

Challenging Corporate Power, Asserting the People's Rights

Session II — Historical Overview of the Corporate Taking of Our Authority to Govern

Few would argue that corporations today are not only ubiquitous but have enormous power over our lives. Was it always like this? How did it get to be this way? And what are the implications of this situation for democracy? The readings in this session explore the answers to these questions and challenge the concepts of democracy that are commonly accepted today. Indeed, so much power and wealth has been amassed by corporations that they can be said to govern, presenting a mortal threat to our body politic. To use a medical analogy, when a surgeon cuts out a cancer, it's not to punish the cancer; it's to save the body. If we wish to prevent the total demise of democracy — rule by the *people* — then we must return corporations to their subservient role.

A central task in this session is to establish the group's process of sharing leadership, an opportunity to design and practice democracy as you grapple with the history and ongoing struggle for self-governance.

Readings:

- 1 – “Know Thine Enemy,” by Joel Bleifuss (2 pages)
- 2 – “Can Corporations Be Accountable?” by Richard Grossman (7 pages)
- 3 – “Human vs. Corporate Rights,” by Mary Zepernick (2 pages)
- 4 – “Meet the Corporation” by Chris Warren (5 pages)
- 5 – “Gangs of America” by Ted Nace (6 Pages)

Discussion Questions:

1. How does this history shed light on the role corporations play on the current scene? In what ways is our democracy affected? Our minds colonized?
2. At the time of the Constitution, who defined what a person is and what property is? How did having the *power to define* shape the evolution of democracy? Who has the power to define today? Why does the power to define matter?
3. What decisions, laws, and institutions have supported the accumulation of corporate wealth, power, and privilege?
4. Discuss definitions for the following: sovereignty, public interest, common good. How are these concepts incorporated into dominant thinking today and how have they changed over time?
5. Can corporations be reformed or does their very existence threaten self governing democracy?

Supplementary Materials:

- "Taking Care of Business: Citizenship and the Charter of Incorporation," by Richard L. Grossman and Frank T. Adams. Originally published in 1993; now in its fourth printing. Reviews historical evolution of corporate power. 32-page booklet (approximately 12 standard 8.5x11 pages). Price: \$3 (includes postage).
- "Who's in Charge?" by The Programme on Corporations, Law & Democracy, London, England. Reviews the evolution of corporations in Great Britain over the same period of time as the readings in this session. 16-page booklet (equivalent of eight standard 8.5x11 pages). Price: \$2 (includes postage).
- *Toward an American Revolution: Exposing the Constitution and Other Illusions*, by Jerry Fresia. South End Press, 1988. Available free online at <http://cyberjournal.org> or for purchase at 800-533-8478.
- "Gangs of America" by Ted Nace. Condensation can be downloaded from www.bloomingtonwilpf.org. Click on local agenda.

KNOW *thine enemy*

A Brief History of Corporations

By Joel Bleifuss

Corporations can't cast a ballot, but they do vote with their wallets. In the 1995-96 election cycle, corporations and corporate PACs contributed \$147 million to candidates running for federal office. The United States is one of the few democracies where such donations are legal. The Supreme Court affirmed the right of corporations to pay for electoral campaigns in the 1978 case *First National Bank v. Bellotti*. Writing for the majority, Justice Lewis Powell explained that giving cash to influence the outcome of an election "is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual."

Indeed, under the prevailing interpretation of the Constitution, corporations have the same rights as individuals. This was not always the case: American corporations gained these protections in the 19th century, when the Supreme Court, in a series of rulings, defined the relationship between business and the state. Those rulings shielded companies from government regulation and thus allowed the corporation to become the dominant form of economic organization. As we near the 21st century, the combined gross revenues of the 200 largest corporations exceed the GDP of all but the nine richest nations. In this context, it is important to know how corporations came to hold such sway over our everyday lives, and what can be done about it.

The first corporations appeared in 17th-century Europe, during capitalism's infancy. At the time, the government chartered all corporations—that is, it gave them a specific public mission in exchange for the formal right to exist. The United States was settled by one such corporation, the Massachusetts Bay Company, which King Charles I chartered in 1628 in order to colonize the New World. The practice of chartering companies was a crucial part of the mercantile economic system practiced by the epoch's great powers—Holland, Spain and England. By allowing investors to pool their capital, the monarch made it possible for companies to launch ventures that would have been beyond the means of one person. And in exchange for the charter, companies expanded their government's wealth and power by creating colonies that served both as sources of raw materials and as markets for exported goods.

But in the 18th century, the Enlightenment challenged this model of economic organization by putting forward the idea that people need not be subjects in feudal structures but could act as individuals. American revolutionaries, inspired by radical notions of "unalienable rights" to "life, liberty and the pursuit of happiness," fought for independence not only from the Crown, but from the corporate bodies it had chartered. The Boston Tea Party, for example, was a protest against the British East India Company's monopoly of Eastern trade. Another critic was Adam Smith, whose *Wealth of Nations* was published in the same year as the Declaration of Independence. Influenced by John Calvin, Smith believed that human resourcefulness and industry were earthly signs of God's favor, and thus that wealth obtained in a market economy was an expression of "natural justice." Smith, however, did not think that corporations were a natural part of this order. Arguing that large business associations limit competition, he wrote, "The pretense that corporations are necessary to the better government of the trade is without foundation."

In the infancy of the republic, Americans gave little thought to corporations. In 1787, fewer than 40 corporations operated in the United States. By 1800, that number had grown to 334. Like the British corporations before them, these companies were typically chartered by the state to perform specific public functions, such as digging canals, building bridges, constructing turnpikes or providing financial services. In return for this public service, the state granted corporations permanence, limited liability and the right to own property.

American manufacturers began to form corporations only when trade with Europe was shut down by President Thomas Jefferson's embargo of France and Britain from 1807 to 1809 and by the War of 1812. In order to supply the domestic market with the manufactured goods that had previously come from England, Americans formed new companies to amass the capital needed to build factories. The rise of these associations—created not to fulfill a public mission, but to create private wealth—led to a legal dilemma: How would these new forms of business enterprise be treated under the law?

That task fell to the Supreme Court, then under the leadership of John Marshall, a staunch federalist from Virginia. The Marshall Court (1801-1835) created a national market by striking down trade barriers between the states. It also set precedent for later pro-business interpretations of the Constitution by invoking the Constitution's "obligation of contracts" clause (Article I, Section 10), which states that "no state shall... pass any... law impairing the obligation of contracts." For example, in *Fletcher v. Peck* (1810), the Supreme Court refused to allow the Georgia legislature to right a wrong committed by a previous heavily corrupt legislature, because to do so would entail voiding contracts that had been made in good faith.

Not all justices agreed that business reigned supreme. Chief Justice Roger Taney, an Andrew Jackson appointee who served from 1836 to 1864, tried to ameliorate the Marshall Court's rulings on the sanctity of contracts. In *Charles River Bridge v. the Proprietors of the Warren Bridge* (1837), he wrote for the majority, "The continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation; and the functions it was designed to perform, transferred to the hands of privileged corporations."

In the 1880s and 1890s, the Supreme Court allowed state courts to apply the Marshall Court's principles on a larger scale. At the time, states with strong Populist movements were passing laws to regulate corporations and the robber barons who owned them. But the courts, using Marshall's interpretation of the inviolability of contracts, struck down numerous attempts to regulate the workplace and protect collective bargaining.

The hand of capital was further strengthened by an unlikely legal sword: the 14th Amendment, which states that "no state shall deprive any person of life, liberty or property, without due process of law." The amendment was adopted during Reconstruction to protect recently emancipated slaves in a hostile South. But in the landmark case of *Santa Clara County v. Southern Pacific Railroad* (1886), the Court, invoking the 14th Amendment, defined corporations as "persons" and ruled that California could not tax corporations differently than individuals. It followed that, as legal "persons," corporations had First Amendment rights as well.

Using this definition of corporations as persons, the Court proceeded to strike down a whole range of state regulations. In 1938, Justice Hugo Black noted that in the 50 years after *Santa Clara*, "less than one-half of 1 percent [of Supreme Court rulings that invoked the 14th Amendment] invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations."

Corporations suffered a setback in the '30s, when the Great Depression discredited *laissez-faire* economics. In *West Coast Hotel Co. v. Parrish* (1937), the Court redefined the due process clauses of the 14th Amendment. In a rebuke of the Marshall Court's ruling in *Fletcher v. Peck*, Chief Justice Charles Evans Hughes wrote, "The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law." That same year, the Court, which had previously struck down key components of Roosevelt's New Deal, upheld the National Labor Relations Act and Social Security legislation. As Justice William Douglas observed in *Williamson v. Lee Optical of Oklahoma* (1955), "The day is gone when the Court uses the Due Process Clause of the 14th Amendment to strike down state laws, regulatory of business and industrial conditions because they may be... out of harmony with a particular line of thought."

Although courts now permit government regulation of business, corporations have managed to retain the First Amendment rights they were granted in *Santa Clara*. Few, if any, mainstream voices consider the question: Should corporations have the same rights as people have? Corporations based in the United States wield vast economic and political power. They can live forever. They feel no pain. They do not need clean air to breathe, potable water to drink or healthy food to eat. Their only goal is to grow bigger and more powerful.

Rather than treating these institutions as if they were flesh and blood, the political and legal system should acknowledge the fact that corporations are merely one way that people organize themselves to do business. They are not "endowed by the creator with unalienable rights" but rather are human-made creatures that can just as easily be unmade if they cease to serve a worthwhile public function.

To begin this retooling process, we need to expose the absurdity of granting First Amendment rights to corporations. We can draw our inspiration from both the 17th-century English philosopher Thomas Hobbes, who decried corporations as "worms in the body politic," and from Hobbes' star pupil, King Charles II. In 1664, the owners of the Massachusetts Bay Company protested when Charles II tried to investigate their company's operations. The Crown responded, "The King did not grant away his sovereignty over you when he made you a corporation. ... When his majesty gave you authority over such subjects as live within your jurisdiction, he made them not your subjects, nor you their supreme authority."

We should be as wise.

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Session II, Reading 1, page 2

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1998

Part I: CAN CORPORATIONS BE ACCOUNTABLE?

by Richard Grossman*

In 1628, King Charles I granted a charter to the Massachusetts Bay Company. In 1664, the King sent his commissioners to see whether this company had been complying with the terms of the charter. The governors of the company objected, declaring that this investigation infringed upon their rights. On behalf of the King, his commissioners responded:

“The King did not grant away his sovereignty over you when he made you a corporation. When His Majesty gave you power to make wholesome laws, and to administer justice by them, he parted not with his right of judging whether justice was administered accordingly or not. When His Majesty gave you authority over such subjects as live within your jurisdiction, he made them not *your* subjects, nor *you* their supreme authority.”¹

From childhood, this King had been led to act as a sovereign should. What about us?

By means of the American Revolution, colonists took sovereignty from the English monarchy and invested it in themselves. Emerging triumphant from their struggle with King George and Parliament, they decided they would figure out how to govern themselves. Alas, a minority of colonists were united and wealthy enough to define *most* of the human beings in the 13 colonies as property or as non-persons before the law and within the society, with no rights that a legal person was bound to respect.

Ours was a flawed sovereignty from the beginning. Because of its moral failings and structural inequities, whole classes of people had to organize and struggle over centuries to gain recognition as part of the sovereign people—that is, they had to get strong enough as a class to define themselves and not let either people or institutions define them: African Americans, native peoples, women, debtors, indentured servants, immigrants...

To this day, many still must struggle to exercise the rights of persons, to be recognized as persons by law and by society.

Throughout this nation's history, there has always been plenty of genuflecting to democracy and self-governance. But the further each generation gets from the Revolution, the less the majority act like sovereign people. And when it comes to establishing the proper relationship between sovereign people and the corporations we create, recent generations seem to be at a total loss.

Yet, earlier generations were quite clear that a corporation was an artificial, subordinate entity with no inherent rights of its own, and that incorporation was a privilege bestowed by the sovereign. In 1834, for example, the Pennsylvania Legislature declared:

“A corporation in law is just what the incorporation act makes it. It is the creature of the law and may be moulded to any shape or for any purpose the Legislature may deem most conducive for the common good.”²

During the 19th century, both law and culture reflected this relationship between sovereign people and their institutions. People understood that they had a civic responsibility not to create artificial entities which could harm the body politic, interfere with the mechanisms of self-governance, assault their sovereignty.

They also understood that they did not elect their agents to positions in government to sell off the sovereignty of the people. In other words, they were human beings who tried to act as sovereign people. One thing they did was to define the *nature* of the corporate bodies they created. If we look at mechanisms of chartering—and at the language in corporate charters, state general incorporation laws and even state constitutions prior to the 20th century—we find precise, defining language that was often mandatory and prohibitory and self-executory in nature. These mechanisms *defined* corporations by denying corporations political and civil rights, by limiting their size, capitalization and duration, by specifying their tasks, and by declaring the people’s right to remove from the body politic any corporations which dared to rebel.

Here is an example of language which sovereign people—responding to the rise of corporations after the Civil War—placed in the California Constitution of 1879, and which appears in other state constitutions at about that time:

“Article I, section 2: All power is inherent in the people...

“Article I, section 10: The people shall have the right freely to assemble together to consult for the common good, to instruct their representatives...

“Article XII, section 8: The exercise of the right of eminent domain shall never be so abridged or construed as to prevent the Legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals, and the exercise of the police power of the State shall never be so abridged or construed as to permit corporations to conduct their business in such manner as to infringe the rights of individuals or the general well-being of the state.”³

The principal mechanism which sovereign people used during the 19th century to assess whether their corporate creations were of a suitably subordinate nature was called *quo warranto*. The *quo warranto* form of action, as attorney Thomas Linzey has noted,⁴ is one of the most ancient of the prerogative writs. In the words of the Delaware Court of Chancery, “the remedy of *quo warranto* extends back to time whereof the memory of man runneth not to the contrary.”

Quo warranto simply means “by what authority?” All monarchs understood how to use this tool in self-defense. They realized that when a subordinate entity they had created acted “beyond its authority,” it was guilty of rebellion and must be terminated.

Sovereignty is in our hands now, but the logic is the same: when the people running a corporation assume rights and powers which the sovereign had not bestowed, or when they assault the sovereign people, this entity becomes an affront to the body politic. And like a cancer ravaging a human body, such a rebellious corporation must be cut out of our body politic.

During the first hundred years of these United States, people mobilized so that legislatures, attorneys general and judges would summon corporations to appear and answer to *quo warranto*. In 1890, the highest court in New York State revoked the charter of the North River Sugar Refining Corporation in a unanimous decision:

“The judgment sought against the defendant is one of corporate death. The state which created, asks us to destroy, and the penalty invoked represents the extreme rigor of the law. The life of a corporation is, indeed, less than that of the humblest citizen, and yet it envelopes great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason... Corporations may, and often do, exceed their authority only where private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But where the transgression has a wider scope, and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise and the violation of its corporate duty...

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is itself a fiction, and has been appropriately described as a figure of speech... The state permits in many ways an aggression of capital, but, mindful of the possible dangers to the people, overbalancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants... the state, by the creation of the artificial persons constituting the elements of the combination and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause, of an aggregation of capital... the defendant corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution... Unanimous.”⁵

Such a judgment should not be regarded as punishment of the corporation, but rather a vindication of the sovereign people. When our sovereignty has been harmed, we are the ones who must be made whole. The concept is similar to what Hannah Arendt described in her book *Eichmann in Jerusalem* (1963), writing about Nazi crimes against humanity,

“The wrongdoer is brought to justice because his act has disturbed and gravely endangered the community as a whole, and not because, as in civil suits, damage has been done to individuals who are entitled to reparation. The reparation effected [here] is of an altogether different nature; it is the body politic itself that stands in need of being ‘repaired,’ and it is the general public order that has been thrown out of gear and must be restored, as it were. It is, in other words, the law, not the plaintiff that must prevail.”⁶

There is no shortage of court decisions affirming the sovereignty of the American people over corporate fictions, recognizing the need to restore the general public order. In *Richardson v. Buhl*, the Nebraska Supreme Court in the late 19th century declared:

“Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are... accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals.”⁷

[1] Neil Berman, “A Short History of Corporations in Massachusetts,” written for POCLAD, October 1995, p. 2.

[2] Carter Goodrich, ed., *The Government and the Economy, 1783-1861*, Indianapolis: Bobbs-Merrill, 1967, p. 44 (Report of the Packer Committee of the Pennsylvania Legislature).

[3] Excerpts from the “California Constitution of 1879,” selected by the author, March 1996 (POCLAD memo).

[4] Thomas Linzey, et al, Brief in Support of Motion for Peremptory Judgment, *Community Environmental Legal Defense Fund v. Thomas Corbett, Attorney General of PA et al*, Civ. No. 1074 M. D. 1996, p. 4, citing *Wilmington City Railway Co. v. People’s Railway Co.*, 47A, 245, 248 (Del. Ch. 1900).

[5] *People v. North River Sugar Refining Corp.*, 24 N. E. 834 (1890).

[6] Hannah Arendt, *Eichmann in Jerusalem*, New York: Viking Penguin, 1977.

[7] *Richardson v. Buhl*, 43 N. W. Rep. 1102.

Rachel's Environment & Health

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Part 2: CAN CORPORATIONS BE ACCOUNTABLE?

by Richard Grossman*

In the late 19th century, the Supreme Court of Georgia, in *Railroad Co. v. Collins*, wrote:

“All experience has shown that large accumulations of property in hands likely to keep it intact for a long period are dangerous to the public weal. Having perpetual succession, any kind of corporation has peculiar facilities for such accumulations, and most governments have found it necessary to exercise caution in their grants of corporate charters. Even religious corporations, professing and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed, as such bodies are, from the sure bounds—the grave—to the schemes of individuals they are able to add field to field, and power to power, until they become entirely too strong for that society which is made of up those whose plans are limited by a single life.”

Justices White, Brennan and Marshall, dissenting in a 1978 case, *First National Bank of Boston v. Belotti*:

“It has long been recognized, however, that the special status of corporations has placed them in a position to control vast amount of economic power which may, if not regulated, dominate not only the economy but also the very heart of our democracy, the electoral process... The State need not permit its own creation to consume it.”²

Chief Justice Rehnquist, dissenting in the same case:

“...the blessing of potentially perpetual life and limited liability... so beneficial [sic—R.G.] in the economic sphere, poses special dangers in the political sphere.”³

A great achievement of corporations, as they set out towards the end of the 19th century to transform the law and recreate themselves, was to replace basic tools of sovereign people—chartering, defining incorporation laws, “by what authority” proceedings and charter revocation—with regulatory and administrative law, new legal doctrines and fines as corporate punishment. Many people of that time understood that these changes amounted to a counterrevolution, and so they resisted with great passion and energy.

Farmers and workers were not willing to concede that the corporate form would define work and money and progress and efficiency and productivity and unions and justice and ethical conduct and sustainability and food and harmful and reasonable behavior. They were not willing to concede that corporations should have the rights and privileges of persons.

So they organized, educated, resisted. They were crushed by giant corporations’ ability to use state and federal government to take rights away from people and bestow them upon corporations.

Over time, corporations were able to claim for them-selves rights and privileges taken from the sovereign people via violence with favorable decisions by federal judges. Corporations were conceded personhood, and a long list of civil and political rights such as free speech, and property rights such as the right to define and control investment, production, and the organization of work.

By the beginning of the 20th century, corporations had become sovereign and they had turned people into consumers, or workers, or whatever the corporation of the moment chose to define humans as.

Without a clear understanding of history, most citizen efforts against corporations in this century have been struggles against the symptoms of corporate domination which we have waged in regulatory and administrative law arenas.

But these are *not* arenas of sovereignty. These are stacked-deck proceedings, where people, communities and nature are fundamentally disadvantaged to the constitutional rights of corporations. Here, we cannot demand “by what authority” has corporation X engaged in a pattern of behavior which constitutes an assault upon the sovereign people? Here, we cannot declare a corporation *ultra vires*, or “beyond its authority.” To the contrary, regulatory and administrative law only enables us to question specific corporate behaviors, one at a time, usually after the harm has been done... over and over and over again.

In these regulatory and administrative proceedings, both the law and the culture concede to the corporation rights, privileges and powers, which earlier generations knew were illegitimate for corporations to possess. In addition, in these proceedings, the corporation has the rights of natural persons: a human and a corporation meet head on, in a “fair fight.”

Today, our law and culture bestow our sovereignty on corporations. So do most of our own citizen organizations dedicated to justice and environmental protection and worker rights and human rights. Consequently, our organizations use their energy and resources to study each corporation as if it were unique, and to contest corporate acts one at a time, as if that could change the nature of corporations.

Folks relentlessly tally corporate assaults, study the regulatory agencies and try to strengthen them. We try to make corporate toxic chemicals and corporate radiation and corporate energy and corporate banking and corporate agriculture and corporate transportation, corporate buying of elections, and corporate writing of legislation, and corporate education of our judges and corporate distorting of our schools, a little less bad.

Isn't it an old story? People create what looks to be a nifty machine, a robot, called the corporation. Over time the robots get together and overpower the people. They redesign themselves and reconstruct law and culture so that people fail to remember they created the robots in the first place, that the robots are machines and not alive. For a century, the robots propagandize and indoctrinate each generation of people so they grow up believing that robots are people too, gifts of God and Mother Nature; that they are inevitable and the source of all that is good. How odd that we have been so gullible, so docile, so obedient.

Isn't it odd that we don't remember who We the People are? How sovereign people should regard ourselves, how sovereign people should act? We need to realize what power and authority we possess, and how we can use it *to define the nature of corporations*, so that we do not have to mobilize around each and every corporate decision that affects our communities, our lives, the planet.

In the face of what we experience about corporations, of what we know to be true, why are so many people so obedient? Why do we hang on to the hope that the corporation can be made socially responsible? Isn't this an absurd notion? After all, organizations cannot be responsible. This is just not a relevant concept, because a principal purpose of corporations is to protect the managers, directors and stockholders from responsibility for what their corporations do.

But only people can be responsible. How? By defining ourselves as sovereign people so that we then can define all the corporate bodies that we create (governmental, business, educational, charitable, and civic).

We the People are the ones who must be accountable. We are not accountable when we create monster robots which run rampant in our communities and which, in our names, sally forth the across the world to wreak havoc upon other places and upon other people's self-governance.

We are not being socially responsible or civically accountable when we don't act like sovereign people.

We are not being socially responsible or civically accountable when we play in corporate arenas by corporate rules.

We are not being socially responsible or civically accountable when we permit our agents in government to bestow our sovereignty upon machines.

We are not being socially responsible or civically accountable when we organize our communities and then go to corporate executives and to the hacks who run corporate front groups and ask them to please cause a little less harm; or when we offer them even more rewards for being a little less dominating.

Sovereign people do not beg of, or negotiate with, subordinate entities which we created. Sovereign people *instruct* subordinate entities. Sovereign people *define* all entities we create. And when a subordinate entity violates the terms of its creation, and undermines our ability to govern ourselves, we are required to move in swiftly and accountably to cut this cancer out of the body politic.

With such deeds do we honor the millions of people who struggled before us to wrest power from tyrants, to define themselves in the face of terror and violence. And we make all struggles for justice and democracy easier by weakening the ability of corporations to make the rules, and to rule over us.

Some might say this is not a practical way to think and act. Why? Because corporations will take away our jobs? Our food? Our toilet paper? Our hospitals? Because we don't know how to run our towns and cities and nation without global corporations? Because they will run away to another state, to another country? Because the Supreme Court has spoken? Because philanthropic corporations won't give us money? Because it's scary? Because it's too late to learn to act as sovereign people?

Because in 1997 it is not realistic for people across the nation and around the world to take away the civil and political rights of all corporations, to take the property rights and real property corporations have seized from human being and from the Earth?

Yeah, and it *is* realistic to keep conceding sovereign powers to corporations, to keep fighting industrial corporations and banking corporations and telemedia corporations and resource extraction corporations and public relations corporations and transportation corporations and educational corporations and insurance corporations and agribusiness corporations and energy corporations and stock market corporations, one at a time forever and ever?

On January 10, 1997, President William Jefferson Clinton sent a letter to the mayor of Toledo, Ohio. The mayor had asked the President for help in getting the Chrysler Corporation to build a new Jeep factory within Toledo city limits to replace the ancient one which Chrysler Corporation was closing. The President of the United States, leader of the most powerful nation the world has ever known, elected head of a government always eager to celebrate the uniqueness of its democracy to the point of forcing it upon other nations, wrote:

"...As I am sure you know, my Administration cannot endorse any potential location for the new production site. My Intergovernmental Affairs staff will be happy to work with you once the Chrysler Board of Directors has made its decision..."⁴

Our President may not have a clue, but We the People did not grant away our sovereignty when we made Chrysler into a corporation. When we gave the Chrysler Corporation authority to manufacture automobiles, we made the people of Toledo not its subjects, nor Chrysler Corporation their supreme authority.

How long shall We the People, the sovereign people, stand hat in hand outside corporate boardrooms waiting to be told our fate? How long until we instruct our representatives to do their constitutional duty? How long until *we* become responsible...until *we* become accountable, to our forebears, to ourselves, to our children, to other peoples and species and to the Earth?

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[1] *Railroad Co. v. Collins*. 40 GA 582.

[2] *First National Bank of Boston v. Belotti* 435 US 765 (1978).

[3] The same source as Note 2 above.

[4] Letter from Bill Clinton to the Honorable Carleton S. Finkbiner, January 10, 1997, printed in the *Toledo Blade*, 25 January 1997.

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Human vs. corporate rights

Mary Zepernick

“The right of property in a slave is distinctly and expressly affirmed in the Constitution.”

In 1857, the U.S. Supreme Court found against Dred Scott’s right to freedom, despite the fact that his owner had taken him to a free state and territory before returning with him to Missouri, a slave state.

The court also declared the Missouri Compromise unconstitutional on the grounds that Congress had no authority to exclude slavery from the territories. “No word can be found in the Constitution which gives Congress a greater power over slave property, or which entitles property of that kind to less protection than property of any other description. The only power conferred is the power coupled with the duty of guarding and protecting the owner in his rights....”

Thus did the highest court come down foursquare on the side of property over people. As for human freedom, Abraham Lincoln, born 190 years ago today, wrote in a letter to journalist Horace Greeley in 1862, that “My paramount object in this struggle is to save the Union, and is not either to save or destroy Slavery. If I could save the Union without freeing any slave, I would do it; and if I could save it by freeing all the slaves, I would do it; and if I could do it by freeing some and leaving others alone, I would also do that.” Lincoln’s humanitarian impulses took a back seat to practical politics.

For example, the Emancipation Proclamation, issued the first day of 1863, freed only those slaves behind enemy lines, where Lincoln had no authority. However, soon after the Union won the Civil War (or War Between the States to those who believe the South will rise again), the 13th Amendment to the Constitution abolished slavery. Three years later, the 14th Amendment extended citizenship to African-Americans. The “due process” and “equal protection of the laws” clauses prohibited states from depriving any person of guaranteed civil liberties and equal treatment.

Not long before he was assassinated, President Lincoln had spoken on another threat to his beloved Union. “I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. As a result of the War, corporations have been enthroned, an era of corruption in high places will follow, and the money-power of the country will endeavor to prolong its reign by working upon the prejudices of the people until the wealth is aggregated in a few hands and the Republic is destroyed.”

Upon this nation’s founding, conditions of corporate operations were clearly defined by state-issued charters. However, with the growth of railroads, banking and manufacturing in the mid-19th century, corporate barons and lawyers figured their fortunes would be better served if their institutions gained the rights of people.

In 1886, after decades of corporate maneuvering and corrupting those in high places, the Supreme Court issued a watershed decision in *Santa Clara County vs. Southern Pacific Railroad*, declaring the corporation a natural person under the Constitution, entitled to the protection of the 14th Amendment.

Sixty years later, Justice William O. Douglas wrote that “There was no history, logic or reason given to support that view.”

In 1896, a decade after giving corporations legal personhood, the court stripped it from African-Americans in *Plessy vs. Ferguson* (“separate but equal”), putting the Supreme seal of approval on segregation.

Between 1890 and 1910, 307 14th Amendment cases came before the Supreme Court, 19 dealing with African-Americans, 288 with corporations. It took 58 years of freedom

struggles before the court reversed Plessy, with Brown vs. Board of Education finding in 1954 that separate is inherently unequal.

Referring to the mid-20th century civil rights movement, researcher Jeff Kaplan writes that “these attempts by real human beings to assert their rights threatened the prerogatives of the corporations. Corporate lawyers responded by seeking to expand the standing of corporate persons to include a number of protections under the Bill of Rights which previously had been granted only to human beings.... In other words the Court has endorsed a counter attack by property against the assertion of human rights by the public in general and people of color and women in particular.”

Consequently, at the turn of another century we witness the grotesquerie of corporate “free speech”; of Omnipoint Corp. suing the citizens of Wellfleet over the placement of cell towers for allegedly violating the corporate entity’s civil rights under the Civil Rights Act of 1964 and the Wells Fargo Corp. threatening a suit against the people of Santa Cruz for denying them a piece of public land; of activists and the government negotiating “voluntary” codes of corporate conduct rather than insisting that the people’s representatives once again define the nature and activities of our legal fictions.

Some folks, alarmed by the corporate usurpation of our power to govern, seek to “level the playing field.” But this is not the people vs. corporations suiting up for a contest between two equal teams. Becoming self-governing, in charge of our common life and institutions, isn’t a game; it’s the work of “We the People.”

Abraham Lincoln had it right. The future of our Republic is at stake.

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Meet the Corporation

It Has No Conscience. It's Pathological. And It's In Your Neighborhood. How Can We Stop The Juggernaut?

Chris Warren

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In April 2003, a group assembled outside the capitol in Richmond, Virginia, to celebrate the chartering of a new tobacco company: Licensed to Kill Incorporated. Cofounder Robert Hinkley bluntly declared the company's purpose: to manufacture and market its products in a way that "generates profits for investors while each year killing over 400,000 Americans and more than 4.5 million other people worldwide."

Licensed to Kill (motto: "We're rich, you're dead!") was formed as a stunt but with the serious goal of demonstrating how states sanction and protect corporations, even those dedicated to making money at the expense of public health and the environment. "We told the Commonwealth of Virginia that we were going to kill people," says Hinkley, a corporate attorney. "To their credit, they didn't want to set this company up, but there was nothing they could do about it."

Obtaining a corporate charter in Virginia--and most other states--is as easy as filling out a short form and paying a modest fee. Only if it planned to break the law would a company *not* receive a charter. (Despite its name, Licensed to Kill wasn't illegal: The tobacco company merely had the audacity to plainly state its products' effects.) But then again, applicants don't usually even have to list the purpose of their business.

Once chartered, corporations are granted a long list of benefits under state and federal law, including the ability to exist forever (there's no expiration date for charters) and the right to influence elections and shape legislation through campaign contributions. Additionally, their shareholders and directors are shielded by limited liability. Meant to encourage investment in business ventures by ensuring that an individual's assets cannot be seized by creditors if a company fails, limited liability also insulates stockholders and directors, in most cases, from personal responsibility for the company's potential debts or even misdeeds.

Many of these rights stem from a series of court decisions over the past 120 years that have, in effect, established corporations as legal "persons"--often powerful ones with little accountability to society. Their widely accepted purpose is simple: to maximize return to shareholders. (This does not, of course, apply to not-for-profit corporations like churches, schools, and charities.)

Thus it has been for at least a century. Professor Jesse Choper, an expert on constitutional and corporate law at the University of California at Berkeley, points to a 1919 case in which automaker Henry Ford was sued by his shareholders for proposing to sell his cars at a below-market price. Ford said he wanted to do it to create more jobs--thereby "spread[ing] the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes"--but the Michigan Supreme Court ruled in favor of the shareholders. Later cases in other

states have broadened corporations' ability to contribute to public welfare but generally followed the Michigan Court's opinion that business should be conducted "primarily for the profit of the stockholders."

Obligations to workers, customers, the environment or the communities in which a company operates generally take a backseat, if they are considered at all. "Nothing in its legal makeup limits what [the corporation] can do to others in its pursuit of its selfish ends," writes Joel Bakan, a law professor at the University of British Columbia and author of *The Corporation: The Pathological Pursuit of Profit and Power*. Indeed, "it is compelled to cause harm when the benefits of doing so outweigh the costs."

Corporations' accumulation of unbridled power--and the way they often misuse it--has inspired myriad efforts to restrain them: boycotts, protests, lawsuits, legislation and shareholder actions to change company policies from within. But after witnessing corporations riding roughshod over local communities' rights to regulate everything from cell phone towers to trash dumping, activists like Hinkley are calling for a new approach. He and others realize that such battles will be endless unless citizens challenge the corporate system itself. "We've created this entity; it's like a monster," says Jim Price, a member of the Sierra Club's Corporate Accountability Committee. "We've given corporations more power than we reserve for ourselves."

That might sound hyperbolic to some, but not to members of the communities that have tried to challenge corporate power. In 1996, for example, the voters of Montana, worried about the influence of money in politics, passed a ban on corporate participation in ballot-initiative campaigns. The federal courts struck down the ban, saying it went against the corporate "person's" constitutionally protected free speech--a right the Supreme Court had affirmed for corporations in the 1970s.

In 1998, Omnipoint Communications (now part of T-Mobile) sought a permit to install a wireless tower in the steeple of a historic church in Wellfleet, Massachusetts, a tiny Cape Cod town. After deliberating, Wellfleet's planning board said no. Undeterred, Omnipoint sued the town for violating its rights under the Telecommunications Act. Faced with the prospect of paying the company for damages (as well as its legal fees), the town relented.

In Virginia in 2001, a federal court threw out a state law that had attempted to restrict the dumping of trash from other states in its own landfills. The court's reasoning? The law violated trash hauler Waste Management Corporation's constitutional rights under the Commerce and Supremacy Clauses, which were designed to prevent state and local governments from restricting the flow of goods.

And just last May, Wal-Mart, the world's largest retailer, thwarted the Flagstaff, Arizona, city council's efforts to regulate land use and limit sprawl. Wal-Mart poured some \$300,000 into an initiative campaign that convinced voters to overturn a council-approved ordinance to restrict the size of big-box stores. The campaign attracted national attention when a Wal-Mart-funded political action committee ran ads featuring a photo of a Nazi-era book burning that asked, "Should we let government tell us what we can read? Of course not. . . . So why should we allow local government to limit where we shop?"

"The authority to govern in this country is theoretically in the hands of the people," notes activist and historian Richard Grossman. But if that's the case, how can a company nullify a state law? Why does a corporation have the power to overturn a local planning decision? To Grossman, it comes down to one basic question--who gets to make the rules?--and one not-so-simple answer: People can only begin to regain control over their communities by confronting corporations' "illegitimate claims to constitutional rights, powers and authorities."

An activist most of his life, Grossman has helped pass laws, elect people, and stop many instances of corporate abuse. A former Peace Corps volunteer and director of Environmentalists for Full Employment, he has also brought community groups together to fight environmental injustice. But despite the individual victories, he felt his side was losing the war. A successful fight to save one forest, say, was soon followed by a hard slog to protect another. "If you're upset about toxics in the air and water, for example, eventually you want to write a law," Grossman says. "But it's not enough to just write an environmental law, or a labor law, or a consumer law, because the fundamental law--the Constitution--is a stacked deck against us." His search for a more comprehensive approach led him to found the Program on Corporations, Law, and Democracy, a small group of organizers, activists, and writers from around the country who are educating the public about how corporations have become more powerful than the institutions that created them--and what people can do to right the scales.

These beliefs have taken hold in rural Pennsylvania, where Grossman now works for the Community Environmental Legal Defense Fund. In the late 1990s, large corporate hog farms were generating a mountain of manure that threatened to seep into the area's groundwater and wells. Instead of protesting these specific conditions, citizens in some of the area's townships--many conservative, lifelong Republicans--worked with Thomas Linzey, head of the defense fund, to pass local laws that banned corporate farms altogether. In two cases, they declared that corporations *don't* have the same rights as people.

Agribusiness firms have fought back by pushing for a plan--unveiled last year by Governor Edward Rendell (D)--to set up a board of political appointees with the power to overturn local ordinances. "The establishment of this board is nothing less than the state being used by agribusiness and sludge corporations to eliminate those 'pesky' Townships and rural communities who continue to believe in local, democratic control over issues affecting their lives," a group of township supervisors wrote. A bill based on Rendell's initiative was signed into law in July.

A similar battle is being waged on the other side of the country, where residents of the Northern California city of Arcata were struggling with the economic impact of fast-food franchises. In 1998, the city passed an ordinance that prohibited any more of these businesses from opening. "Local businesspeople were very much in favor of it," says David Cobb, a Humboldt County activist and the Green Party's 2004 presidential candidate. So much so that they said, "Why only do restaurants?" The city is considering a prohibition on all chain retailers, while the county weighs a ban on

nonlocal corporate involvement in elections. Last year Arcata voted (in a non-binding resolution) to oppose corporate personhood altogether, declaring that "only persons who are human beings should be able to participate in the democratic process."

The conviction shared by these disparate communities--that democracy is impossible unless corporations are subordinate to citizens--is nonpartisan and proliferating. And its biggest advertisement is the corporations themselves: Every time big business comes into a community and effectively declares that its citizens don't have the right to govern themselves, Grossman says, more people will understand what is at stake.

Tobacco-industry provocateur Hinkley is less troubled by the rights of corporations than by their lack of responsibilities. Legally designed to "valorize self-interest and invalidate moral concern," as author Bakan writes, the amoral corporation behaves in ways that most people would find "abhorrent, even psychopathic, in a human being." Current environmental regulations, Hinkley says, do little more than tell companies how much they can legally do. A law that limits the amount of mercury and other toxic emissions, for instance, essentially allows a certain level of pollution. As entities dedicated to the pursuit of profit, corporations naturally regard these rules as impediments to making money and try to circumvent them any way they can.

To change that dynamic, Hinkley wants to add a coda to the laws that govern corporate charters that says, yes, corporate directors should be focused on profit but not at the expense of "the environment, human rights, the public health and safety, the welfare of communities . . . [or] the dignity of employees." The essence of capitalism--the profit motive--would remain intact. But corporations would have to serve interests beyond the bottom line. Just as potential profits are already limited by specific laws against, for example, child labor and false advertising, harm to the environment and communities would no longer be an acceptable part of competition.

Under Hinkley's proposed changes to state business laws, pollution would be flatly prohibited--after companies were given 15 years to develop and implement the technology they need to meet that requirement. Any violations after that deadline would be illegal, making large corporations and their directors subject to criminal or civil charges for their misdeeds.

State legislators in California, Maine, and Minnesota have already introduced bills based on, or similar to, Hinkley's ideas. "My goal is to make social responsibility and social responsiveness and social benefit integral to the nature of corporations," says California state senator Richard Alarcon (D). But the going is slow. The Maine bill, sponsored by Representative John Eder (G), was quickly voted down in committee. The Minnesota version, championed by Senator Sandra Pappas (D), received a hearing and was tabled for further review. Alarcon's bill received a hearing in early 2004. But the California Chamber of Commerce and other business groups dubbed it a "job killer," and it did not make it out of committee.

In a letter to Alarcon, the Chamber said that the bill would act as the "ultimate disincentive" for people to serve on corporate boards and that a flood of litigation could result. Its language, the Chamber argued, "could render the corporation and its directors liable for the economic and environmental consequences of any number of

legitimate business decisions, such as closing a facility within a community or engaging in a regulated activity that has some adverse environmental consequences."

Hinkley believes the 15-year transition period would allow companies and their directors to avoid unfair liability by retooling their operations so they won't damage the public interest in the first place. He's watched corporations respond in this way to the demand of corporate securities law, his specialty as an attorney. "Companies basically err on the side of caution" when disclosing financial information to potential investors, Hinkley says. "It's not so they'll win a lawsuit, but so they'll never face one."

What he says his proposal would do is change the rules of the game: Build in an obligation to be socially responsible and let companies compete, and profit, on that basis. Even with new rules, few companies would abandon the profitable U.S. market altogether, and their operations conducted and products sold here would be subject to these restrictions, regardless of where the companies were based. Many might find it more cost-effective to just follow the same rules everywhere.

The European Union is already moving businesses in this direction, passing strict environmental regulations that require manufacturers selling their product in Europe to conduct extensive tests on common chemicals and limit dangerous materials in electronic products. (See "Old Europe's New Ideas," January/February 2004). If adopted widely in the United States, Hinkley's proposal might even become a model for other countries, just as California's clean-car regulations have paved the way for other states to demand more environmentally friendly options.

Hinkley is convinced that once corporations accept that they can no longer damage the public interest in pursuit of profit, they'll innovate and evolve. "When businesses see this is what consumers want--and they'll see this if we stand up and pass a law--they're going to say, OK, the profit motive is still what we're about. We're just going to have to do things a little better." Not requiring them to change, he insists, is not an option.

It's too early to tell whether corporations can be reined in by Hinkley's attempts to broaden their responsibilities or Grossman's challenges to their rights--or something else entirely. But these efforts are unquestionably helping to forge a broad movement for reform. "More than two centuries of government 'of the people, by the people, and for the people' in the United States came to an end at the beginning of the twenty-first century," businessman Robert Monks wrote last year in a report for the London-based Centre for the Study of Financial Innovation. "Instead, what we have today is a new phenomenon, one that I deplore: the corporate state."

Monks should know. He served on the board of Tyco International before scandals engulfed the company and its CEO. Now a shareholder activist working to influence other corporations, he says reform is urgently needed. "We're like a frog in the water that's boiling away. We're not cooked yet, but my God, when history looks back, people will say, Where were you? Didn't you understand what was happening?"

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Nace, Ted (2003). ***Gangs of America: The Rise of Corporate Power and the Disabling of Democracy.*** San Francisco: Berrett-Koehler.
Condensed by James Allison, June-July 2004.

According to recent Harris polls, the great majority of Americans think that big companies have too much power in Washington. How did they get that power? The answers lurk in the history of the American corporation and its British progenitor.

Crafts guilds began to proliferate in 13th-century Britain. They were not businesses, but umbrella groups of those who plied different crafts: clothworkers, fishmongers, haberdashers and the like. With the growth of international trade some guilds became the first business corporations. Among them were the Merchant Adventurers, independent traders who pooled their capital to finance a shared infrastructure that comprised such facilities as wharfs, convoys and overseas embassies. At first each member maintained his own capital. However, as maritime innovations extended the reach of trade, the attendant increase in potential risk and reward made it advantageous for merchants' financial backers to spread their capital across several trade ventures. This method of pooling capital was essentially a joint-stock company, the form used by the modern corporation. They also found it advantageous to seek grants of exclusive access to particular regions. Within such regions they repelled rivals and imposed order by means of private armies and police.

This kind of entity was no longer a federation of independent businessmen, but a separate entity, chartered by the state, that allowed the law to deal with it instead of the individual investors. The consummate corporation, still the most powerful one in history, was the British East India Company, formed in 1600 in the reign of Elizabeth I. It pioneered the use of joint-stock capital and limited liability, under which stockholders evade responsibility for corporate misdeeds and debts. It had its own army, jails and justice system, and it squeezed India dry for over 200 years.

A major cause of the Boston Tea Party was an attempt by the British East India Company to expand its tea business at the expense of independent American tea merchants. History texts typically portray the American Revolution as a revolt against unfair taxes, but it was truly more of an anti-corporate revolt. An important ingredient in the revolution was a long-standing grudge against corporations on the part of indentured servants, conscripted sailors and others at the bottom of the socioeconomic ladder. Many of them had experienced the exploitative practices—starvation, overwork and brutal treatment—commonly employed in the great archipelago of corporate colonies scattered along the Atlantic rim in Ireland, West Africa, the Caribbean and the eastern coast of North America. The upper reaches of American society were also hostile to the corporation, because most American businesses were owned by family or partnerships: they neither had nor needed corporate charters or joint-stock ownership. It was an economic depression in Europe that knocked the bottom out of the tea market and inspired the East India Company to request permission to dump its tea on the American market through specially commissioned local consignees. The

proposal involved both an export tax abatement for the company on the British side, and a continued import tax on the American side, but that alone would not have moved wealthy American businessmen to rebellion. What moved them was their certainty that if the East India Company could control tea distribution from top to bottom, it would eventually control in the same way every other imported commodity. When John Hancock learned that he was not to be one of the favored merchants, he patched up a quarrel with Sam Adams and joined the rebellion. It was the excessive British reaction to the tea rebellion that brought about the American Revolution, with its odd coalition of adherents across the entire spectrum of colonial society.

After the revolution, the founding fathers worried about corporations. When the Constitutional Convention convened in 1787 there were only six corporations besides banks. Nevertheless, the framers thought it advisable to place the corporation under democratic oversight and use it to meet the need for public projects that required an unusually large amount of capital, such as the building of canals, roads and bridges. James Madison proposed that the federal government take charge of corporations in cases where the authority of a state might be “incompetent.” Other delegates, anxious to avoid an American version of the East India Company, stood fast for local control.

For the most part the states had their way. Two rare exceptions were federal charters for the Bank of the United States, chartered twice and revoked twice between 1791 and 1832, and our 20th century Amtrak. Otherwise, it was state legislatures that granted the charters and laid down restrictions and standards of accountability. There was a legislative focus on restrictions, rather than privileges, that reflected a widespread notion that great corporate power would endanger democracy. In consonance with that notion, in 1809 the Virginia Supreme Court stated that a charter should not be granted if the applicant’s “object is merely private or selfish; if it is detrimental to, or not promotive of, the public good.” In 1816, Thomas Jefferson wrote “I hope we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength, and bid defiance to the laws of our country.” Note that the prevailing sentiment was anti-corporate, not anti-business. As a representative of the National Trade Union wrote in 1835, “We entirely disapprove of the incorporation of Companies, for carrying on manual mechanical business, inasmuch as we believe their tendency is to eventuate in and produce monopolies, thereby crippling the energies of individual enterprise, and invading the rights of smaller capitalists.”

In those early days corporations were kept on a tight leash. They had to renew their charters as often as every three years. State legislatures denied them limited liability. Corporations were prohibited from any activities not specified in their charters. They could not own stock in other corporations. Most states limited the amount of capital a corporation could raise. Most corporations could not operate outside the home state; some were restricted to the home county. They could not own property not needed for their authorized activities. Errant or scofflaw corporations had their charters revoked in

Massachusetts, New York and Pennsylvania. In those days the proper role of corporations was thought to be the building of public infrastructure or the provision of public services, such as banking and insurance. Their absence from manufacturing, which was carried on mainly by partnerships, did not inhibit the growth of American manufacturing, which reached by 1860 a per capita output second only to that of Great Britain.

Despite its success, this system had been swept aside by 1900. A major figure in the change was Tom Scott, of the Pennsylvania Railroad, who began to wield his influence in the 1850s, when railroad lobbyists began to wring concessions from the state legislatures. His monumental coup came when he persuaded the Pennsylvania legislature to permit one corporation to own stock in another.

His first mission as a lobbyist was the repeal of the tonnage tax levied by the state on the railroads. He organized supporters at the county level, bought ads in nearly every Pennsylvania newspaper and, when he still lacked a legislative majority, began to make deals with legislators—mainly promises to build rail lines to particular communities. The kicker was a legislative proposal that would let the railroad divert its state taxes to the construction of local spur lines. The measure squeaked through, but the public was outraged. In the next election almost all of the legislators who had supported the bill were defeated. But when the next session tried to undo the bill, legislators found that it had been written as a contract between the state and the railroad, and could therefore not be repealed without the consent of both parties. Scott had made the bill almost irrevocable, and his allies in the legislature frustrated an attempt to investigate allegations of bribery.

During the Civil War Scott gave extraordinary service in the Lincoln government as a railroad expert. As a result, he returned from the war not as a despicable manipulator, but as Colonel Scott the war hero, with more legislative clout than ever. His postwar dream was to replace the jumble of small fragmented lines with a nationwide railroad system that ran from New York to Washington, deep into the old Confederacy, and west along the southern tier to California. To achieve this goal he had to outmaneuver numerous interests that benefited from the fragmented system, and conceal the hand of the Pennsylvania Railroad and its sinister taint of imperial Yankee capital.

Scott's solution was the holding company, an entity formed specifically to own stock in other companies. Corporate charters normally prohibited ownership of stock in another company, but Colonel Scott was able to persuade the Pennsylvania legislature to ease the restriction, first for the Pennsylvania Railroad and then for another company that would buy up southern railroads. This tactic allowed Scott to buy up lines in southern states without getting charters from hostile southern legislatures. When word got out, Scott's southern rivals tried to use the press to inflame the public against the northern invader, but Scott silenced the opposition by buying up scads of southern newspapers and ordering their editors to toe the company line. By the time he was done, Scott had co-opted the Ku Klux Klan and

used as free construction labor the entire penitentiary population of North Carolina. He had also forged back room deals that put Rutherford Hayes in the White House, installed Jim Crow in the South and secured for his railroad millions of acres of public land and huge federal subsidies. He conducted bloody strike-breaking battles with the aid of federal troops furnished by President Hayes. As the first oligarch whose power rivaled that of the government, Scott embodied the worst fears of those who framed the Constitution.

By 1889, through the efforts of a New York attorney named William Nelson Cromwell, Scott's interesting invention for the Pennsylvania Railroad had become available to all corporations. That was the year in which the New Jersey legislature relaxed the state's incorporation statutes so as to permit any corporation chartered there to hold stock in any other corporation in America. When Governor Woodrow Wilson tightened up the New Jersey law in 1913, Delaware rushed in to fill the vacuum. Having won the race to the bottom, Delaware remains to this day the corporate venue of choice. But the flood had begun years before: In the period 1897-1903 about 2,650 firms were absorbed by a handful of immense corporations, such as International Paper, U.S. Steel and International Harvester. By 1903 some 250 corporations dominated the American economy, and the legal system, once democracy's shield against corporate power, had turned into a corporate shield against legislative power.

By 1903 anyone could get a corporate charter by filing some papers with the state, and corporations had begun to acquire an unlimited life span. A discredited corporation could disappear and re-emerge by means of reorganizations, sell-offs or absorptions into other companies. Because the corporation could go venue-shopping, its accountability to any particular state had greatly diminished. Because states had begun to charter corporations for "any lawful purpose" rather than some specific purpose, corporations were now free to form conglomerates; they could also form vertically integrated companies that controlled the entire life of a product from production to distribution and retail. Limited liability had arrived in full, which meant the end of any external incentive for shareholders to concern themselves with the behavior of businesses in which they owned an interest. Several court decisions had made shareholders subordinate to corporate managers in such matters as acquisitions, mergers and bankruptcy proceedings. Many of these changes had the effect of removing restrictions on size. Anti-trust laws have tended to restrict size, but the enforcement and judicial interpretation of such laws have often reflected political ideology.

The biggest impediments to democratic control are the constitutional rights the corporations wrested from the courts, starting in the 19th century. Encouraged by Thomas Jefferson, New Hampshire had enacted legislation that would have converted Dartmouth, a private college, into a public one. Dartmouth trustees argued that the 1769 charter from King George was a contract protected under Article 1 of the Constitution, which prohibits states from impairing contractual obligations. The court

ruled for the state, declaring the trustees to be servants of the public. The trustees appealed to the Supreme Court, which reversed the lower court and held that the charter from King George was a contract protected by the Constitution. However, Chief Justice John Marshall made it clear that corporations were subordinate to state power, and state legislatures added a clause to charters which asserted the state's right of revocation. Nevertheless, the Dartmouth case marked the beginning of a long phase in which the courts steadily eroded state sovereignty over corporations.

Enacted in 1868, the Fourteenth Amendment sought to protect the rights of freed slaves by means of due process and equal protection of the law, but its most profound effect was the empowerment of the corporation. One cause of this unintended consequence was Supreme Court Justice Stephen J. Field, son of a New England Congregational minister. Field graduated from law school, clerked for his brother, a lawyer for railroad robber barons Fisk and Gould, traveled in Europe and followed the California gold rush in 1849. He became Mayor of Marysville his third day in town, and a state legislator the following year. He was elected to the California Supreme Court in 1857 and became its chief justice in 1859. When Congress created a new federal court of appeals for the Pacific region in 1863, Field became the head of the new circuit court. By the custom of the day, he became at the same time a justice of the U.S. Supreme Court. Field had been recommended by Governor Leland Stanford, who later became a Southern Pacific railroad magnate. When he organized his university, Leland Stanford made Field a trustee. Field had also been recommended by his brother, a Lincoln partisan. President Lincoln duly nominated Field, who soon became notorious for his pro-railroad sympathies.

Their lobbyists' bribes had the Congress well in hand, but at the state level the railroad barons needed help from a Supreme Court willing to invalidate state legislation on Constitutional grounds. There was no problem in Pennsylvania, where Tom Scott ruled. The trouble came from the west and the midwest, where militant farm and labor movements often had enough muscle to enact regulations and taxes harmful to railroads. For example, in Illinois Grangers and small-town merchants, in their opposition to rate-gouging by railroads and grain elevators, pushed for the creation of a state regulatory commission. Corporate interests challenged Illinois law, claiming that the state regulation of rates violated the due process clause of the Fourteenth Amendment. In 1877, in *Munn v. Illinois*, the U.S. Supreme court ruled, seven to two, that such regulation was acceptable. The guiding principle: When private property is "affected with a public interest, it ceases to be *juris privati* only." Field dissented on the principle that such an interpretation would leave all property and all business in the state to the mercy of a majority of its legislature.

But Field soon had another chance. Under the 1879 California constitution it was a democratically elected State Board of Equalization, staffed with excellent legal and accounting talent, that controlled the assessment of railroad taxes. At issue was how to value land for tax purposes. Individuals were taxed on the value of the land minus any outstanding mortgage. If railroads were taxed the same way they would pay no

state property tax, because railroads could point to bonds worth more than the land itself. State law recognized that different rules were required for railroads and individuals, but the railroads took the issue to court. One of their arguments was that the difference in methods of assessment was a violation of the equal protection clause of the Fourteenth Amendment.

Two such cases reached Field at the ninth circuit court: *San Mateo County v. Southern Pacific Railroad* in 1882, and *Santa Clara County v. Southern Pacific Railroad* in 1883. In *San Mateo* both Field and Justice Sawyer ruled in favor of the corporation on the basis of the Fourteenth Amendment guarantee of equal protection to all persons, but they differed in their interpretation of “person.” Sawyer simply ruled that a corporation was a legal person, but Field knew that the personhood of corporations had always applied only to the corporate ability to make contracts and own property. The courts had already rejected the notion that this restricted kind of personhood entitled corporations to broader rights. Accordingly, Field sought another justification for the extension of equal protection to corporations. He argued that it was the personhood rights of stockholders that were violated when counties levied discriminatory taxes on corporations. He used the same rationale in his circuit court opinion in the second case, *Santa Clara County*.

Field’s rationale may look plausible on paper, but it had no grip on reality. Courts had long distinguished between corporate property and individual property. The most important distinction was that the shareholder, in accepting the privilege of limited liability, also renounced control of the property. It was patently absurd to state that a tax on the corporation was a tax on the shareholders, especially when the buying and selling of stocks meant that the group called “shareholders” was in a constant state of flux. Additional proof that they were not one and the same was that shareholders could sue the corporation. Nevertheless, on the train from California to Washington he hoped the Supreme Court would ratify his new theory of the Fourteenth Amendment as a protector of corporations. The Court was to disappoint him, but an obscure Court Reporter would grant far more than Field could have hoped for, corporate personhood under the Fourteenth Amendment. (Continued in Session III.)