. In Gorham's later account, this move reflected Field's belief that constitutional law existed to protect fundamental rights "independently of all governments," rather than to ratify legislative judgments about public welfare.

Slaughter-House did not resolve this tension. The majority prevailed, and the Amendment's scope was formally limited. Yet Field's dissent articulated a conception of liberty that would endure. By defining liberty as economic self-direction and detaching it from historical context, Field supplied a constitutional vocabulary capable of extending beyond Reconstruction and into new domains of economic life.

Free Labor, Public Good, and the Rise of Contract Formalism

To understand why Field saw economic regulation as constitutionally suspect, understanding why Field saw economic regulation as constitutionally suspect requires examining how the meaning of "public good" shifted in the decades after emancipation. Harry Scheiber's essay "Economic Liberty and the Modern State" shows that nineteenth-century Americans did not initially view regulation as inherently opposed to economic activity.⁵⁵ Tariffs, banking laws,

⁵⁵Harry N. Scheiber, "Economic Liberty and the Modern State," in *The State and Freedom of Contract*, ed. Harry N. Scheiber (Stanford: Stanford University Press, 1998), 49-50.

canal subsidies, and early transportation policies were designed to promote national development and, in their eyes, the public good. The state's power to regulate emerged from a belief that collective welfare sometimes required shaping economic relationships.

But after the Civil War, as Scheiber explains, the definition of public good began to shift toward a classical-liberal understanding: unregulated markets were themselves a public good because they unleashed economic energy.⁵⁶ As the economy expanded and industrialized, some jurists came to believe that market freedom, not state intervention, was the primary engine of national prosperity. This shift had profound consequences for constitutional interpretation. If markets were self-correcting, and if contract rights were the foundation of individual liberty, then regulations aimed at protecting workers or restraining corporations could easily be recast as violations of constitutional rights. Field internalized this logic. His writings show repeated skepticism of state claims that economic regulations served the public good.⁵⁷ Instead, he saw such regulation as imposing unequal burdens on particular actors, precisely the kind of "class legislation" the Fourteenth Amendment prohibited.

This intellectual moment produced what scholars call contract formalism: the idea that courts should enforce contracts strictly as written, without adjusting for inequalities in bargaining power or broader social consequences. In this view, interference with contractual freedom is interference with liberty itself. The Supreme Court would ultimately adopt this principle in *Lochner v. New York* (1905), but Field was one of its earliest and most influential architects.

***Munn v. Illinois* and the Fragility of the Public Interest**

⁵⁶Scheiber, "Economic Liberty and the Modern State," 55-59.

⁵⁷Gorham, *Some Account of the Work of Stephen J. Field*, judicial sections on economic liberty.

If *Slaughter-House* exposed competing definitions of liberty, *Munn v. Illinois* tested how those definitions would operate when regulation was explicitly justified by the public good. Decided in 1877, *Munn* addressed whether a state could regulate the rates charged by private grain warehouses on the ground that such businesses were "affected with a public interest." Chief Justice Morrison Waite's majority opinion upheld the regulation, grounding state authority in long-standing common-law principles. When private property was devoted to a use "in which the public has an interest," Waite argued, it became subject to public control for the common good. Regulation, in this view, was not a violation of liberty but an expression of public obligation.

Field's dissent rejected this framework. He argued that the majority had abandoned the fundamental principle that property rights require strong constitutional protection. In Field's view, the warehouse owners had not surrendered their constitutional rights simply because their business affected the public. He described the majority's interpretation as an unwarranted expansion of the police power that threatened to undermine the liberty and property rights of all economic actors.⁵⁸ If the state could set rates for grain warehouses, Field reasoned, it could later set rates for other businesses that affected the public. Field's dissent included a warning that the decision would lead to an ever-expanding category of "public interest" industries, undermining the economic liberties of individuals.

Scheiber's work helps situate Field's disagreement in a broader intellectual context. During this period, Americans were divided over whether the public good was best served through market regulation or market freedom.⁵⁹ For Waite and the majority, regulation could be justified as long as it served the public interest. For Field, the public interest was preserved by protecting individual rights against state intervention. Scheiber notes that this tension between

⁵⁸*Munn v. Illinois*, 94 U.S. 113, 136-137 (1877) (Field, J., dissenting).

⁵⁹Scheiber, "Economic Liberty and the Modern State," 52-55.

public good and economic liberty intensified throughout the post-emancipation period, providing an ideological foundation for the rise of contract formalism.⁶⁰

Gorham described *Munn* as a case in which Field sought to preserve the "inviolability of private property" against expanding assertions of governmental authority. Read together with Field's earlier dissents, *Munn* illustrates a further consolidation of economic liberty as a constitutional principle. Regulation grounded in public necessity remained permissible, but it increasingly appeared as an exception to a baseline of individual right rather than as an ordinary expression of state power.

Field's dissent in *Munn* is significant because it demonstrates how he merged natural law reasoning with classical liberal concerns about regulation.⁶¹ His insistence on limiting the police power gave corporations a powerful argument in later decades. If a regulation could be framed as discriminatory or arbitrary, it could be challenged as unconstitutional under the Fourteenth Amendment. Field did not explicitly apply his dissent to corporations in *Munn*, but his reasoning made it easier for corporate lawyers to argue that burdens placed on corporations violated equal protection or due process.

Responsibility as a Conceptual Absence

The corporate rights line raises an important question about responsibility. As corporations gained expanding constitutional rights, the Court did not develop a parallel doctrine of corporate obligations to the public. Johnson observes that corporate personhood historically involved a balance between rights and responsibilities, but the late nineteenth century focused heavily on rights.⁶² Field's jurisprudence contributed to this imbalance by framing constitutional

⁶⁰Scheiber, "Economic Liberty and the Modern State," 56-59.

⁶¹ Gorham, *Some Account of the Work of Stephen J. Field*, judicial chapters on economic liberty.

⁶²Johnson, "Corporate Responsibility and Corporate Personhood," 1523-1524.

liberty primarily as freedom from regulation rather than as part of a broader relationship between corporations and the public.

The Field era is marked by a striking shift in constitutional attention. The very Amendment written to secure the rights of formerly enslaved people was quickly drawn into disputes involving railroads, mining corporations, and large business enterprises. As scholars have shown, more than half of the Fourteenth Amendment cases in the late nineteenth century involved corporate litigants.⁶³ This does not mean that the Court abandoned racial minorities entirely; cases like *Yick Wo* demonstrate that the Court sometimes protected the rights of vulnerable individuals. Anti-Chinese sentiment and the establishment of Jim Crow increasingly limited the Court's use of the Amendment for their protection, however. This numerical imbalance reveals a deeper transformation in the purpose and meaning of the Amendment, and exemplifies that corporations were accepted as "persons" under the law.

Field's constitutional method contributed to this transformation. By universalizing the Fourteenth Amendment and treating economic liberty as a fundamental right, he opened the door to claims that corporate property was entitled to the same protection as individual property. His repeated warnings against class legislation positioned corporations as potential victims of discriminatory state action. The conceptual tools he developed for protecting marginalized individuals could be adopted by corporate lawyers seeking to resist regulation.

The consequences for citizens were significant. When economic liberty became the center of constitutional liberty, the space for democratic regulation narrowed. The state's ability to respond to industrial harms became constrained by doctrines that treated regulation as a threat to constitutional rights. The idea that corporations could challenge regulations under the

⁶³Atkinson, "Slaves, Coolies, and Shareholders," 183.

Fourteenth Amendment altered the balance between private power and public authority. Citizens who sought protections through labor laws or regulatory policies found their claims limited by a constitutional framework that privileged market freedom.

A Rights-Centered Constitutional Identity and the Pendulum of Regulation

By the late 1870s, Fourteenth Amendment doctrine reflected a shift in constitutional reasoning that altered the balance between public authority and private rights. Earlier regulatory traditions remained available, but they increasingly operated within a constitutional framework that treated economic liberty as a primary right. This moment marks a movement in a recurring historical pendulum: the shifting allocation of power and obligation between the state and economic actors.

Field's dissents in *Slaughter-House* and *Munn* reframed constitutional analysis around rights rather than regulation. Liberty was identified with the free use of property and pursuit of economic activity. Regulation became a potential constitutional violation requiring justification. As Gorham emphasized, Field understood constitutional protection to attach to the individual "as such," independent of regulatory context. This abstraction rendered personhood increasingly formal.

Under this rights-centered framework, courts evaluated economic injury in terms of interference with liberty rather than in terms of public necessity. Public interest reasoning persisted, but it no longer structured constitutional analysis. As the pendulum shifted, the burden of explanation moved with it: the state was required to justify regulation against constitutional liberty, while the rights-holder's obligations to the public remained largely unarticulated.

Although these cases did not yet center on corporate litigants, the constitutional identity they produced was not confined to natural persons. A conception of liberty grounded in

economic capacity allowed constitutional rights to attach to any entity capable of owning property and engaging in lawful enterprise. The Fourteenth Amendment's reference to "any person," read through this lens, functioned as a constitutional category defined by capacity rather than by social role.

This movement did not eliminate regulation, nor did it permanently resolve the relationship between the state and economic actors. The pendulum would swing again in later periods. At this stage, however, the direction of movement was clear. Constitutional doctrine increasingly privileged rights over regulation, reshaping expectations of what the state owed economic actors and what those actors owed the public.

Setting the Stage for Corporate "Persons"

The foundations laid in this period, natural-law universalism, free labor ideology, classical-liberal public-good reasoning, and contract formalism, made it possible for corporations to later claim constitutional rights. If "all persons" were entitled to due process and equal protection; if economic liberty was central to personhood; and if businesses were understood as associations of property-owning individuals, then it was only a matter of time before corporations began to argue that the Fourteenth Amendment applied to them.

As Elizabeth Pollman notes, nineteenth-century jurists increasingly framed corporations as "associations of natural persons" whose property was "the property of the individual corporators."⁶⁴ This aggregate theory of the corporation meant that any legal burden on a corporation was effectively a burden on the individuals behind it. Field did not fully articulate this theory himself, but his expansive constitutional language made it plausible. By grounding

⁶⁴Elizabeth Pollman, "Reconceiving Corporate Personhood," *Utah Law Review* (2011): 1620-1623.

constitutional liberty in economic rights, and by reading "person" broadly, Field provided the doctrinal soil in which corporate personhood would soon grow.

Conclusion

This chapter shows how Fourteenth Amendment doctrine began to shift away from regulation and toward rights during the Field era. Field's jurisprudence did not eliminate police power, but it restructured constitutional analysis so that economic liberty became the starting point and regulation required justification. Personhood was increasingly treated as a formal, rights-bearing category rather than as a status grounded in public obligation.

This shift did not complete the transformation of constitutional doctrine. Regulatory authority remained intact, and public-interest reasoning continued to appear in the case law. What changed was the balance. The constitutional presumption moved toward liberty and against regulation. Police power survived, but on weaker footing.

The *Lochner* era marks the point at which this shift becomes dominant. The next chapter examines how courts converted the Field-era redefinition of liberty into a jurisprudence that sharply constrained the regulatory power of the state.

Chapter Three

The Corporate Constitution and the Problem of Responsibility in the *Lochner* Era

Part I: Corporate Personhood and the Constitutional Order

Introduction

By the closing decades of the nineteenth century, the United States had ceased debating corporate existence in the language of public purpose and chartered obligation. It was instead confronting industrial capitalism in constitutional terms. Railroads dominated interstate commerce, factories restructured labor on an unprecedented scale, and workplace accidents became endemic features of industrial life. Legislatures responded with rate regulation, liability statutes, and labor laws. Corporations responded in court. The result was a transformation of American constitutional law that stretched from roughly the 1890s through 1937, when New Deal legislation and judicial recalibration introduced a fundamental shift in doctrine.

That period takes its name from *Lochner v. New York* (1905), a Supreme Court decision that struck down a New York law limiting bakers to sixty hours of work per week. The Court held that the law unconstitutionally interfered with the "liberty of contract", the right of employers and employees to freely negotiate the terms of their labor, which it treated as a protected liberty under the Fourteenth Amendment. The case became shorthand for an era in which the Supreme Court treated economic liberty and property as constitutional baselines, meaning it treated them as the default protected position under the Constitution, so that any government regulation that interfered with them had to justify itself as falling within the police power, rather than the other way around. Instead of government authority being presumed valid

and rights-claimants having to prove interference, the burden flipped: the state had to prove its regulation was legitimate against a background presumption favoring economic freedom. From *Lochner* through the New Deal, the Court narrowed the scope of state police power within a broader political and intellectual climate that favored laissez-faire economic principles and limited state intervention in the market.

This chapter argues that the *Lochner* era did not merely narrow police power in abstract constitutional theory. It consolidated a rights-centered constitutional order in which corporations increasingly grounded their legal identity in constitutional protections rather than in public-serving justification. The two central doctrinal developments of the period, the recognition of corporations as constitutional "persons" under the Fourteenth Amendment, and the constitutionalization of liberty of contract in labor disputes, were not separate conversations happening in parallel. They were mutually reinforcing. As liberty came to be defined in economic terms, corporations, which were organized around property and contract, fit naturally within the category of constitutional persons. And as corporate personhood was consolidated through the property cases of the 1880s, it gave corporations the constitutional standing to invoke liberty of contract protections against regulation. Each development strengthened the other.

The significance of this shift becomes clearest when responsibility is placed at the center of analysis. This chapter also marks a shift in both geography and era from the preceding chapters. Chapters One and Two moved through the post-emancipation South and the constitutional arguments that emerged in the decade after the Civil War, when freedpeople, immigrants, and workers challenged state restrictions in a legal culture shaped by Reconstruction. Chapter Three moves forward in time and northward in focus: to the industrial

cities, steel mills, railroad yards, and federal courtrooms of the Gilded Age and Progressive Era, where a different set of conflicts was producing a different kind of constitutional transformation. In the industrial North, courts treated employers and employees as formally equal contractors even as workplace injury doctrines and economic necessity made bargaining power deeply unequal. Meanwhile, corporations gained increasing access to constitutional protections against state interference. To understand how this happened, and what it meant for workers, for the public, and for the constitutional order, requires tracing four interrelated developments, each of which moved the pendulum toward a rights-centered constitutional identity for corporations: the constitutionalization of railroad regulation; the articulation of corporate personhood under the Fourteenth Amendment; the expansion of liberty-of-contract doctrine culminating in *Lochner*; and the extension of corporate constitutional protections beyond the Fourteenth Amendment.

These developments show how corporations came to find their footing not primarily in chartered purpose, but in constitutional rights. As legal historian William Forbath has argued, the courts' increasingly rights-centered interpretation of the Constitution during this period shaped not only what corporations could claim, but what avenues of reform remained available to those who sought to challenge corporate power.⁶⁵

Railroads and the Constitutionalization of Economic Conflict

To understand how railroad cases transformed American constitutional law, it helps to picture the regulatory landscape of the late nineteenth century. State legislatures across the country had begun passing laws to control railroads: setting maximum rates that railroads could charge for freight and passengers, creating commissions to oversee railroad operations, and

⁶⁵ William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge: Harvard University Press, 1991). Forbath argues that courts' use of injunctions, antitrust law, and constitutional doctrine against labor closed off reform avenues and pushed the labor movement toward radicalism.

passing liability statutes that made railroads responsible for certain categories of harm. The Interstate Commerce Act of 1887 created the first federal regulatory agency, the Interstate Commerce Commission, to address railroad rate discrimination between shippers. These were not minor administrative adjustments. They touched the most powerful and profitable corporations in the country, corporations that had received massive federal land grants and bond subsidies to build their lines. The railroads did not simply lobby against regulation in state capitals. They challenged it in the federal courts, arguing that regulation violated their constitutional rights under the Fourteenth Amendment.

Railroad cases from the 1880s and 1890s reveal a core transformation: regulatory conflict, once resolved primarily through legislative bargaining and state commission proceedings, increasingly migrated into constitutional adjudication in the federal courts, particularly the circuit courts and the Supreme Court of the United States. Railroads were central to this transformation because they sat at the intersection of private enterprise and public necessity. States depended on them economically, feared their power, subsidized their construction, and sought to control their rates. The railroads, in turn, increasingly treated regulation not as an ordinary incident of governance but as a potential constitutional injury.

A clear example of these constitutional stakes appears in *Smyth v. Ames* (1898), a case in which Nebraska railroad companies challenged a state law fixing maximum rates for in-state rail transport. The companies argued that the rates were so low they would deprive the railroads of a fair return on their property, effectively confiscating it without due process. The Supreme Court agreed that while rate-setting for intrastate transportation was "primarily for" the state to determine, the question of whether rates were "so unreasonably low as to deprive the carrier of

its property" could not be conclusively resolved by the legislature without judicial review.⁶⁶ The opinion frames judicial oversight as a constitutional necessity: the federal courts must ensure that state legislation does not destroy the property rights secured by the "supreme law of the land."⁶⁷

This ruling matters for two reasons. First, it placed federal courts at the center of economic governance. Rate regulation, previously a matter for legislatures and state commissions, became a due process question that the judiciary had authority to second-guess. Second, it clarifies why railroad litigation became such a powerful engine of constitutional development. Railroads did not simply resist regulation politically through lobbying; they challenged it constitutionally, forcing courts to decide how to translate economic regulation into the categories of rights and property that the Fourteenth Amendment protected. And they did so at extraordinary scale. The federal circuit courts and the Supreme Court handled hundreds of railroad rate and liability cases in the 1880s and 1890s. The railroad industry, with its national reach, its access to sophisticated legal counsel, and its financial resources, flooded the courts with constitutional challenges. *Reagan v. Farmers' Loan and Trust Co.* (1894), decided four years before *Smyth*, had already held that federal courts could enjoin state railroad commissioners from enforcing confiscatory rates, meaning that even before a final ruling, railroads could obtain court orders blocking regulation from taking effect. The cumulative result was that constitutional adjudication, not legislative deliberation, became the primary arena in which the terms of railroad regulation were actually settled.

This constitutionalization of railroad conflict did not begin with *Smyth*. It built on earlier doctrinal moves that had brought corporations into the Fourteenth Amendment's protected class. The Court made the corporate inclusion principle explicit in *Pembina Consolidated Silver*

⁶⁶*Smyth v. Ames*, 169 U.S. 466, 546 (1898).

⁶⁷*Smyth*, 169 U.S. at 546–47.

Mining Co. v. Pennsylvania (1888). There the Court declared: "under the designation of 'person' there is no doubt that a private corporation is included."⁶⁸ This is worth distinguishing from the famous, and frequently misunderstood, *Santa Clara County v. Southern Pacific Railroad* (1886), where it was the court reporter, Bancroft Davis, who inserted the statement about corporate personhood into the headnote, not the Court itself in its opinion. In *Pembina*, by contrast, the corporate inclusion principle appears in the Court's own reasoning. That distinction matters: *Pembina* supplies the actual doctrinal gateway through which the Fourteenth Amendment's protections against deprivation of property and denial of equal protection flow to private corporations.

The corporate inclusion principle was consolidated in *Minneapolis & St. Louis Railway Co. v. Beckwith* (1889), a railroad liability case. The Court stated that "corporations are persons within the meaning of the clauses in the Fourteenth Amendment concerning the deprivation of property and the equal protection of the laws."⁶⁹ More than a repetition of *Pembina*, *Beckwith* gathers the operative Fourteenth Amendment clauses for corporate litigation: property deprivation and equal protection. Both tools were now available to corporate litigants challenging state regulation.

What makes *Beckwith* especially significant for the pendulum framework running through this thesis is that it simultaneously affirms corporate personhood and affirms police power. Justice Field, writing for the Court, rejected the premise that corporate constitutional rights necessarily entail a narrowed regulatory sphere. The Fourteenth Amendment, he wrote, "does not limit the subjects in relation to which the police power of the State may be exercised

⁶⁸*Pembina Consolidated Silver Mining Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888).

⁶⁹*Minneapolis & St. Louis Railway Co. v. Beckwith*, 129 U.S. 26, 28 (1889).

for the protection of its citizens."⁷⁰ What the Court is constructing here is not a categorical immunity from regulation. It is something more subtle: a balancing framework in which corporate rights and regulatory power coexist, with courts as the arbiters of where the line falls in any given case. Corporations are persons for constitutional purposes, but regulation remains doctrinally legitimate, within limits that courts define and enforce.

This late nineteenth-century shift should not be seen as police power collapsing overnight. It is better described as a shift toward corporate litigants gaining access to the language of constitutional rights, even when police power remained formally broad. In that environment, the central question became not whether states could regulate, but how far regulation could go before it became a constitutional injury. Railroad litigation turned that question into doctrine.

Why Corporations Became Constitutional Persons

The Court's statements in *Pembina* and *Beckwith* did not emerge from nowhere. They drew on older corporate theory but transformed it. The doctrinal question is not only that corporations became constitutional "persons," but why that move became plausible, and what alternative paths existed that courts chose not to take.

Corporate law in the nineteenth century operated through competing frameworks for understanding what a corporation fundamentally was. The artificial entity theory, dominant in early American law, held that corporations were creatures of law, brought into existence by state charter and possessing only the attributes that the state chose to grant them. In *Trustees of Dartmouth College v. Woodward* (1819), Chief Justice John Marshall described a corporation as

⁷⁰*Beckwith*, 129 U.S. at 29.

"an artificial being, invisible, intangible, and existing only in contemplation of law."⁷¹ The implication is not that corporations are natural rights-bearers. The implication is precisely the opposite: corporations are constituted by law, derive their attributes from legal grant, and stand in a relationship of dependency to the state that created them. Against this stood the real entity theory, which treated corporations as genuine social organisms with existence independent of their legal charter, and therefore with natural claims to rights and protections. A third framework, the aggregate theory, treated corporations as mere collections of the natural persons who composed them, deriving constitutional rights from the individual rights of their shareholders. Courts never adhered consistently to any single framework. As Daniel Lipton has shown, artificial entity, aggregate, and real entity theories appeared opportunistically across different doctrinal contexts, depending on which produced the desired result.⁷²

The artificial entity conception historically carried a responsibility-centered expectation. When corporations existed only by state charter, and charters were granted for specific public purposes, corporate legitimacy was tied to what the corporation did for the public. Historian Lyman Johnson highlights an 1809 Virginia decision capturing this logic: charters "ought never to be passed, but in consideration of services to be rendered to the public."⁷³ In that framework, a corporation that ceased to serve public purposes had weakened its claim to its legal privileges. This connection between corporate existence and public service was genuine, and its erosion was not inevitable. The rise of general incorporation laws in the mid-nineteenth century began to dissolve it. Once corporations could be formed without a specific legislative charter, without a

⁷¹*Trustees of Dartmouth College v. Woodward*, 17 U.S. 518, 636 (1819).

⁷²Daniel Lipton, "Corporate Capacity for Crime and Politics: Defining Corporate Personhood at the Turn of the Twentieth Century," *Virginia Law Review* 96, no. 7 (2010): 1940.

⁷³Lyman Johnson, "Law and Legal Theory in the History of Corporate Responsibility: Corporate Personhood," *Seattle University Law Review* 35 (2012): 1532.

particularized public purpose, the old framework of public-service justification became increasingly formal and hollow. Corporations now existed as a matter of right upon filing the necessary papers, not as a grant contingent on demonstrating a benefit to the public.

There is a striking irony embedded in this development that Perrone's analysis brings into focus. The Fourteenth Amendment had been written to sever the legal connection between personhood and property, to ensure that formerly enslaved people could not be treated as someone else's property. Yet within two decades, courts were using that same Amendment to protect the property rights of corporate entities by treating them as persons. The constitutional language designed to disentangle person from property was being used to fuse them again, in a different form: corporate personhood became a vehicle for conferring constitutional status on aggregated property interests.

Lipton's account clarifies how courts navigated the tension between artificial entity theory, which implied corporate subordination to the state, and the desire to extend constitutional protections to corporations. Courts "grounded the corporate entity in the familiar category of property," interpreting corporations as "aggregations of property interests" rather than as independent moral agents.⁷⁴ This move resolved the tension doctrinally. The corporation could remain an artificial being constituted by law while still being a Fourteenth Amendment "person," because the object of constitutional concern was property and economic participation. When corporate property was regulated, taxed, or burdened, the injury was framed as a deprivation of property that triggered constitutional protection. The corporate "person" designation became a bridge allowing constitutional protection of property held collectively through the corporate form.

⁷⁴Lipton, "Defining Corporate Personhood," 1940.

The contrast with earlier purpose-based justification is critical. In the world of specific charters, corporations justified their existence by what they did for the public. By the 1880s and 1890s, cases like *Pembina* and *Beckwith* show corporations justifying their legal position by what they could claim under constitutional law. This is the transition this chapter develops: corporate identity moving from purpose to rights.

Part II: Liberty, Labor, and the Problem of Responsibility

Liberty Expands, Police Power Retreats: From Ordinary Governance to Constitutional Exception

The corporate personhood cases made corporations constitutionally legible as persons for purposes of property protection. A parallel development was making economic freedom constitutionally legible as part of Fourteenth Amendment liberty. State regulation of economic life in the 1880s and 1890s extended well beyond railroad rates. States regulated the hours workers could labor in mines, smelters, and bakeries; licensed certain occupations; fixed prices in some industries; and restricted certain kinds of contracts. These regulatory measures emerged from legislatures responding to visible social problems: workplace injury, exploitative labor conditions, monopolistic pricing. Whether such measures were constitutionally permissible depended on whether they fell within the state's police power. The cases of this period transformed that question from a presumptively legislative judgment into a matter for judicial supervision. The doctrinal shift was general, affecting all economic actors, but corporations were the most powerful and well-resourced litigants in this environment, and their challenges drove the doctrinal development at a scale that individual workers or small businesses could not match.

A key hinge appears in *Allgeyer v. Louisiana* (1897). The Court defined liberty under the Fourteenth Amendment to include: "the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."⁷⁵ By embedding work and livelihood within the constitutional definition of liberty, *Allgeyer* established the framework within which later cases would operate. Even when regulation was justified in public welfare terms, it now had to be measured against a constitutional baseline framed in economic language.

The Court did not immediately treat all regulation as illegitimate. In *Holden v. Hardy* (1898), it upheld an hours law for miners and smelter workers, emphasizing the distinctive dangers of those occupations and the state's authority to legislate for health.⁷⁶ *Muller v. Oregon* (1908) similarly upheld a maximum hours law for women workers, with the Court relying heavily on Louis Brandeis's famous "sociological brief" marshaling evidence of the physical harms of long working hours for women.⁷⁷ Both cases represent the police power surviving as a genuine constitutional authority. They also reveal its new posture: police power no longer operated as an ordinary presumption of governance. It survived as a carve-out, a category of regulation that courts evaluated and permitted when the empirical connection to health or safety was sufficiently established. Courts, not legislatures, were determining which harms qualified.

Legal historian William Novak's account emphasizes that nineteenth-century police power was not originally a narrow carve-out from liberty. Police power was understood as a basic incident of governance. Novak quotes a New York justice in 1827: police power was

⁷⁵*Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897).

⁷⁶*Holden v. Hardy*, 169 U.S. 366, 397–98 (1898).

⁷⁷*Muller v. Oregon*, 208 U.S. 412 (1908). Muller upheld a maximum hours law for women workers, relying on Louis Brandeis's "sociological brief" marshaling evidence of the physical harms of long working hours.

"incident to every well regulated society, and without which it could not well exist."⁷⁸ Under the older conception, police power was part of what made ordered society possible, it needed no special justification because it expressed the ordinary authority of democratic self-governance. What the late nineteenth-century cases produced was a fundamental restructuring of this relationship. Police power became a constrained justification that had to pass judicial muster against a background presumption favoring liberty of contract.

Contemporaries recognized this transformation as both doctrinal and ideological. Henry Seager's 1904 article "The Attitude of American Courts Towards Restrictive Labor Laws," published in the *Political Science Quarterly*, diagnosed the moment with unusual clarity: "the constitutional and the economic aspects of the question are so intimately related" that courts' views of economic desirability shape constitutional outcomes.⁷⁹ Seager was identifying not merely a methodological tendency in judicial reasoning but an ideological commitment, the courts' embrace of classical liberal economics as the background against which regulation had to justify itself. Constitutional adjudication and economic philosophy were entangled in ways that formal legal analysis could not fully disentangle.

When liberty was defined economically and corporate property was constitutionally protected, the police power became a boundary line rather than an ordinary presumption. Courts increasingly rewrote where that boundary sat. Railroad regulation intensified this dynamic: rate statutes and liability schemes forced courts to translate political conflict over economic distribution into the categories of constitutional rights. Cases like *Smyth* insisted that judicial inquiry was necessary when legislation threatened to deprive carriers of property without due

⁷⁸William J. Novak, "The American Law of Overruling Necessity," in *States of Exception in American History* (Chicago: University of Chicago Press, 2020), 105.

⁷⁹Henry R. Seager, "The Attitude of American Courts Towards Restrictive Labor Laws," *Political Science Quarterly* 19 (1904): 601.

process, embedding courts as arbiters of the reasonableness of economic regulation, not merely its constitutionality in the abstract.

The doctrinal environment was already in motion before *Lochner*. Corporate personhood was established for Fourteenth Amendment property protection. Liberty was defined to include livelihood and work. Police power persisted but was increasingly contested and judicially supervised. *Lochner* was the point at which this structure was enforced most famously against labor legislation, narrowing the space of permissible regulation and strengthening the rights-centered framework within which corporations already operated.

***Lochner* and the Narrowing of Police Power**

Lochner v. New York (1905) arose from a straightforward set of facts. The state of New York had enacted the Bakeshop Act, which limited bakers to ten hours of work per day and sixty hours per week. The law was motivated by genuine concerns: bakery cellars in urban tenements were notoriously unhealthy, often damp and poorly ventilated, and the hours were grueling. A Utica bakery owner named Joseph Lochner was fined for allowing an employee to work more than sixty hours in a week and challenged the law as an unconstitutional interference with his freedom to contract with his own employees. The New York courts upheld the law. The Supreme Court reversed.

The majority held that "the general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution."⁸⁰ Implementing the liberty definition of *Allgeyer*, the Court treated the right to contract for labor as a constitutional baseline. Police power, the state's authority to regulate for

⁸⁰*Lochner v. New York*, 198 U.S. 45, 53 (1905).

health and welfare, did not disappear. But the Court insisted that regulations must be genuinely connected to health or safety. It rejected the idea that minimal or speculative concerns could justify interference: "there must be more than the mere fact of the possible existence of some small amount of unhealthiness" to warrant restricting liberty.⁸¹ The bakeshop law, the majority concluded, was "an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."⁸²

The comparison with *Holden v. Hardy*, and with *Muller v. Oregon*, decided three years after *Lochner*, reveals the narrowing mechanism. *Holden* upheld an hours law for miners because the Court treated mining as uniquely hazardous, with well-documented dangers to health.⁸³ *Muller* upheld a maximum hours law for women workers partly on the basis that women's physiological differences from men made long hours specially harmful.⁸⁴ *Lochner* distinguished both by denying that baking presented comparable dangers. This move is not merely doctrinal classification. It is judicial boundary-making: courts deciding which occupations and which legislative purposes qualify as sufficient to overcome the constitutional presumption in favor of liberty of contract. The police power survived *Lochner*, *Holden*, and *Muller*. But it survived as a category of exception that courts defined and enforced, not as an ordinary presumption of legislative authority.

Contemporaneous legal analysis confirms that this boundary-making was widely understood as the decision's real significance. Writing in 1906 in the *Columbia Law Review*, S. Whitney Dunscomb described *Lochner* as "another landmark in defining the boundary line

⁸¹*Lochner*, 198 U.S. at 57.

⁸²*Lochner*, 198 U.S. at 56.

⁸³*Holden v. Hardy*, 169 U.S. at 397–98.

⁸⁴*Muller v. Oregon*, 208 U.S. at 421–23.

between the spheres of governmental force and individual liberty.”⁸⁵ This framing is important: it shows how *Lochner* was understood immediately not merely as a ruling about bakeries, but as a constitutional demarcation, a statement about the structure of the relationship between the state and economic actors. Dunscomb noted that police power "has never been exactly defined," operating by "restraint and compulsion" directed at individuals to promote public welfare.⁸⁶ That definition aligns precisely with the Court's approach: liberty of contract is the baseline, and coercive regulation must justify itself as genuinely health-related rather than economic management dressed in health-related language.

Henry Seager's 1904 article, written before the Supreme Court issued its ruling but after the New York Court of Appeals had affirmed the Bakeshop Act, puts the period's jurisprudential logic plainly. Seager argued that the legal phrases used to justify regulatory legislation, terms like "public health," "safety," and "general welfare", often served as covers for what were really economic policy choices about labor conditions and market power. Courts and legislatures alike were really asking whether restrictions "are calculated to promote the general welfare," and constitutional doctrine increasingly made that question one for judicial rather than legislative judgment.⁸⁷ Once the Supreme Court ruled in *Lochner* that liberty of contract outweighed the public health justification for the hours restriction, it set a framework in which demonstrating a sufficient connection to health or safety became progressively more demanding. Dunscomb and Seager, read together, show that constitutional adjudication and economic ideology had become inseparable, which was precisely what made *Lochner* both legally significant and politically contested.

⁸⁵S. Whitney Dunscomb, "The Police Power and Civil Liberty," *Columbia Law Review* 6 (1906): 93.

⁸⁶Dunscomb, "The Police Power and Civil Liberty," 93–94.

⁸⁷Seager, "The Attitude of American Courts Towards Restrictive Labor Laws," 610.

This framework connects to Field's constitutional method developed in Chapter Two. Field's dissents in *Slaughter-House* and *Munn* had defined liberty as economic self-direction and treated regulation as constitutionally suspect when it imposed unequal burdens on lawful occupations. *Lochner* does not simply repeat Field's reasoning. But it adopts his structure: define liberty as economic freedom, then ask whether regulation fits within a limited police power exception. The doctrinal architecture Field had built in dissent became, in *Lochner*, the majority's constitutional standard.

For corporate personhood, the significance is structural. Corporate entities had already been recognized as Fourteenth Amendment "persons" for purposes of due process and equal protection in *Pembina* and *Beckwith*. When *Lochner* entrenched liberty of contract and narrowed police power, the constitutional environment corporations inhabited shifted further toward rights-based adjudication. A corporation did not need to win in *Lochner* to benefit from the method *Lochner* entrenched. It needed only to operate within a constitutional order where economic freedom and property were the baseline, and where regulation had to justify itself as sufficiently health-or-safety oriented.

Liberty, Injury, and the Problem of Responsibility

The narrowing of police power in *Lochner* did not only reshape constitutional doctrine about labor regulation. It also helped stabilize a legal environment in which the costs of industrial life were allocated in ways that contradicted the premise of equal bargaining that liberty of contract presupposed. Understanding this requires looking not only at constitutional law but at the private law of industrial accidents, the tort rules that governed when injured workers could recover, and at the social and political context in which those legal doctrines operated.

By the 1890s, industrial accidents had become a public crisis of visible proportions. Railroads killed and maimed thousands of workers and passengers each year. Steel mills and mines produced routine fatalities. The Interstate Commerce Commission reported that in 1889 alone, American railroads killed 1,972 employees and injured 20,028 more. Newspaper coverage of major industrial disasters, particularly the Pullman Strike of 1894 and the Homestead Strike of 1892, brought workplace conditions into public consciousness. The Pullman Strike began when workers at the Pullman Palace Car Company walked out to protest wage cuts and was met with a federal injunction obtained by the Cleveland administration, backed by federal troops, effectively crushing the strike under the authority of law. The Homestead Strike against Carnegie Steel ended with Pinkerton agents transported by barge to break the picket line, killing workers in the process. William Forbath has argued that these experiences of courts and law being turned against labor, through preemptive injunctions, contempt proceedings, and the use of the Sherman Antitrust Act against unions, radicalized segments of the labor movement, because all other avenues for reform had been closed off.⁸⁸

A tort, a civil wrong for which the law provides a remedy, is the legal instrument through which an injured worker would ordinarily seek compensation. In private law, tort doctrine governs who bears the cost when someone is harmed through another's action or negligence. In the industrial context, the relevant question was whether an employer owed a duty to a worker injured on the job, and whether the employer's failure to meet that duty gave rise to liability. The answer, in the late nineteenth century, was usually: not if the employer could invoke one of three established defenses.

⁸⁸ Forbath, *Law and the Shaping of the American Labor Movement*, 59–97.

John Fabian Witt's *The Accidental Republic* provides unusually concrete evidence for how this system worked. Witt begins with the premise that the "industrial-accident crisis" was not marginal to the transformation of American law, it was central to it.⁸⁹ The legal problem was not simply how to compensate victims. It was how to reconcile industrial risk with a liberal legal order built around autonomy, responsibility, and fault. Three tort doctrines were especially consequential. Contributory negligence barred recovery if the injured worker was found to have contributed to the accident in any way, even slightly, making liability disputes turn on the victim's conduct and inviting fact-finders to reconstruct accidents as failures of individual care. Assumption of risk treated workplace dangers as risks that a worker had accepted upon taking the job, transforming hazard into a contractualized choice. Critically, the assumption of risk doctrine also assumed that those risks had been incorporated into the wage the worker agreed to accept: by agreeing to work for a given wage in a given setting, the worker was understood to have accepted both the wage and the risk of injury that came with it, risk of serious harm or death included.⁹⁰ The fellow-servant rule limited employer liability for injuries caused by co-workers, providing another barrier to recovery even where industrial organization and management had created the foreseeable risk.

The industrial accident problem grew serious enough to generate legal responses precisely because of its scale and visibility. Witt notes that as accidents accumulated in litigation patterns, it became apparent that the existing doctrinal framework was producing systematic results: whenever there was an accident without the victim's contributory negligence, there was railroad negligence; whenever there was no railroad negligence, there was contributory

⁸⁹ John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge: Harvard University Press, 2004), 44.

⁹⁰ Witt, *The Accidental Republic*, 55.

negligence.⁹¹ The effect was to swallow the category of faultless injury. A case like *Baltimore & Ohio Railroad Co. v. Baugh* (1893), decided by the Supreme Court the same year as *Reagan v. Farmers' Loan*, illustrates how the fellow-servant rule worked in practice. A locomotive fireman named Baugh was injured when the engineer of his own train ran it negligently, causing a collision. Baugh sued the railroad. The Court held that the railroad was not liable: because the engineer and fireman were fellow servants, co-workers employed by the same master, the railroad bore no responsibility for the engineer's negligence. The fireman, by accepting employment in a position where negligent co-workers were a foreseeable risk, had assumed that risk as part of his contract of employment. Baugh recovered nothing. The railroad, whose organizational structure put a fireman at the mercy of an engineer's decisions, bore no legal obligation for the outcome. Corporations were effectively shielded from liability by private law rules that classified structural workplace danger as individual worker choice, at precisely the moment when constitutional law was also shielding them from regulation.

Witt shows that these doctrines carried an ideological function: they relieved pressure on tort law posed by the mismatch between liberal autonomy theory and the realities of industrial wage labor. Assumption of risk worked by treating the worker's continued labor in the face of danger as consent to bear loss.⁹² Under this doctrine, an employer could escape liability for accidents caused by defects or incompetent co-workers simply by warning employees and declining to fix the hazard: the worker who continued to labor after notice was understood to have accepted the risk.⁹³ This is not a minor doctrinal detail. It reclassified industrial danger, a

⁹¹ Witt, *The Accidental Republic*, 66.

⁹² Witt, *The Accidental Republic*, 55.

⁹³ Witt, *The Accidental Republic*, 55.

structural feature of how enterprises organized production, as something workers freely chose, even when the choice was constrained by economic necessity and the absence of alternatives.

This is where the relationship to *Lochner* becomes direct. *Lochner* constitutionalized a vision of freedom in which labor contracts were products of voluntary negotiation between formally equal parties. The private law of industrial injury operated on a similar formal premise while reaching similar real-world results: workers were treated as freely consenting adults whose "choices", to work, to continue working despite dangers, to accept wages that incorporated risk, served as the legal basis for denying recovery. Together, constitutional doctrine and private law produced a framework in which neither the state nor the corporation was structurally required to prioritize workers' welfare as a legal obligation. The worker's injury was treated as a cost of choosing to work, rather than as a cost of how industrial enterprises organized production for profit.

Theodore Roosevelt's framing of industrial injuries as a national crisis, and his advocacy for workmen's compensation, introduced a different logic. Witt recounts that Roosevelt emphasized the "grim hardship" that industrial injuries produced for working families.⁹⁴ The social implication was concrete: when a primary wage-earner was killed or permanently injured on the job, the family was left without income. In an era before public welfare programs, this meant potential destitution, dependency on charity and the state. Industrial accidents were thus not merely a private misfortune. They were a social cost that, when uncompensated by the enterprise that created the risk, was transferred from the corporation to the worker's family and ultimately to the broader community. But this recognition did not translate into immediate relief. Workmen's compensation legislation, which would have imposed liability on employers without

⁹⁴ Witt, *The Accidental Republic*, 33–34.

requiring workers to prove fault, was largely blocked or constrained during the *Lochner* era itself. When New York enacted an early workmen's compensation statute in 1910, the New York Court of Appeals struck it down in *Ives v. South Buffalo Railway Co.* (1911), holding that imposing liability without fault violated the due process and equal protection guarantees of the state and federal constitutions. It was precisely the kind of economic regulation that *Lochner*-era doctrine treated as constitutionally suspect. Federal and state workmen's compensation regimes only became widespread and constitutionally stable after the New Deal's recalibration of the relationship between regulation and constitutional rights, which is the story of the next chapter. For the purposes of this chapter's argument, the significant point is that the social crisis produced by industrial injury was visible and well-documented, public pressure for relief was real, and yet the doctrinal environment actively forestalled regulatory responses. That is precisely the gap between formal liberty and substantive inequality that the *Lochner* era constructed.

Corporate personhood as a rights-centered identity could obscure structural inequality by translating power disparities into disputes about individual choice. In the labor context, the doctrine that liberty includes contract presumes equal capacity to bargain. Witt's evidence shows that injury law often treated workers' participation in dangerous labor as consent to risk, even when workers' economic position left no real alternative. The post-emancipation legal order had treated freedpeople as formally free negotiators while using vagrancy laws and related coercive systems to constrain their actual bargaining position. The *Lochner*-era labor market reproduced that pattern in a different doctrinal register: formal freedom coexisted with legal mechanisms that made bargaining unequal.

The *Lochner* era thus produced a legal environment in which corporate identity increasingly rested on rights, while responsibility for industrial harm was redirected away from

corporate entities and toward individuals framed as autonomous market actors. The gap between formal liberty and substantive inequality was not incidental. It was structured into doctrine, by constitutional law that privileged contract, by tort rules that transformed hazard into consent, and by courts that treated both as expressions of the same liberal commitment to individual autonomy.

Corporate Personhood Beyond the Fourteenth Amendment

The doctrinal structure traced in the previous section, constitutional doctrine privileging economic liberty, private law casting industrial injury as consented-to risk, made visible a broader pattern: the corporation's constitutional identity was becoming increasingly rights-centered, while its obligations to workers and the public remained legally thin. That pattern extended beyond the Fourteenth Amendment in ways that the case of *Hale v. Henkel* (1906) illustrates with particular clarity.

Hale arose from a federal antitrust investigation into the tobacco industry. A federal grand jury issued a subpoena compelling a corporate officer named *Hale* to produce corporate documents and to testify. *Hale* resisted, claiming that the corporation was entitled to the same protections that individual citizens could invoke against compelled self-incrimination and unreasonable search and seizure under the Fourth and Fifth Amendments. The constitutional questions required the Court to determine which constitutional protections extended to corporations and which did not.

The Court began by reiterating the artificial entity conception: "A corporation is a creature of the State ... and it can make no contract and do no act except by its charter."⁹⁵ This

⁹⁵*Hale v. Henkel*, 201 U.S. 43, 74 (1906).

language echoes the *Dartmouth* formulation and, on its face, might suggest that corporations should stand in a position of subordination to the state that created them. But the Court did not stop there. It held that the corporation was entitled to Fourth Amendment protection against unreasonable searches and seizures: "The corporation is a person within the meaning of the Fourth Amendment."⁹⁶ At the same time, it denied that the corporation could invoke the Fifth Amendment privilege against self-incrimination.⁹⁷ The pattern is instructive: corporate personhood was extended where constitutional protection could be framed as limiting coercive governmental intrusion into property and papers, yet simultaneously withheld where the right was tied to personal testimony and human conscience.

Lipton's analysis clarifies why this distinction held together doctrinally. Corporate constitutional protections in this period were most secure where they could be understood as protecting property interests or the aggregated interests embodied in the corporate form.⁹⁸ The Fourth Amendment protection in *Hale* fits this logic: it constrains state interference with corporate documents and property. The Fifth Amendment privilege, by contrast, was characterized as a personal safeguard against compelled self-accusation, a right tied to the individual human being's relationship to conscience and self-incrimination, and thus was denied to the corporate entity. Corporations got the constitutional protection that protected property. They did not get the protection tied to personal dignity.

What makes *Hale* especially significant for this chapter is its timing. It appears at the very moment when *Lochner* has narrowed police power and entrenched liberty of contract as a constitutional baseline. In that environment, coercive state action was increasingly scrutinized.

⁹⁶*Hale*, 201 U.S. at 76.

⁹⁷*Hale*, 201 U.S. at 69–70.

⁹⁸Lipton, "Defining Corporate Personhood," 1940.

When the Court extended Fourth Amendment protection to corporations, it confirmed that corporate entities were participants in the constitutional order as rights-bearing actors capable of resisting state compulsion, not just under the Fourteenth Amendment, but across the Bill of Rights.

The expansion was selective but its direction was clear. Corporate identity in constitutional law was becoming anchored in rights-bearing capacity. The question in litigation was no longer primarily what public purpose the corporation served, but what constitutional protections it might invoke. Responsibility, whether for industrial injury or for broader social welfare, was less central to the doctrinal definition of what a corporation was. Instead, the corporation appeared increasingly as a constitutional actor entitled to invoke protections designed to constrain governmental force.

Conclusion: Corporate Identity in a Rights-Centered Constitutional Order

This chapter has traced a convergence rather than a single doctrinal rupture. In the 1880s, the Court explicitly positioned corporations as "persons" within the Fourteenth Amendment's protection of property and equal protection. In *Pembina*, corporate inclusion was stated as doctrinally obvious: "under the designation of 'person' there is no doubt that a private corporation is included."⁹⁹ In *Beckwith*, the Court consolidated that inclusion across due process and equal protection.¹⁰⁰ Those cases did not abolish police power. Field insisted that the Fourteenth Amendment "does not limit" the subjects on which police power may be exercised.¹⁰¹ The shift was not deregulation by declaration. It was the creation of a constitutional footing through which corporate property could be protected and regulation could be contested as a rights issue.

⁹⁹*Pembina*, 125 U.S. at 189.

¹⁰⁰*Beckwith*, 129 U.S. at 28.

¹⁰¹*Beckwith*, 129 U.S. at 29.

Fourteenth Amendment liberty expanded in parallel into an explicitly economic concept. *Allgeyer* defined liberty as including the right to earn a livelihood and pursue lawful callings.¹⁰² *Holden* and *Muller* demonstrated that police power remained viable when tied to concrete health hazards, but as carve-outs subject to judicial evaluation, not as ordinary legislative authority.¹⁰³ Novak's nineteenth-century framing, in which police power is "incident to every well regulated society," sits uneasily beside a constitutional order where liberty of contract is the baseline.¹⁰⁴ Seager's diagnosis makes the transitional nature of the moment explicit: "the constitutional and the economic aspects" are "so intimately related" that judicial decisions track contested economic assumptions, and ideological commitments, about the proper relationship between the market and the state.¹⁰⁵ *Lochner* crystallized this framework, narrowing police power by requiring regulation to demonstrate a substantial relation to health.¹⁰⁶ Dunscomb's contemporaneous boundary-line framing captured how the decision was understood: as a landmark in defining the spheres of governmental force and individual liberty.¹⁰⁷

While courts were redefining liberty in economic terms, the private law of industrial accidents, as Witt demonstrates, was channeling the costs of railroad and factory injuries through doctrines of assumption of risk, contributory negligence, and the fellow-servant rule. These doctrines recast structural workplace danger as individual fault or consent, treating workers as formally equal contractors even where their bargaining position made that equality illusory. Corporate constitutional expansion and the private-law containment of corporate liability operated within the same rights-centered environment, each reinforcing the other.

¹⁰²*Allgeyer*, 165 U.S. at 589.

¹⁰³*Holden*, 169 U.S. at 397–98; *Muller*, 208 U.S. at 421.

¹⁰⁴Novak, "The American Law of Overruling Necessity," 105.

¹⁰⁵Seager, "The Attitude of American Courts Towards Restrictive Labor Laws," 601.

¹⁰⁶*Lochner*, 198 U.S. at 53, 56–57.

¹⁰⁷Dunscomb, "The Police Power and Civil Liberty," 93.

In *Hale*, corporate constitutional protection expanded beyond the Fourteenth Amendment in ways that followed the same logic: the Court preserved the language of artificial entity theory while extending Fourth Amendment protection and denying Fifth Amendment self-incrimination.¹⁰⁸ The expansion was selective but significant: corporate personhood became a platform for invoking multiple constitutional protections, particularly those tied to property and procedure.

The doctrinal developments of the *Lochner* era clarify the shift at the center of this argument. Earlier corporate legitimacy leaned on public-purpose justification and chartered responsibility. By the end of this period, corporations increasingly found their footing in constitutional rights. They did not need to justify themselves primarily through services rendered to the public. They could justify themselves as constitutional actors entitled to due process, equal protection, and Bill of Rights protections. Corporate identity became rights-centered within a constitutional order that defined liberty economically and treated police power as a boundary to be justified rather than an ordinary attribute of self-governance.

This is the doctrinal configuration that the New Deal would confront. The pendulum had swung hard toward the rights-bearing side of corporate personhood's dual potential. The next chapter examines how the New Deal recalibrated that relationship, and why the recalibration proved partial and impermanent.

¹⁰⁸*Hale*, 201 U.S. at 74, 76, 69–70.

Chapter Four

The New Deal and the Recalibration of Corporate Obligation

The collapse of the American economy in 1929 put decades of constitutional doctrine under pressure in ways that legal argument alone could not have accomplished. The *Lochner* era had elevated liberty of contract to a constitutional norm and treated broad exercises of the police power with skepticism. It had produced a judicial framework in which corporations could claim constitutional protections against regulation while their obligations to workers and the public remained legally thin. What changed during the New Deal was not corporate personhood itself. The concept survived. What changed was the doctrinal weight assigned to each of its dimensions. Where the late nineteenth and early twentieth centuries had consistently emphasized the rights-bearing side of corporate status, the New Deal forced a reckoning with the other side: corporate responsibility as a legally enforceable public obligation. In this sense, the New Deal represents something of an anomaly in the longer story this thesis traces. It is not a repudiation of the framework built up over the preceding decades, but a rebalancing of it, one that proved partial and temporary, and that carried within it the conditions for its own eventual reversal.

The constitutional turning point came in 1937. In *West Coast Hotel Co. v. Parrish*, the Supreme Court upheld a Washington State minimum wage law for women, explicitly rejecting the liberty of contract reasoning that had governed economic regulation since *Lochner*. Chief Justice Hughes wrote for the majority that the Constitution did not speak of freedom of contract, and that the liberty protected by the Fourteenth Amendment was subject to restraint by the due

process clause where regulation served the health, safety, morals, and welfare of the people.¹⁰⁹ This was not a minor doctrinal adjustment. It fundamentally reoriented the baseline from which regulation had to justify itself. Under the *Lochner* framework, legislatures bore the burden of demonstrating that regulation was a legitimate exercise of the police power against a presumption of individual economic liberty. After *West Coast Hotel*, that presumption shifted. Courts would no longer act, as Justice Brandeis had once put it, as a super-legislature second-guessing the social and economic judgments of democratically elected bodies.¹¹⁰

The practical implications for corporations were significant. The passage of the National Labor Relations Act in 1935, and its constitutional validation two years later, established for the first time a durable federal regime in which workers' rights to organize and bargain collectively were protected against corporate interference.¹¹¹ This was a direct statutory imposition of corporate obligation. A corporation was no longer free, as a matter of constitutional right, to use the conditions of employment as an expression of its contractual liberty at the expense of workers' ability to associate. The law required it to recognize unions and bargain in good faith. This was corporate responsibility operating not as an aspirational principle but as an enforceable legal duty. Lyman Johnson has argued that corporate personhood historically carried both rights and responsibilities, yet the late nineteenth century had systematically elevated the former while neglecting the latter.¹¹² The New Deal labor legislation can be read as a partial correction of that imbalance, forcing the ledger toward the side that the Field era and *Lochner* period had left largely blank.

¹⁰⁹*West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

¹¹⁰Glen Atkinson and Stephen P. Paschall, "*Citizens United v. Federal Election Commission*: The Return of Substantive Due Process?" *Journal of Economic Issues* 45, no. 2 (2011): 444.

¹¹¹National Labor Relations Act, 29 U.S.C. secs. 151-169 (1935).

¹¹²Johnson, "Corporate Responsibility and Corporate Personhood," 1524.

It is important, however, not to overstate the discontinuity. Morton Horwitz has noted that the New Deal constitutional revolution did not produce a wholesale repudiation of the corporate rights framework.¹¹³ Corporations retained their status as constitutional persons. They continued to hold property rights, to make contracts enforceable in law, and to invoke due process protections against arbitrary state action. What the New Deal altered was the terrain on which those rights operated. The Court in *West Coast Hotel* was explicit that liberty exists within the social organization and must be protected against the evils that menace health, safety, morals, and welfare.¹¹⁴ That framing did not eliminate the concept of corporate liberty. It subordinated it, at least provisionally, to a more expansive understanding of the public interest. The language of police power, which had been squeezed thin by decades of economic substantive due process, regained legitimacy as a justification for regulatory intervention.

Atkinson and Paschall have argued that the cases following *West Coast Hotel*, particularly the decisions endorsing regulatory delegation to administrative agencies, reflected a jurisprudential model in which the consequences of regulation for going concerns were evaluated against social purposes rather than against the abstract property rights of shareholders.¹¹⁵ Under this model, the question was not whether a regulation interfered with a corporation's liberty, but whether it served legitimate public ends. Gillman has described the earlier era as organized around the idea that the police power could only legitimately restrain "special" or "partial" legislation that transferred wealth between groups rather than pursuing genuinely public goals.¹¹⁶ The New Deal dismantled that framework by treating labor protections, wage floors, and

¹¹³ Morton J. Horwitz, *The Transformation of American Law, 1870-1960* (Cambridge: Harvard University Press, 1992), 220-222.

¹¹⁴ *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

¹¹⁵ Atkinson and Paschall, "*Citizens United v. Federal Election Commission*," 444.

¹¹⁶ Gillman, *The Constitution Besieged*, 197-201.

collective bargaining rights as legitimate public purposes rather than improper interference with contractual freedom.

The implications for corporate responsibility extended beyond labor law. Workers' compensation regimes, building on the administrative law developments of the prior decades, increasingly formalized corporate obligations to employees injured in the course of their work. These mechanisms did not rely on fault in the common law sense. They imposed liability as a function of the employment relationship itself, treating it as an expression of the corporation's obligation to bear the costs of harm that its operations produced. Johnson observes that this period marked the first sustained instance in which corporate responsibility was legally institutionalized as a baseline expectation rather than a matter of charitable discretion or contractual negotiation.¹¹⁷ The corporation, as a legal person, was being held accountable through regulatory and administrative law in ways that the *Lochner* framework had made constitutionally suspect.

The Supreme Court's 1937 decision in *National Labor Relations Board v. Jones and Laughlin Steel Corp.* captured this transformation with particular clarity. Upholding the National Labor Relations Act (NLRA) against a constitutional challenge, Chief Justice Hughes rejected the argument that the federal government lacked power to regulate the labor relations of industrial corporations operating across interstate commerce. The Court held that the right of employees to self-organization and to collective bargaining was a fundamental right, and that interference by employers with that right through coercion and intimidation created industrial strife that burdened the flow of commerce.¹¹⁸ The reasoning is notable for what it assumed: that a corporation operating at industrial scale bore obligations to its workers that were sufficiently

¹¹⁷Johnson, "Corporate Responsibility and Corporate Personhood," 1525-1526.

¹¹⁸*National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 42 (1937).

weighty to justify federal intervention when it violated them. The corporation's interest in managing its own employment relations was real, the Court acknowledged, but it did not override the public interest in labor peace and worker organization.¹¹⁹

This rebalancing was politically contingent in ways that deserve acknowledgment. The New Deal settlement was not a philosophical consensus about the proper relationship between corporations and society. It was a response to crisis, shaped by the particular pressures of mass unemployment, financial collapse, and political upheaval. Horwitz has noted that the New Deal's constitutional revolution was achieved partly through the transformation of the Court's composition and partly through the broader political realignment that made aggressive regulatory legislation politically viable.¹²⁰ Johnson has made the related observation that the New Deal era's institutionalization of corporate responsibility did not produce a durable theory of what corporations owed the public.¹²¹ It produced a set of regulatory and statutory obligations without a coherent account of why corporations bore those obligations as a matter of their constitutional or legal status. That conceptual gap would matter later.

There is also a dimension of the New Deal settlement that cuts against a straightforward narrative of expanding corporate accountability. The cases that retreated from *Lochner* did not articulate a theory of corporate obligation grounded in personhood doctrine. They relied instead on an expansive reading of congressional commerce power and state police authority. Corporate personhood, as a constitutional concept, was left largely untouched by this reorientation. The Court's earlier decision in *Hale v. Henkel*, which had already noted that a corporation was not entitled to refuse production of its records on Fifth Amendment grounds as a natural person

¹¹⁹*National Labor Relations Board v. Jones and Laughlin Steel Corp.*, 301 U.S. 1, 43 (1937).

¹²⁰ Horwitz, *The Transformation of American Law*, 223-225.

¹²¹ Johnson, "Corporate Responsibility and Corporate Personhood," 1527.

might, illustrated that even at the height of the earlier era there were doctrinal limits on how far corporate constitutional rights extended.¹²² The New Deal consolidated and extended that logic in the regulatory sphere without eliminating the underlying framework of corporate constitutional protection.

Elizabeth Pollman has observed that the New Deal period produced a kind of doctrinal equilibrium in which corporate rights and corporate responsibilities coexisted under a broader regulatory umbrella, but that this equilibrium depended on institutional and political conditions that were not inherent in personhood doctrine itself.¹²³ Atkinson and Paschall describe the post-New Deal regulatory model as one in which state and federal legislatures delegating regulatory authority to administrative agencies could balance private interests against public interests without constant recourse to the courts.¹²⁴ The corporation, in this model, was not simply a rights-bearer asserting claims against regulation. It was an economic actor operating within a regulatory environment that defined, at least partially, what it owed to workers, consumers, and the public. It was a shift in emphasis, not in the underlying constitutional architecture. The framework of corporate personhood that had been built up across the preceding decades remained in place, and with it the potential for a return to a more rights-centered understanding when political and institutional conditions changed.

The Compromise and Its Limits

The New Deal settlement rested on a compromise that was more precarious than it appeared. The legal institutionalization of corporate responsibility through labor law, administrative regulation, and workers' compensation did not resolve the deeper question of what

¹²²*Hale v. Henkel*, 201 U.S. 43 (1906).

¹²³Pollman, "Reconceiving Corporate Personhood," 1645-1646.

¹²⁴Atkinson and Paschall, "*Citizens United v. Federal Election Commission*," 444-445.

corporations owed the public as a matter of their constitutional status as persons. It answered that question pragmatically and provisionally, through legislation and administrative rulemaking rather than through constitutional doctrine. That distinction matters. Statutory obligations can be repealed. Regulatory regimes can be dismantled or defunded. Constitutional protections, once established, are considerably harder to undo.

The post-World War II period illustrated this asymmetry. American corporations, operating in an era of sustained economic growth, provided workers with benefits, pensions, and healthcare coverage as part of a private welfare state intended to forestall more aggressive government intervention. This arrangement worked as long as corporations found it in their interest to maintain it. But it depended on a political economy that was contingent, not on a constitutional or doctrinal commitment to corporate responsibility. When the political economy shifted, as it did beginning in the 1970s with the rise of a new wave of market-oriented conservatism, the institutional scaffolding of the New Deal settlement began to erode.¹²⁵¹²⁶

Atkinson and Paschall have identified the key doctrinal vulnerability. The New Deal's retreat from substantive due process in the economic sphere did not eliminate the constitutional apparatus of corporate personhood. It left it dormant but intact.¹²⁷ When courts and litigants returned to that apparatus in the late twentieth century, they found that the tools were all still there: the Fourteenth Amendment's broad language, the precedents establishing corporate constitutional standing, the rhetorical frameworks connecting economic liberty to personhood. The New Deal had altered the doctrinal emphasis without dissolving the underlying framework. That is the sense in which it represents an anomaly in the longer history rather than a resolution

¹²⁵ Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 213-226; see also Pollman, "Constitutionalizing Corporate Law," 640-641.

¹²⁶ Atkinson and Paschall, "*Citizens United v. Federal Election Commission*," 445.

¹²⁷ Horwitz, *The Transformation of American Law*, 226.

of it. It forced an acknowledgment of the obligation side of corporate personhood without completing the theoretical work that would have been required to make that acknowledgment durable. The seeds of the reversal that followed were embedded in the compromise itself.¹²⁸

¹²⁸Johnson, "Corporate Responsibility and Corporate Personhood," 1528.

Chapter Five

The Return of Corporate Rights and the Architecture of Avoidance

The New Deal's rebalancing of the relationship between corporate rights and corporate responsibilities did not hold. By the late twentieth century, the pendulum had swung decisively back toward the protection of corporate constitutional interests, and it had done so with tools that were more sophisticated and more deeply embedded in legal doctrine than anything available to the litigants of the *Lochner* era. The late twentieth and early twenty-first centuries produced two related developments that together represent the most complete articulation yet of the rights-maximizing side of corporate personhood. The first was a series of Supreme Court decisions extending First Amendment and religious liberty protections to corporations, culminating in *Citizens United v. Federal Election Commission* (2010) and *Burwell v. Hobby Lobby Stores, Inc.* (2014). The second was the development of increasingly sophisticated strategies of entity structuring and strategic bankruptcy that allowed corporations to invoke constitutional and legal protections while simultaneously diffusing liability across subsidiary networks and insolvency proceedings. These developments represent not a sudden rupture in the history of corporate personhood but rather a return, with new instruments, to the logic that had governed the Field era and the *Lochner* period: that the corporation's status as a legal person entitled it to constitutional protections that functioned primarily as shields against public obligation.

The groundwork for the modern resurgence of corporate constitutional rights was laid before *Citizens United*. In *First National Bank of Boston v. Bellotti* (1978), the Supreme Court struck down a Massachusetts statute prohibiting corporate expenditures to influence ballot

referenda on questions not materially affecting the corporation's business. Writing for the majority, Justice Powell framed the issue not as a question of whether corporations possessed First Amendment rights, but as a question of whether the speech itself was protected.¹²⁹ Political discussion, Powell wrote, was "indispensable to decisionmaking in a democracy," and this was no less true because the speech came from a corporation rather than an individual.¹³⁰ The move was subtle but consequential. By focusing on the speech rather than the speaker, the Court effectively placed corporate political expenditure within the category of protected First Amendment activity without needing to resolve whether corporations as such were rights-holders in the same sense as natural persons. The speaker's corporate identity became, in this framing, constitutionally irrelevant to the question of whether the speech could be restricted. This reasoning would prove durable.

Asaf Raz has observed that the period following *Citizens United* and *Hobby Lobby* produced a revival of serious scholarly engagement with the concept of corporate personhood, as legal academics attempted to recover a more historically grounded and analytically precise account of what corporate status actually meant and what rights it could properly support.¹³¹ That scholarly revival is itself a symptom of the doctrinal confusion that the modern cases created. Both decisions invoked the language and logic of corporate personhood while deploying it in ways that sat uneasily with the historical record. They treated corporate constitutional rights as natural extensions of a personhood concept that had, in reality, always been contested and contingent.

¹²⁹*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777 (1978).

¹³⁰*First National Bank of Boston v. Bellotti*, 435 U.S. 765, 784-785 (1978).

¹³¹Asaf Raz, "Taking Personhood Seriously," *Columbia Business Law Review* 2023, no. 2 (2024): 782.

In *Citizens United*, the Court struck down provisions of the Bipartisan Campaign Reform Act that restricted corporate independent expenditures in connection with federal elections. Writing for the majority, Justice Kennedy held that the government's power to suppress speech did not depend on whether the speaker was an individual or a corporation, and that political speech did not lose First Amendment protection simply because its source was a corporate entity.¹³² The majority overruled *Austin v. Michigan Chamber of Commerce*, which had permitted restrictions on corporate independent expenditures based on an anti-distortion rationale, holding that Austin's reasoning was inconsistent with the First Amendment's prohibition on speech restrictions based on the speaker's identity.¹³³ The government, the Court concluded, may not suppress political speech on the basis of the speaker's corporate form.¹³⁴

What the majority in *Citizens United* did not confront directly was the question that this thesis has traced across the preceding chapters: the relationship between the rights that corporate personhood confers and the responsibilities it historically implied. Atkinson and Paschall have argued that *Citizens United* effectively replicated the logical structure of the Lochner era's economic substantive due process, treating a particular understanding of corporate constitutional standing as a baseline against which regulatory interference must justify itself.¹³⁵ Justice Stevens's dissent made the historical point forcefully: corporations are not citizens in the constitutional sense, have no consciences, no beliefs, no feelings, no thoughts, no desires, and the majority's equation of corporate and individual First Amendment rights rested on a conception of the corporation that had no basis in the text or history of the Constitution.¹³⁶ Stevens further

¹³²*Citizens United v. Federal Election Commission*, 558 U.S. 310, 348 (2010).

¹³³*Citizens United v. Federal Election Commission*, 558 U.S. 310, 349–350 (2010).

¹³⁴*Citizens United v. Federal Election Commission*, 558 U.S. 310, 352 (2010).

¹³⁵Atkinson and Paschall, "*Citizens United v. Federal Election Commission*," 444.

¹³⁶*Citizens United v. Federal Election Commission*, 558 U.S. 310, 478 (2010) (Stevens, J., dissenting).

argued that the Court's ruling threatened to undermine the integrity of elected institutions by allowing corporations to use their economic resources to drown out individual voices in the political process.¹³⁷ These criticisms did not carry the day, but they identified precisely the tension that has run through the history of corporate personhood from the beginning: the gap between the legal fiction of corporate status and the political and social consequences of treating that fiction as coextensive with the rights of natural persons.

Raz has argued that recovering a more accurate, historically grounded understanding of corporate personhood is a precondition for thinking clearly about what corporations owe the people they affect.¹³⁸ His analysis confirms that the modern cases departed significantly from the common law foundations of corporate status, which had always treated the entity as distinct from its members and as existing in relation to public purposes, not merely as a vehicle for the constitutional rights of investors.

Four years later, *Burwell v. Hobby Lobby Stores, Inc.* extended the logic of corporate constitutional protection into the domain of religious liberty. The Court held that closely held for-profit corporations could assert claims under the Religious Freedom Restoration Act, and that the federal contraceptive mandate substantially burdened the religious exercise of the corporations' owners.¹³⁹ The majority's reasoning collapsed the distinction between the corporation as a legal entity and the natural persons who controlled it, treating the religious beliefs of the owners as effectively continuous with the corporate entity's religious exercise.¹⁴⁰ Steven Harrison has identified the central analytical problem with this approach: the majority failed to specify whose religious exercise was actually at issue, sliding between the beliefs of the

¹³⁷*Citizens United v. Federal Election Commission*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting).

¹³⁸Raz, "Taking Personhood Seriously," 782.

¹³⁹*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706 (2014).

¹⁴⁰*Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 706–709 (2014).

individual owners and the religious identity of the corporate entity without resolving the tension between them.¹⁴¹ This ambiguity was not incidental; it reflected a broader difficulty in the Court's treatment of corporate personhood during this period: the willingness to invoke corporate identity when it served to extend constitutional protection, while simultaneously denying that the corporate form created any meaningful distinction between the entity and its members when that distinction would have limited the scope of those protections.¹⁴²

Pollman has argued that the modern cases represent a misinterpretation of corporate personhood that has little grounding in the historical development of the concept.¹⁴³ The entity theory that had informed corporate law for most of American history treated the corporation as distinct from its members and as existing for public-regarding purposes, not simply as an aggregation of individual rights. The modern Court's treatment of corporate constitutional claims drew instead on a kind of aggregation theory in which the corporation was essentially a conduit for the rights of its owners, without accepting the accountability implications that would flow from treating the entity as genuinely distinct from those owners. This is precisely the one-sided deployment of personhood doctrine that this thesis has tracked across the preceding periods: the extraction of constitutional protection while deflecting the question of constitutional obligation.

Corporate Personhood and the Architecture of Avoidance

The expansion of corporate constitutional rights through *Citizens United* and *Hobby Lobby* represents one dimension of the modern period's reorientation of corporate personhood toward protection and away from accountability. A second, related development occurred not in

¹⁴¹Steven J. Harrison, "Wait, Who Are We Talking About Here? Searching for a Consistent Approach to Applying RFRA to Corporations," *Notre Dame Journal of Law, Ethics and Public Policy* 31, no. 2 (2017): 418-419.

¹⁴²Harrison, "Wait, Who Are We Talking About Here?," 424-425.

¹⁴³Pollman, "Reconceiving Corporate Personhood," 1648-1649.

constitutional law but in the intersection of corporate structure and bankruptcy procedure: the rise of what scholars have called "designer bankruptcy," and specifically the technique known as the Texas Two-Step. This strategy does not invoke constitutional language. It operates through the mechanics of corporate law and insolvency procedure. But it expresses the same underlying logic: the corporation's status as a legal person, with the capacity to divide, create subsidiaries, and selectively allocate assets and liabilities across distinct entities, can be deployed to insulate operating assets from the consequences of harmful conduct.

Michael Francus has described designer bankruptcy as the ability of large businesses to pick and choose which of their assets and liabilities land in bankruptcy court and which remain outside of bankruptcy entirely.¹⁴⁴ The paradigmatic case involved Johnson and Johnson, which faced approximately 38,000 lawsuits alleging that its talc-based Baby Powder caused ovarian cancer and mesothelioma.¹⁴⁵ Rather than filing for bankruptcy itself, Johnson and Johnson availed itself of a divisional merger under Texas law that allowed it to split into two new entities: one, LTL Management, that assumed all talc-related tort liabilities but none of the operating assets, and another, New Consumer, that retained the operating assets without the liabilities.¹⁴⁶ LTL then filed for Chapter 11 bankruptcy. This maneuver, which has become known as the Texas Two-Step, allowed the profitable operating business to continue normally outside of bankruptcy while the liability-holding entity sought judicial management of the claims through the bankruptcy process.

The Third Circuit ultimately dismissed LTL's bankruptcy filing in 2023, holding that LTL had not demonstrated the financial distress required to file in good faith under the

¹⁴⁴Michael A. Francus, "Designing Designer Bankruptcy," *Texas Law Review* 102, no. 6 (2024): 1207.

¹⁴⁵Francus, "Designing Designer Bankruptcy," 1207–1208.

¹⁴⁶Charlie Hu, "Court Rejects Johnson and Johnson's Use of the 'Texas Two-Step' to Tackle Baby Powder Liability," *University of Chicago Business Law Review Online Edition* (2023).

Bankruptcy Code.¹⁴⁷ The court's decision was a meaningful check on the maneuver, but it was not a categorical prohibition. It held that a corporation that was not genuinely in financial distress could not manufacture that distress by creating a shell entity and transferring liabilities to it for the purpose of triggering bankruptcy protection. The normative question the decision left open was considerable: what should happen when a corporation has genuine, large-scale tort liability and seeks to use the bankruptcy process to resolve it in ways that may be more efficient but that also remove individual claimants from the ordinary tort system where they would otherwise have constitutional rights to jury trial?

Francus has identified the structural vulnerability at the heart of the Texas Two-Step. The divisional merger allocates liability to a newly created entity while leaving all assets in a separate entity. The management of the liability-holding entity is typically drawn from the parent corporation itself.¹⁴⁸ While those managers may satisfy formal tests for conflicts of interest, they are effectively installed because they will act in ways that serve the asset-holding entity's interests under the guise of loyalty to the liability-holding entity. The asset-holding entity, meanwhile, owes no duty of loyalty to the tort victims at all. Formally, it is a solvent company with obligations to its shareholders.¹⁴⁹ The tort victims are not even creditors of the asset-holding entity, because the divisional merger has placed the liability in a separate entity. The result is that the party that caused the harm, and that retains the economic value generated by the conduct that caused it, bears no formal legal obligation to the people it injured.

What makes this development significant in the context of this thesis's argument is that it illustrates how corporate personhood's capacity to create legally distinct entities can be

¹⁴⁷*In re LTL Management, LLC*, No. 22-2003, 2023 WL 1098189 (3d Cir. Jan. 30, 2023).

¹⁴⁸Francus, "Designing Designer Bankruptcy," 1227.

¹⁴⁹Francus, "Designing Designer Bankruptcy," 1229–1230.

mobilized not merely to insulate shareholders from individual liability, the traditional function of limited liability, but to separate the rights-bearing function of the corporation from its accountability function across an entire restructuring. Johnson and Johnson, as the parent entity, retained the constitutional and legal status of a going concern with full rights to operate, contract, and litigate. LTL Management, the entity created to hold the liability, was designed to be what it was: a receptacle for obligation without assets to satisfy it. The Two-Step thus weaponizes the very feature of corporate law that has always distinguished the corporation from its members, the separateness of the legal entity, in order to prevent that separateness from producing the accountability that was historically one of its functions.¹⁵⁰

Francus has argued that the defenders of the Texas Two-Step who point to its potential efficiency benefits overlook the fundamental governance problem: the management of the liability-holding entity is not loyal to the tort victims, and the information asymmetries between the asset-holding entity and the claimants are severe.¹⁵¹ The party with the most accurate information about the value of the tort claims, the nature of the harm, and the financial capacity to satisfy those claims is the asset-holding entity, which has no obligation to share that information or to act in the interests of the people owed compensation. This is not an accident of implementation. It is the design of the strategy. The Two-Step works precisely because it severs the informational and fiduciary connections that would otherwise allow tort victims to assess and enforce their claims against the entity that actually caused the harm.¹⁵²

The lead paint litigation described at the opening of this thesis illuminates the broader pattern. After more than a decade of litigation, courts found major lead pigment manufacturers

¹⁵⁰Hu, "Court Rejects Johnson and Johnson's Use of the 'Texas Two-Step.'"

¹⁵¹Francus, "Designing Designer Bankruptcy," 1249.

¹⁵²Francus, "Designing Designer Bankruptcy," 1230.

liable for creating a public nuisance and ordered them to fund a remediation program. The industry's response, supporting a ballot initiative that would have shifted the costs to California taxpayers, followed the same logic as the Texas Two-Step: use available legal and political mechanisms to relocate the costs of harmful conduct away from the entity that caused it and onto the public. The constitutional framework built up across the preceding century, which gave corporations standing to litigate, to lobby, and to spend in political campaigns, provided the tools for that effort. The personhood doctrine that courts had developed to allow corporations to be sued and to bear responsibility also made them capable, rights-bearing actors with access to every legal and political avenue for avoiding that responsibility.

Conclusion: The Pendulum and Its Architecture

The history traced in these two chapters brings this thesis's central argument to its clearest expression. Corporate personhood has always carried a dual potential. It can function as a mechanism of accountability, making corporations legally imputable and subject to duties that protect workers, consumers, and the public. It can also function as a platform for constitutional protection, placing corporations as rights-bearing actors capable of resisting regulation and managing liability through legal architecture. What changes over time is not the concept itself but the doctrinal emphasis that courts, legislatures, and corporate actors place upon it.

The New Deal represented a genuine, if incomplete, attempt to hold both dimensions of corporate personhood in view simultaneously. It forced an acknowledgment that corporations operating at industrial scale bore obligations to workers and to the public that were not simply a matter of contract. It institutionalized those obligations through labor law, administrative regulation, and a broader understanding of what the police power could legitimately require. But it did so without resolving the deeper constitutional question of what corporate personhood, as

such, implied about the relationship between corporate rights and corporate responsibility. That unresolved question created the space for the reversal that followed.

The modern period's expansion of corporate constitutional rights through *Citizens United* and *Hobby Lobby*, combined with the development of sophisticated entity-structuring strategies like the Texas Two-Step, represents a new chapter in the old pattern. The tools have grown more refined. The stakes have grown larger. But the underlying dynamic is recognizable from the Field era and the *Lochner* period: corporate personhood is being deployed primarily as a framework of protection, extracting constitutional rights while distributing the costs of harmful conduct across subsidiary entities, bankruptcy proceedings, and ultimately onto the individuals who bear the harm. Pollman has noted that the concept of personhood is being misread in ways that serve particular interests while departing from the historically grounded understanding of what corporate status actually meant.¹⁵³ Raz has argued that recovering that more accurate understanding is a precondition for thinking clearly about what corporations owe the people they affect.¹⁵⁴ That recovery begins with recognizing that the current framework was constructed through doctrinal choices, and that those choices have been made differently before. The pendulum has swung before. What determines where it settles is not the logic of personhood doctrine alone. It is the institutional, political, and social conditions that determine which dimension of that doctrine courts are willing to enforce.

¹⁵³Pollman, "Reconceiving Corporate Personhood," 1650.

¹⁵⁴Raz, "Taking Personhood Seriously," 782.

Conclusion

From the Reconstruction era through the present, American courts have repeatedly confronted the same problem: how to define the relationship between corporate power and public responsibility. The doctrine of corporate personhood developed within this struggle. Across the nineteenth and twentieth centuries, courts did not simply decide whether corporations could possess rights. They also determined when corporations could be held accountable for the consequences of their actions. The balance between those two possibilities has shifted over time. In some periods, the law emphasized corporate duties to the public. In others, it elevated corporate liberty as a constitutional protection against regulation.

This thesis has argued that the concept of corporate personhood itself did not change. What changed was the doctrinal emphasis placed upon it. Early courts frequently treated corporations as legally imputable actors. Personhood allowed courts to assign responsibility, enforce contracts, and impose liability. By the late nineteenth century, however, constitutional litigation transformed the meaning of that status. As the Fourteenth Amendment became the primary vehicle for economic rights claims, corporations increasingly appeared before courts as constitutional claimants rather than regulated entities. The shift was subtle but significant. Corporate personhood moved from a framework of accountability toward a framework of protection.

The chapters in this study traced that transformation across several moments of doctrinal development. The Reconstruction period produced intense debates over liberty, citizenship, and the meaning of constitutional equality. In that context, corporate litigants began to invoke the Fourteenth Amendment to challenge taxation and regulation. During the late nineteenth century,

courts increasingly interpreted liberty to include economic activity and contractual freedom. The Lochner era represented the most explicit articulation of this idea. Liberty of contract became central to constitutional doctrine, and the police power of the state faced greater scrutiny when it interfered with economic relations.

The New Deal altered this balance but did not erase the underlying framework. Courts accepted broader regulatory authority and upheld legislation designed to stabilize markets and protect workers. Corporate rights did not disappear. Instead, the relationship between rights and responsibilities was recalibrated. The state asserted a stronger role in regulating economic life, while corporations remained constitutional actors capable of invoking legal protections. The New Deal represents the moment in this history when courts most clearly acknowledged both sides of corporate personhood: the recognition of corporate rights alongside the expectation of corporate responsibility.

That balance did not hold. In recent decades, courts have once again emphasized the rights-bearing dimension of corporate personhood. Decisions involving corporate speech, religious liberty, and regulatory challenges reflect a renewed willingness to treat corporations as constitutional claimants. At the same time, corporate structures have grown increasingly complex. Limited liability regimes, subsidiary networks, and strategic bankruptcy filings allow corporations to separate legal responsibility from economic activity. The ability to invoke constitutional protections while distributing liability across multiple entities has become a defining feature of modern corporate law.

Understanding this history clarifies the stakes of contemporary debates about corporate power. Discussions of campaign finance, environmental regulation, workplace safety, and mass tort liability often focus on individual cases or recent decisions. Yet those disputes emerge from

a deeper doctrinal structure shaped over decades of constitutional interpretation. The rights that corporations invoke today did not appear suddenly. They developed through a series of judicial choices about how to interpret liberty, property, and the role of the state.

This history does not provide a simple solution to the problem of corporate responsibility, but it does reveal that the current balance between corporate rights and public regulation is neither inevitable nor fixed. The doctrinal framework that governs corporations today was constructed over time, and it has been revised before. The pendulum has shifted repeatedly as courts, legislatures, and citizens debated the proper limits of economic power.

Corporate personhood therefore cannot be understood solely as a legal technicality. It reflects broader decisions about the kind of economic order Americans are willing to accept. At different moments, the law has emphasized public welfare, individual liberty, or market autonomy. Each of those choices carries consequences for workers, consumers, and communities who interact with corporate institutions every day. The contemporary disputes that opened this study illustrate the persistence of this tension. When courts confront cases involving environmental harm, public health, or mass tort liability, they are not only resolving individual disputes; they are operating within a constitutional framework shaped by more than a century of debate over the rights and responsibilities of corporate actors.

The history traced in this thesis shows that the question has never been simply whether corporations possess rights. The deeper question has always been how those rights coexist with responsibility. That tension remains unresolved. It continues to shape American law, and it will likely continue to define the role of corporations in society for years to come.

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