Adam Winkler, "'Corporations Are People' Is Built on an Incredible 19th-Century Lie" How a farcical series of events in the 1880s produced an enduring and controversial legal precedent" - *The Atlantic*, March 6, 2019

Somewhat unintuitively, American corporations today enjoy many of the same rights as American citizens. Both, for instance, are entitled to the freedom of speech and the freedom of religion. How exactly did corporations come to be understood as "people" bestowed with the most fundamental constitutional rights? The answer can be found in a bizarre—even farcical—series of lawsuits over 130 years ago involving a lawyer who lied to the Supreme Court, an ethically challenged justice, and one of the most powerful corporations of the day.

That corporation was the Southern Pacific Railroad Company, owned by the robber baron Leland Stanford. In 1881, after California lawmakers imposed a special tax on railroad property, Southern Pacific pushed back, making the bold argument that the law was an act of unconstitutional discrimination under the Fourteenth Amendment. Adopted after the Civil War to protect the rights of the freed slaves, that amendment guarantees to every "person" the "equal protection of the laws." Stanford's railroad argued that it was a person too, reasoning that just as the Constitution prohibited discrimination on the basis of racial identity, so did it bar discrimination against Southern Pacific on the basis of its corporate identity.

The head lawyer representing Southern Pacific was a man named Roscoe Conkling. A leader of the Republican Party for more than a decade, Conkling had even been nominated to the Supreme Court twice. He begged off both times, the second time after the Senate had confirmed him. (He remains the last person to turn down a Supreme Court seat after winning confirmation). More than most lawyers, Conkling was seen by the justices as a peer.

It was a trust Conkling would betray. As he spoke before the Court on Southern Pacific's behalf, Conkling recounted an astonishing tale. In the 1860s, when he was a young congressman, Conkling had served on the drafting committee that was responsible for writing the Fourteenth Amendment. Then the last member of the committee still living, Conkling told the justices that the drafters had changed the wording of the amendment, replacing "citizens" with "persons" in order to cover corporations too. Laws referring to "persons," he said, have "by long and constant acceptance … been held to embrace artificial persons as well as natural persons." Conkling buttressed his account with a surprising piece of

evidence: a musty old journal he claimed was a previously unpublished record of the deliberations of the drafting committee.

Years later, historians would discover that Conkling's journal was real but his story was a fraud. The journal was in fact a record of the congressional committee's deliberations but, upon close examination, it offered no evidence that the drafters intended to protect corporations. It showed, in fact, that the language of the equal-protection clause was never changed from "citizen" to "person." So far as anyone can tell, the rights of corporations were not raised in the public debates over the ratification of the Fourteenth Amendment or in any of the states' ratifying conventions. And, prior to Conkling's appearance on behalf of Southern Pacific, no member of the drafting committee had ever suggested that corporations were covered.

There's reason to suspect Conkling's deception was uncovered back in his time too. The justices held onto the case for three years without ever issuing a decision, until Southern Pacific unexpectedly settled the case. Then, shortly after, another case from Southern Pacific reached the Supreme Court, raising the exact same legal question. The company had the same team of lawyers, with the exception of Conkling. Tellingly, Southern Pacific's lawyers omitted any mention of Conkling's drafting history or his journal. Had those lawyers believed Conkling, it would have been malpractice to leave out his story.

When the Court issued its decision on this second case, the justices expressly declined to decide if corporations were people. The dispute could be, and was, resolved on other grounds, prompting an angry rebuke from one justice, Stephen J. Field, who castigated his colleagues for failing to address "the important constitutional questions involved." "At the present day, nearly all great enterprises are conducted by corporations," he wrote, and they deserved to know if they had equal rights too.

Rumored to carry a gun with him at all times, the colorful Field was the only sitting justice ever arrested—and the charge was murder. He was innocent, but nonetheless guilty of serious ethical violations in the Southern Pacific cases, at least by modern standards: A confidant of Leland Stanford, Field had advised the company on which lawyers to hire for this very series of cases and thus should have recused himself from them. He refused to—and, even worse, while the first case was pending, covertly shared internal memoranda of the justices with Southern Pacific's legal team.

The rules of judicial ethics were not well developed in the Gilded Age, however, and the self-assured Field, who feared the forces of socialism, did not hesitate to weigh in. Taxing the property of railroads differently, he said, was like allowing deductions for property "owned by white men or by old men, and not deducted if owned by black men or young men."

So, with Field on the Court, still more twists were yet to come. The Supreme Court's opinions are officially published in volumes edited by an administrator called the reporter of decisions. By tradition, the reporter writes up a summary of the Court's opinion and includes it at the beginning of the opinion. The reporter in the 1880s was J.C. Bancroft Davis, whose wildly inaccurate summary of the Southern Pacific case said that the Court had ruled that "corporations are persons within … the Fourteenth Amendment." Whether his summary was an error or something more nefarious—Davis had once been the president of the Newburgh and New York Railway Company—will likely never be known.

Field nonetheless saw Davis's erroneous summary as an opportunity. A few years later, in an opinion in an unrelated case, Field wrote that "corporations are persons within the meaning" of the Fourteenth Amendment. "It was so held in *Santa Clara County v. Southern Pacific Railroad*," explained Field, who knew very well that the Court had done no such thing.

His gambit worked. In the following years, the case would be cited over and over by courts across the nation, including the Supreme Court, for deciding that corporations had rights under the Fourteenth Amendment.

Indeed, the faux precedent in the Southern Pacific case would go on to be used by a Supreme Court that in the early 20th century became famous for striking down numerous economic regulations, including federal child-labor laws, zoning laws, and wage-and-hour laws. Meanwhile, in cases like the notorious *Plessy v. Ferguson* (1896), those same justices refused to read the Constitution as protecting the rights of African Americans, the real intended beneficiaries of the Fourteenth Amendment. Between 1868, when the amendment was ratified, and 1912, the Supreme Court would rule on 28 cases

involving the rights of African Americans and an astonishing 312 cases on the rights of corporations.

The day back in 1882 when the Supreme Court first heard Roscoe Conkling's argument, the *New-York Daily Tribune* featured a story on the case with a headline that would turn out to be prophetic: "Civil Rights of Corporations." Indeed, in a feat of deceitful legal alchemy, Southern Pacific and its wily legal team had, with the help of an audacious Supreme Court justice, set up the Fourteenth Amendment to be more of a bulwark for the rights of businesses than the rights of minorities.