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# If I were a Corporation, I'd be a Constitutional Person, too

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# ESSAY

## IF I WERE A CORPORATION, I'D BE A CONSTITUTIONAL PERSON, TOO

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## I. INTRODUCTION

Since the decision of the U.S. Supreme Court in *Roe v. Wade* that unborn children are not persons within the meaning of the Fourteenth Amendment,<sup>1</sup> the question arises why an artificial legal entity called a corporation acquires constitutional rights that a natural human being cannot. This essay explores how corporations attained constitutional protection under the Fourteenth Amendment and identifies the various legal tests developed by judges that must be passed before personhood is conferred. When these tests are applied to unborn human beings, it becomes obvious that the unborn have a stronger case for personhood than do corporations. Yet the unborn remain non-persons while corporations maintain their legal status as persons. So why are there two different laws of personhood—one denying personhood for a human being and one granting personhood for a fictional entity?

## II. THE COMMON LAW

The precedent that artificial persons known as corporations can be created by laws for the purposes of society and government is inherited from the common law.<sup>2</sup>

In *Trustees of Dartmouth College v. Woodward*, Justice Story described how these artificial persons have a life of their own and possess certain legal rights equal to that of a natural person:

An aggregate corporation, at common law, is a collection of individuals, united under one collective body, under a special name, and possessing certain immunities, privileges, and capacities, in its collective character, which do not belong to the natural persons composing it. Among other things, it possesses the capacity of perpetual succession, and of acting by the collected vote or will of its component members, and of suing and being sued in all things touching its corporate rights and duties. It is, in short, an artificial person, existing in contemplation of law, and endowed with certain powers and franchises which, though they must be exercised through the

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1. *Roe v. Wade*, 410 U.S. 113, 158 (1973).

2. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 119 (1st ed. 1765).

medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real personage.<sup>3</sup>

Justice Story identified “aggregation” as a defining characteristic of an artificial person, for it was the “aggregate” of natural persons that constituted the components of the corporation.<sup>4</sup>

Chief Justice Marshall also defined the corporation as an artificial being, but differed from Justice Story by identifying the element of “invisibility” as a feature of an artificial person: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>5</sup> In other words, while corporations were capable of immortality and perpetual succession of individuals, these artificial persons did not possess any inherent inalienable rights like natural persons. Neither were corporations granted the status of citizenship under Article IV, Section Two of the Constitution, which entitles citizens of each state to “all the privileges and immunities of citizens of the several states.”<sup>6</sup>

In an earlier case, Chief Justice Marshall declared, “That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen . . . .”<sup>7</sup> While artificial persons could legally enforce property and contractual rights, the attributes of citizenship were denied to corporations until 1853 when Justice Grier created an exception (the “Grier exception”) allowing corporations to be presumed citizens to establish jurisdiction needed to maintain and defend lawsuits.<sup>8</sup> Justice Campbell dissented vigorously, predicting future “doubt, contest and contradiction,” for there was no telling of “when the mischief would end.”<sup>9</sup>

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3. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 667 (1819) (Story, J., concurring).

4. *Id.*

5. *Id.* at 636.

6. U.S. CONST. art. 4, § 2. *See, e.g., Bank of Augusta v. Earle*, 38 U.S. 519, 586 (1839); *Paul v. Virginia*, 75 U.S. 168, 177 (1869).

7. *Bank of the United States v. Deveaux*, 9 U.S. 61, 86 (1809).

8. *Marshall v. Balt. & Ohio R.R. Co.*, 57 U.S. 314, 328 (1853).

9. *Id.* at 353 (Campbell, J., dissenting).

In the 1869 case of *Paul v. Virginia*, Justice Field acknowledged that the Grier exception was necessary and reaffirmed the general rule that only natural persons were citizens within the meaning of the Constitution.<sup>10</sup> That same year, in the case of *Steamboat Burns*, the Supreme Court again articulated that a corporation, “anything but a human being,” is “an inanimate object, without sense or reason, or legal capacity.”<sup>11</sup> Hence, a corporation did not have the ability to prosecute legal proceedings in federal courts, nor could this capacity be conferred by the states.<sup>12</sup>

### III. THE FOURTEENTH AMENDMENT

The ratification of the Fourteenth Amendment spawned litigation to determine the meaning of “citizen” and “person” in the Fourteenth Amendment. Most of the litigation revolved around the question of whether a corporation was a “person” and entitled to equal protection of the laws.

In 1870, Judge Woods in *Insurance Co. v. New Orleans* visited that question and found that since the passage of the Fourteenth Amendment, “citizenship in a state is the result and consequence of the condition of citizenship of the United States.”<sup>13</sup> The Fourteenth Amendment itself defined “citizen” to be, “All persons born or naturalized in the United States.”<sup>14</sup> Judge Woods concluded that, based on a plain reading of the text, citizens of the United States must be natural and not artificial persons.<sup>15</sup> By definition, this would exclude corporations, which cannot be born or naturalized.

Judge Woods then turned to the question of whether corporations were “persons” within the meaning of the Amendment. Judge Woods noted that the word “person” was used three times in the Fourteenth Amendment.<sup>16</sup> In the first two clauses, it was obvious that a corporation had no claim to these rights, for it did not possess the attributes contemplated by the Amendment: “Only natural persons can be born or

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10. *Paul*, 75 U.S. at 177–79.

11. *Steamboat Burns*, 76 U.S. 237, 238–39 (1869).

12. *Id.*

13. 13 F. Cas. 67, 68 (No. 7052) (C.C.D. La. 1870).

14. U.S. CONST. amend. XIV, § 1.

15. *Ins. Co.*, 13 F. Cas. at 68.

16. *Id.*

naturalized; only natural persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded . . . .”<sup>17</sup> The last clause, “deny to any person . . . the equal protection of the laws,” was more challenging, for it was possible for “person” to have a “wider and more comprehensive meaning.”<sup>18</sup> Judge Woods concluded that this last clause also referred only a natural person, to be consistent with the plain and evident meaning of “person” in the two prior clauses.<sup>19</sup> In support of his textual interpretation, Judge Woods referred to the “history of the submission by Congress, and the adoption by the states of the Fourth Amendment, so fresh in all minds as to need no rehearsal.”<sup>20</sup>

This analysis by Judge Woods is helpful to establish the claim that the unborn child is a person within the meaning of the Fourteenth Amendment. An unborn child is a natural person. If permitted to live, he or she can be born. At birth, he or she is conferred citizenship. He or she is not a fictitious, artificial creation of law. The unborn child is flesh and blood, a human being who is a unique individual. In 1870, it made perfect sense for the unborn child to be included as a person under the Fourteenth Amendment, for it was in harmony with state laws criminalizing abortion and with advances in embryology.

Then in 1882, Justice Field of the U.S. Supreme Court, sitting as a Circuit Judge in California, expanded the meaning of person in the Fourteenth Amendment to include an artificial person.<sup>21</sup> A corporation, the Southern Pacific Railroad, complained that its tax treatment by San Mateo County was unfair, contrary to the Equal Protection Clause. While conceding that the original purpose of the Fourteenth Amendment was to “protect the newly-made citizens of the African race in their freedom,” Justice Field utilized the generality of the language in the Equal Protection Clause to extend protection to “persons of every race and condition.”<sup>22</sup> Justice Field emphatically rejected as “without force” the

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17. *Id.*

18. *Id.* (quoting U.S. CONST. amend. XIV, § 1).

19. *Id.*

20. *Id.*

21. *San Mateo v. Southern Pac. R.R. (Railroad Tax Cases)*, 13 F. 722, 740 (C.C.D. Cal. 1882).

22. *Id.*

argument that “a limitation must be given to the scope of this amendment because of the circumstances of its origin.”<sup>23</sup>

#### IV. OPPRESSION

Oppression was the underlying evil that the Fourteenth Amendment was intended to combat. Inequality affected minorities who did not have the political power to remove discriminatory laws. Justice Field predicted, “When burdens are placed upon particular classes or individuals, while the majority of the people are exempted, little heed may be paid to the complaints of those affected. Oppression thus becomes possible and lasting.”<sup>24</sup> The key to repealing unfair laws is to burden everyone equally, which results in political pressure for change.

A person of every condition was henceforth eligible for constitutional protection. Persons of every description were protected from “discriminating and hostile state action of any kind.”<sup>25</sup> In expounding the meaning of “person,” Justice Field gave it the broadest operation possible, just short of a construction that was “so obviously absurd or mischievous, or repugnant to the general spirit of the instrument.”<sup>26</sup> Judge Sawyer agreed, observing that the Equal Protection Clause was,

protective and remedial, not punitive in character, and should, therefore, be *liberally*, not *strictly*, construed. No restriction should be put upon the term not called for by the exigencies of the case, or by the public interest; and it must be manifest that the public interest requires that the broadest signification be adopted.<sup>27</sup>

#### V. EQUALITY AND JUSTICE FOR BOTH THE RICH AND THE POOR

The Fourteenth Amendment was portrayed by Justice Field “as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the *most humble* or the *most powerful* . . . .”<sup>28</sup> Railroad corporations, perceived as rich and powerful, were

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 741 (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 645 (1819)).

27. *Id.* at 759 (Sawyer, J., concurring) (emphasis added).

28. *Id.* at 741 (emphasis added).

entitled “to have the same justice meted out to them which is meted out to the humblest citizen. *There cannot be one law for them and another law for others.*”<sup>29</sup>

Artificial persons like corporations were “persons” within the meaning of the Equal Protection Clause on the theory they were “aggregations of individuals united for some legitimate business.”<sup>30</sup> In addition, the courts as a matter of public policy “will always look beyond the name of the artificial being to the individuals it represents.”<sup>31</sup> Just because an artificial person is invisible does not mean those who do business with a corporation do not deal with real natural persons.<sup>32</sup> Therefore, the term “person” includes a corporation, for the court “will look through the ideal entity and name of the corporation to the persons who compose it, and protect them . . . .”<sup>33</sup> Judge Sawyer concurred, adopting the language of Mr. J. Norton Pomeroy, counsel for the defendant railroad corporation: “Metaphysical and technical notions must give way to the reality. The truth cannot be evaded that, for the purpose of protecting rights, the property of all business and trading corporations is the property of the individual corporators.”<sup>34</sup>

The manner in which the railroad corporation was deprived of its Fourteenth Amendment rights further violated its right to due process of law and aggravated the violation of equal protection before the law. The corporation was not given notice of a hearing for the proposed deprivation of property and, consequently, was never given an opportunity to be heard. Justice Field refused to condone this denial of natural justice that was “as old as the *Magna Charta*,” which espoused “the great principle which lies at the foundation of all just government, that no one shall be deprived of his life, his liberty, or his property without an opportunity of being heard against the proceeding.”<sup>35</sup>

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29. *Id.* at 730 (emphasis added).

30. *Id.* at 743.

31. *Id.* at 744.

32. *Id.* at 746.

33. *Id.* at 748.

34. *Id.* at 758 (Sawyer, J., concurring).

35. *Id.* at 751. The Field/Sawyer approach is interesting because the liberal definition of “person” is broad enough to include the unborn. First, an unborn human being is the humblest of all persons. As a class, the unborn are oppressed and do not have the political clout to achieve equality on their own. There is one law for them and another for those who are born. Second, a mother and her unborn child or children are in a way



In his concurring opinion, Judge Sawyer in the strongest possible language urged that all laws void under this conception of the Equal Protection Clause be harmonized with the Fourteenth Amendment—the “crowning glory of our national constitution.”<sup>36</sup> Judge Sawyer rejected any notion that inconvenience could excuse non-compliance with the Constitution: “If the life, liberty, property, and happiness of all the people are to be preserved, then it is of the utmost importance to every man, woman, and child of this broad land that every guaranty of our national constitution, whatever temporary inconvenience may be felt, be firmly and rigorously maintained at all times and under all circumstances.”<sup>37</sup> Then, to emphasize his contention that equal protection before the law is sacred and immune from suspensions or exception because it is foundational and integral to the rule of law, Judge Sawyer quoted Justice Davis in *Ex Parte Milligan*:

The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . . .<sup>38</sup>

Judge Sawyer also referred to *Insurance Co. v. New Orleans*, and without much discussion, refused to follow it:

In *Ins. Co. v. New Orleans*, 1 Woods, 85, it was held on the circuit that a corporation is not embraced in the word “person,” as used in the amendment under consideration, and the supreme court of California, upon the authority of that case, made a similar ruling in *C.P.R. Co. v. State Bd. of Equalization*, 8 Pac. Coast Law J. 1155. But notwithstanding their high character for ability, and my respect for the decisions of the judges taking that view, I am compelled to

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an aggregation of individuals, united for a limited time for the specific purpose of gestation and birth. Even though the unborn are invisible to the naked eye, the courts ought to look through the skin of the mother and protect the unseen natural person or persons contained within the mother. Third, unlike other persons, the unborn are given no legal hearing, no notice, and no opportunity to be heard prior to deprivation of their life and liberty.

36. *Id.* at 781 (Sawyer, J., concurring).

37. *Id.*

38. *Id.* (quoting *Ex parte Milligan*, 71 U.S. 2, 120–21 (1866)).

adopt a different conclusion. I think, both upon reason and authority, that the other is the better view. Again, with respect to corporate property, I adopt the language of counsel, which expresses my view accurately and clearly:

“The property of the corporation is in reality the property of its individual corporators. A state statute depriving a corporation of its property does deprive the individual corporators of their property. These clauses of the fifth and fourteenth amendments, and the similar clauses of the state constitution, apply, therefore, to private corporations, not alone because such corporations are ‘persons,’ within the meaning of that word, but also because statutes violating their prohibitions, in dealing with corporations, must necessarily infringe upon the rights of natural persons. In applying and enforcing these constitutional guaranties, corporations cannot be separated from the natural persons who compose them.”<sup>39</sup>

#### VI. THE SUPREME COURT DEFINES “PERSON” TO INCLUDE CORPORATIONS

At the United States Supreme Court four years later in the case *Santa Clara County v. Southern Pacific Railway Co.*, Chief Justice Waite saw no need to add to the analysis of Justice Field and Judge Sawyer in the *Railroad Tax Cases* and summarily expanded the meaning of “person” in the Fourteenth Amendment to include corporations:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion it does.<sup>40</sup>

In later cases, the Supreme Court, under the leadership of Justice Field, solidified its holding that corporations were persons. In *Pembina Consolidated Silver Mining & Milling Co. v. Pennsylvania*, Justice Field stated the following:

[T]he equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation. Under the designation of person there is no doubt that a private

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39. *Id.* at 760.

40. *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (published notes of clerk).

corporation is included. Such corporations are merely associations of individuals united for a special purpose.<sup>41</sup>

## VII. THE HISTORICAL CONTEXT

Justice Field was no stranger to cases of discrimination under the Fourteenth Amendment. Sitting as a circuit judge in *Ho Ah Kow v. Nunan*, Justice Field held that cutting off the ponytail (or queue) of all “Chinamen” detained in custody was wanton cruelty and not a health measure under the police powers of the states.<sup>42</sup> The “Queue Ordinance” of San Francisco was enforced only against the Chinese and was described as “torture” because of its humiliation of and disgrace toward people of Chinese ancestry.<sup>43</sup> Indeed, the circuit court analogized the ordinance to force-feeding pork to Jewish prisoners.<sup>44</sup> Justice Field and Judge Sawyer jointly held that “hostile and discriminating legislation by a state against persons of any class, sect, creed or nation, in whatever form it may be expressed, is forbidden by the fourteenth amendment of the constitution.”<sup>45</sup> The Court also emphasized that “we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness.”<sup>46</sup>

In *Pembina*, Justice Field referred to other cases, the most notable of which was *Yick Wo v. Hopkins*, as to the meaning of the Fourteenth Amendment.<sup>47</sup> Yick Wo’s laundry business had been licensed for twenty-two years when the City of San Francisco passed an ordinance requiring the Chinese to obtain special consent from the board of supervisors to conduct business. Yick Wo’s laundry business essentially was closed down after Yick Wo tried to obtain special consent from the board of supervisors but was denied. Of the 320 laundry businesses in the city and county of San Francisco, about 240 were owned and operated by Chinese. Pursuant to the arbitrary will of the board of

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41. 125 U.S. 181, 188–89 (1888).

42. 12 F. Cas. 252, 253 (1879).

43. *Id.* at 255.

44. *Id.*

45. *Id.* at 256.

46. *Id.* at 255.

47. *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U.S. 181, 190 (1888) (citing *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Barbier v. Connolly*, 113 U.S. 27 (1885); *Soon Hing v. Crowley*, 113 U.S. 703 (1885); *Missouri v. Louis*, 101 U.S. 22, 30 (1880); *Hayes v. Missouri* 120 U.S. 68 (1887)).

supervisors, all Chinese applications for a permit were denied and all those from Caucasians were granted. The result was the relocation of laundry businesses owned by the Chinese to remote locations outside the county, the closure of others, the prosecution and imprisonment of Chinese laundry owners who defied the ordinance, and the monopoly of laundry businesses run by Caucasians. In his opinion, Judge Sawyer asked, “Can a court be blind to what must be necessarily known to every intelligent person in the State?”<sup>48</sup> In spite of this observation, contrary to his own views, Judge Sawyer dismissed Yick Wo’s application for habeas corpus, remanding him back in custody. The Supreme Court unanimously reversed.<sup>49</sup>

Justice Matthews noted that the ordinance in question violated the Fourteenth Amendment for it conferred a “naked and arbitrary power to give or withhold consent . . . as to persons.”<sup>50</sup> This tyrannical power over persons, conferred by law, gave unlimited authority to give or withhold consent over the life of each business, without reason, restraint, or responsibility, pursuant to the untrammelled arbitrary will of the powerful over the helpless. The result was the division of businesses into two classes, the “wanted” run by Caucasians, whose businesses were allowed to survive, and the “unwanted” owned by the Chinese, whose businesses were shut down pursuant to the “mere will and pleasure” of the administrative authority.<sup>51</sup>

Justice Matthews rejected any arguments to dismiss the case on the basis that Yick Wo was an alien and a subject of the Emperor of China. Instead, he held that the Fourteenth Amendment was not confined to the protection of American citizens but extends to every person within the territorial jurisdiction of the Court without discrimination:

The fourteenth amendment to the Constitution is not confined to the protection of citizens. . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of

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48. *In re Wo Lee*, 26 F. 471, 475 (1886).

49. *Yick Wo*, 118 U.S. at 374.

50. *Id.* at 366.

51. *Id.* at 370. There is a strong analogy to unborn children, as some are “wanted” and others are “unwanted.” For the Supreme Court in *Yick Wo*, the wanted/unwanted distinction did not have any bearing upon the finding that all businesses were entitled to Fourteenth Amendment protection.

race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.<sup>52</sup>

Justice Matthews then breathed life into the Supreme Court's narrow conception of the rule of law, which regained much of its lost meaning when he broadly portrayed the rule of law to go beyond the idea of law and order to include natural justice. Justice Matthews stated:

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. . . . But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth "may be a government of laws and not of men." For, *the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.*<sup>53</sup>

The San Francisco ordinance, even though on its face appeared to be benign and impartial, was inoperative and void because it granted arbitrary power to a board of supervisors and hence conflicted with the Fourteenth Amendment and denied equal justice—not only within the framework of the Constitution but also under the rule of law. The discrimination against the Chinese was not justified but instead illegal and a denial of the equal protection of the laws.

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52. *Id.* at 369.

53. *Id.* at 369–70 (emphasis added).

It was in this context that Justice Field and the Supreme Court in *Pembina* noted that corporations, as a class of artificial persons, were like natural persons entitled to freedom from discrimination and equal protection of the laws. Citizenship was not a prerequisite to entitlement to protection under the Fourteenth Amendment. It was sufficient for Fourteenth Amendment protection to be either a natural person or an artificial person created by law.

#### VIII. THE ENTRENCHMENT OF CORPORATE PERSONHOOD

Over the next few years, the Supreme Court declared that the extension of the scope of the Equal Protection Clause of the Fourteenth Amendment to benefit artificial persons in the form of corporations was settled jurisprudence.

In *Missouri Pacific Railway Co. v. Mackey*, Justice Field noted that counsel “conceded” that corporations were persons within the meaning of the Fourteenth Amendment.<sup>54</sup> In 1889, relying on *Pembina* and *Santa Clara County*, Justice Field held in *Minneapolis & St. Louis Railway Co. v. Beckwith* that corporations were persons within the meaning of the Fourteenth Amendment and entitled to equal protection of the law with regard to the enjoyment of property.<sup>55</sup> In 1892, Justice Field held in *Charlotte, Columbia & Augusta Railroad Co. v. Gibbes* that private corporations were persons within the meaning of the Fourteenth Amendment.<sup>56</sup>

In 1896, Justice Harlan declared in *Covington & Lexington Turnpike Road Co. v. Sanford*, “It is now settled that corporations are persons within the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.”<sup>57</sup> In 1897, Justice Brewer, in *Gulf, Colorado & Santa Fe Railway Co. v. Ellis*, stated it was “well settled” that “corporations are persons within the provisions of the fourteenth amendment of the constitution of the United States.”<sup>58</sup> In 1898, Justice Harlan reaffirmed in *Smythe*

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54. 127 U.S. 205, 209 (1888).

55. 129 U.S. 26, 28 (1889).

56. 142 U.S. 386 (1892).

57. 164 U.S. 578, 592 (1896).

58. 165 U.S. 150, 154 (1897).

*v. Ames* that corporations were persons within the Fourteenth Amendment.<sup>59</sup>

In all of these cases, the Supreme Court ignored the decision of Justice Woods in *Insurance Co. v. New Orleans*.<sup>60</sup>

#### IX. DRAWING THE LINE BETWEEN NATURAL AND ARTIFICIAL PERSONS

In 1906, the Supreme Court drew a distinction between protections enjoyed under the Fourteenth Amendment by natural persons and those by artificial persons. In *Northwestern National Life Insurance Co. v. Riggs*, Justice Harlan held that “the liberty” referred to in the Fourteenth Amendment “is the liberty of natural, not artificial persons.”<sup>61</sup> A year later, in *Western Turf Ass’n v. Greenberg*, the Supreme Court affirmed the holding in *Riggs*, stating that “the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of natural, not artificial, persons.”<sup>62</sup> Justice Harlan also refused to permit corporations to enjoy the status of citizenship under the Fourteenth Amendment.

#### X. RECONSIDERING CORPORATE PERSONHOOD

It was not until 1938 that a Supreme Court Justice questioned corporate personhood altogether. Justice Black wrote a strong dissent in *Connecticut General Life Insurance Co. v. Johnson*, urging the Court to overrule its prior decisions that granted personhood to corporations.<sup>63</sup> Justice Black relied on the *Slaughter-House Cases* to demonstrate that the ratification and eventual adoption of the Fourteenth Amendment had nothing to do with granting rights to corporations.<sup>64</sup> Justice Black disclosed that in 1882, counsel had argued to the Supreme Court in *San Mateo County v. Southern Pacific Railroad Co.* that a journal of the joint congressional committee that had framed the Fourteenth Amendment “indicated the Committee’s desire

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59. 169 U.S. 466, 522 (1898).

60. Justice Woods served on the Supreme Court from 1881 until his death on May 14, 1887.

61. 203 U.S. 243, 255 (1906).

62. 204 U.S. 359, 363 (1907).

63. 303 U.S. 77, 85 (1938) (Black, J., dissenting).

64. 83 U.S. 36 (1873).

to protect corporations by the use of the word ‘person.’”<sup>65</sup> Such a secret purpose, reasoned Justice Black, “would not be sufficient” to expand the meaning of person to include a corporation.<sup>66</sup> Justice Black concluded that the purpose of the Fourteenth Amendment is to protect the life and liberty of weak and helpless human beings. His words may just as easily apply to unborn children as to members of the formerly enslaved African-Americans:

The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter House Cases*, that: “By ‘any person’ was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color.” Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings.<sup>67</sup>

In this manner, Justice Black equated the word “person” with “human being.” A natural person is in fact a human being. Justice Black did not distinguish between unborn and born human beings. As long as a human being was in existence, he or she was a person under the Fourteenth Amendment and entitled to equal protection of the law and to life and liberty. Justice Black explained that the purpose of the Fourteenth Amendment was to “prevent discrimination by the states against classes or race.”<sup>68</sup> Thus, to divide the born from the unborn is to create different classes of human beings.

According to Justice Black’s logic and reasoning, this was discrimination and violated the Constitution. It was ironic that in the first fifty years following its ratification, the Fourteenth Amendment became a powerful tool for corporations and relatively unused by poor and helpless human beings.<sup>69</sup>

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65. *Conn. Gen. Life Ins. Co.*, 303 U.S. at 87 (Black, J., dissenting).

66. *Id.*

67. *Id.* (citation omitted).

68. *Id.* at 89.

69. In reviewing the cases alleging discrimination under the Fourteenth Amendment in the first fifty years following its adoption, Justice Black observed that in more than half of these cases, corporations sought to invoke the Fourteenth Amendment’s benefits, while in less than 0.5% were the Fourteenth Amendment’s benefits invoked by African Americans. See *Conn. Gen. Life Ins. Co.*, 303 U.S. 77 (Black, J., dissenting).



Just over a decade later, Justice Douglas added his voice to the dissent of Justice Black. In *Wheeling Steel Corp. v. Glander*, Justices Douglas and Black wrote that there was “no history, logic, or reason” to the Supreme Court’s decisions since *Santa Clara County* that a corporation is a “person” within the meaning of the Equal Protection Clause of the Fourteenth Amendment.<sup>70</sup>

At long last, passages from the decision of Justice Woods in *Insurance Co. v. New Orleans* that limited the meaning of “person” to human beings were referred to and quoted with approval by Justices Douglas and Black.<sup>71</sup> Concluding that the *Santa Clara County* case and its progeny were wrong and that *Santa Clara County* should be overruled, Justices Douglas and Black urged their brethren that even old constitutional cases can be reversed.<sup>72</sup> If it were necessary to grant corporations equal protection under the Constitution, the way to accomplish this objective was by constitutional amendment, not by judicial interpretation.<sup>73</sup>

#### XI. OPINION

Justice Black’s reasoning and logic is impeccable, and in my view, correct. Since “person” is not defined in the Constitution, “person” must be interpreted “in light of the common law, the principles and history of which were familiarly known to the Framers of the Constitution.”<sup>74</sup>

I submit that under the Fourteenth Amendment, a person means the same thing as a human being. Justice Black agrees.<sup>75</sup>

The purpose of the Fourteenth Amendment is to protect weak and helpless human beings. Justice Black agrees.<sup>76</sup>

The Fourteenth Amendment is not limited to preventing discrimination based on race, but extends to any condition of vulnerability that makes a human being weak and helpless. I surmise Justice Black would agree with me if he were alive today, for to him all human beings were natural persons and entitled to constitutional protection.

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70. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 577 (1949).

71. *Id.* at 579.

72. *Id.* at 580.

73. *Id.* at 581.

74. *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898).

75. *Conn. Gen. Life Ins. Co. v. Johnson*, 303 U.S. 77, 87 (1938) (Black, J., dissenting).

76. *Id.* at 89.

Depending on his or her age, a human being may be born or unborn. Under the Fourteenth Amendment, once a person is born, that person is a person under the law. Under the Fourteenth Amendment, if a human being is unborn, that human being also should be a person under the law.

The unqualified language of the Fourteenth Amendment was not intended to be confined to benefit a particular class or condition of human beings; it was meant to equally protect all classes and conditions of human beings. In this respect, the dissenting judgment of Justice Swayne in the *Slaughter-House Cases* was right: “The protection provided was not intended to be confined to those of any particular race or class, but to embrace equally all races, classes, and conditions of men.”<sup>77</sup>

## XII. THE COMBINED TEST OF CORPORATE PERSONHOOD

The interesting question that remains is whether using the various corporate tests for personhood means that an unborn child may be defined as a person within that understanding of the Fourteenth Amendment. Distilled to their essential elements, the various principles and factors identified in the case law for conferring personhood to corporations under the Fourteenth Amendment may be identified as follows:

- The generality of the language in the Equal Protection Clause allows expansion of the meaning of “person” beyond that originally intended by the Framers.<sup>78</sup>
- Oppression of a particular person or class of persons is a factor signaling that such person or class of persons is a minority in need of protection under the Fourteenth Amendment.<sup>79</sup>
- Human beings of every kind and description are persons within the meaning of the Fourteenth Amendment and qualify for equal protection of the laws.<sup>80</sup>
- The broadest, most liberal construction of “person” consistent with the general spirit of the intent of the

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77. 83 U.S. 128, 129 (1873).

78. See, e.g., *San Mateo v. Southern Pac. R.R. (Railroad Tax Cases)*, 13 F. 722, 740 (C.C.D. Cal. 1882).

79. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

80. See, e.g., *id.* at 369.

instrument must be given to protect the public interest and to remedy injustice.<sup>81</sup>

- Equal protection of the laws means the same law binds the most powerful and the most humble in society.<sup>82</sup>
- An artificial person is a constitutional person, for a corporation cannot be separated from the natural persons who compose them.<sup>83</sup>
- An aggregation of persons united for some common purpose constitutes a “person” qualified for protection under the Equal Protection Clause of the Fourteenth Amendment.<sup>84</sup>
- The court will look beyond the corporate image to discern and identify the invisible persons in order to protect natural human beings.<sup>85</sup>
- Equal protection and treatment of every human being in every condition in every class is foundational and integral to the rule of law.<sup>86</sup>
- Equal protection under the Fourteenth Amendment is not limited to citizens.<sup>87</sup>
- Natural human beings have a stronger case for inclusion within the meaning of “person” than do artificial beings, such as corporations.<sup>88</sup>

### XIII. APPLICATION

When evaluating these factors, it is readily apparent that the unborn have a stronger case for designation as a “person” under the Fourteenth Amendment than do corporations.

The unborn child is a natural human being.

The condition of the unborn child is one of helplessness, dependency, and, technically, poverty.

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81. *See, e.g., Railroad Tax Cases*, 13 F. at 741.

82. *See, e.g., id.* at 730.

83. *See, e.g., id.* at 748.

84. *See, e.g., id.* at 743.

85. *See, e.g., id.* at 748.

86. *See, e.g., Ex parte Milligan*, 71 U.S. 2, 120–21 (1866).

87. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

88. *See, e.g., Railroad Tax Cases*, 13 F. at 748 (finding that corporations are “persons” under the Fourteenth Amendment on the rationale that behind the corporate shield are “natural persons” who deserve protection).

The unborn child and his or her mother are an aggregate being of two individuals (or more if there is more than one unborn child).

The pregnancy is a temporary stage, where there is a union for a special purpose.

The mother and the unborn child are both natural persons that cannot, without harm, be separated from one another until the time of birth.

Both the mother and the unborn child are persons, although the mother is also a citizen by virtue of her birth.

The unborn child cannot be seen by the naked eye, yet he or she is discernable by technology, such as ultrasound, or by clinical medical evaluation.

The unborn child is vulnerable and at present subject to oppression by the violence of abortion that causes his or her death through physical assault and battery.

There is no justice for the unborn, for his or her life is taken without any semblance of due process of law.

The unborn child is unequal and inferior to other human beings who have constitutional protection.

The rule of law for the unborn is absent, for equal protection is non-existent.

Not only do the unborn qualify for inclusion under the liberal test for granting personhood, it is a great irony that a corporation, an artificial entity, enjoys equal protection under the Fourteenth Amendment while an oppressed class of human beings does not.<sup>89</sup>

While there are legitimate concerns by Justices Black and Douglas about the process by which corporations attained the status of personhood, the fact remains that the test for corporate personhood has a legal pedigree and is firmly embedded in constitutional jurisprudence. Accordingly, this test for corporate personhood, as I have restated it in useable form, is available for all unborn children who would benefit by becoming constitutional persons.

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89. Other scholars have come to the same conclusion or have urged legal reform of constitutional protection of corporations. See, e.g., Natasha N. Aljalian, *Fourteenth Amendment Personhood: Fact or Fiction?*, 73 ST. JOHN'S L. REV. 495 (1999); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

Representatives of states such as South Dakota and Tennessee, who are currently looking for ways to limit or ban abortion,<sup>90</sup> might conclude that if the test for personhood is good enough for corporations, as a matter of fairness and consistency, it also is good enough for unborn persons from the moment of conception. By adopting this corporate model for granting personhood to the unborn, state legislatures and eventually judges will rationally, intellectually, and legally be able to reject the current test for personhood crafted by secular humanist philosophers who seized upon human physical, psychic, and social attributes (or lack thereof) to discriminate between human beings in different conditions of life, to determine who is and who is not a person, and thus to ultimately decide who may and may not be killed against their will.<sup>91</sup> Applying the corporate test for personhood will remove artificial line-drawing, such as at the moment of birth, which delineates the bestowing of constitutional personhood. It will also eliminate discrimination, establish equal protection, and restore specieism (membership in the human family) as per se eligibility to be a constitutional person.

While opponents of the idea to utilize the test for corporate personhood as a tool against abortion will argue that the Justices who decided the cases that establish the corporate test for personhood did not have abortion in mind, the Justices' judgments reveal they were acutely aware of human rights and equal treatment, values that transcend time, parties, and circumstances.

#### XIV. CONCLUSION

Much time has elapsed since corporations achieved personhood status and since natural human beings were segregated into persons and non-persons. Jurisprudence is

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90. On March 6, 2006, South Dakota Governor Mike Rounds signed into law the Women's Health and Human Life Protection Act, which bans abortion except to save the life of the pregnant mother. See, e.g., Jill Lawrence, *Abortion Battle Gains New Intensity With Ban in S.D.; Governor Says Aim is Reversing 'Roe'*, USA TODAY, Mar. 7, 2006, at 1A. On March 9, 2006, the Tennessee Senate passed a state constitutional amendment that said that the state constitution does not secure or protect a right to abortion or require the funding of abortion. See, e.g., Andy Sher, *Fowler Anti-Abortion Amendment Passes Senate*, CHATTANOOGA TIMES FREE PRESS, Mar. 10, 2006, at 0.

91. These philosophers include Michael Tooley, Peter Singer, and Joseph Fletcher. See Charles I. Lugosi, *Respecting Human Life in 21st Century America: A Moral Perspective to Extend Civil Rights to the Unborn from Creation to Natural Death*, 48 ST. LOUIS L.J. 425 (2004).

settled and cultural expectations are engrained. To unravel the weave of jurisprudence would be nothing less than starting all over again and causing social and legal chaos. If the combined test of corporate personhood is here to stay, then it is available to challenge jurisprudence that denies personhood to unborn human beings.

At one time corporations, like unborn human beings, were not legally defined as persons under the Fourteenth Amendment. However, if corporations can attain constitutional personhood, so too can unborn human beings, even though it can be argued that the Fourteenth Amendment was never originally intended to bestow personhood upon artificial entities or unborn natural persons, and that only a constitutional amendment can confer such status.

The test for corporate personhood remains valid jurisprudence that can potentially be applied to all unborn human beings, and thus utilized to its full potential to live up to the noble intentions and ideals of human equality contemplated by the drafters of the Fourteenth Amendment. Then there will be equality for all persons, natural and artificial, under the law.

