

# **TAKING CARE OF BUSINESS**

## **Citizenship and the Charter of Incorporation**

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1993

*Charter Ink*

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Neither the claims of ownership nor those of control can stand against the paramount interests of the community. It remains only for the claims of the community to be put forward with clarity and force.

--A. A. Berle & Gardner C. Means,

*The Modern Corporation and Private Property*, 1933

### **Preface**

Corporations cause harm every day. Why do their harms go unchecked? How can they dictate what we produce, how we work, what we eat, drink and breathe? How did a self-governing people let this come to pass?

Corporations were not supposed to reign in the United States.

When we look at the history of our states, we learn that citizens intentionally defined corporations through charters -- the certificates of incorporation.

In exchange for the charter, a corporation was obligated to obey all laws, to serve the common good, and to cause no harm. Early state legislators wrote charter laws and actual charters to limit corporate authority, and to ensure that when a corporation caused harm, they could revoke its charter.

During the late 19th century, corporations subverted state governments, taking our power to put charters of incorporation to the uses originally intended.

Corporations may have taken our political power but they have not taken our Constitutional sovereignty. Citizens are guaranteed sovereign authority over government officeholders. Every state still has legal authority to grant and to revoke corporate charters. Corporations, large or small, still must obey all laws, serve the common good, and cause no harm.

To exercise our sovereign authority over corporations, we must take back our political authority over our state governments.

### **Claiming Our Legacy**

Today, in our names, state legislators give charters to individuals who want to organize businesses. Our legislators are also supposed to oversee how every corporation behaves. Corporations cannot operate -- own property, borrow money, hire and fire, manufacture or trade, sign contracts, sell stock, sue and be sued, accumulate assets or debts -- without the continued permission of state officeholders.

Our right to charter corporations is as crucial to self-government as our right to vote. Both are basic franchises, essential tools of liberty.

At first only white men who owned property could vote, and gaining the vote for every person has taken years. But as we were winning that struggle, corporate promoters were taking away our right to have a democratic say in our economic lives.

Corporate owners claim special protections under the U.S. Constitution. They assert the legal authority over what to make and how to make it, to move money and mountains, to influence elections and to bend governments to their will.

They insist that once formed, corporations may operate forever. Corporate managers say they must enjoy limited liability, and be free from community or worker interference with business judgments.

The lord proprietors of England's colonial trading corporations said the same things, even boasting that their authority came not from a constitution, but from God. Since the colonists used guns to take land from the Indians, they could easily see the source of that corporate authority was the king's militia.

The colonists did not make a revolution over a tax on tea. They fought for many reasons, but chiefly to create a nation where citizens were the government and ruled corporations.

So even as Americans were routing the king's armies, they vowed to put corporations under democratic command. As one revolutionary, Thomas Allen, said:

It concerned the People to see to it that whilst we are fighting against oppression from the King and Parliament that we did not suffer it to rise up in our Bowels . . . [and to have] Usurpers rising up amongst ourselves.

The victors entrusted the chartering process to each state legislature. Legislators still have this public trust.

## **A Hostile Takeover**

The U.S. Constitution makes no mention of corporations. Yet the history of constitutional law is, as former Supreme Court Justice Felix Frankfurter said, "the history of the impact of the modern corporation upon the American scene."

Today's business corporation is an artificial creation, shielding owners and managers while preserving corporate privilege and existence. Artificial or not, corporations have won more rights under law than people have -- rights which government has protected with armed force.

Investment and production decisions that shape our communities and rule our lives are made in boardrooms, regulatory agencies, and courtrooms. Judges and legislators have made it possible for business to keep decisions about money, production, work and ownership beyond the reach of democracy. They have created a corporate system under law.

This is not what many early Americans had in mind.

People were determined to keep investment and production decisions local and democratic. They believed corporations were neither inevitable nor always appropriate. Our history is filled with successful worker-owned enterprises, cooperatives and neighborhood shops, efficient businesses owned by cities and towns. For a long time, even chartered corporations functioned well under sovereign citizen control.

But while they were weakening charter laws, corporate leaders also were manipulating the legal system to take our property rights. "Corporations confronted the law at every point. They hired lawyers and created whole law firms," according to law professor Lawrence M. Friedman. "They bought and sold governments."

In law, property is not merely a piece of land, a house, a bicycle. Property is a bundle of rights; property law determines who uses those rights. As legal scholar Morris Raphael Cohen said, property is "what each of us shall receive from our work, and from the natural resources of the earth . . . the ownership of land and machinery, with the rights of drawing rent, interest, etc., [which] determine the future distribution of the goods . . ."

Under pressure from industrialists and bankers, a handful of 19th century judges gave corporations more rights in property than human beings enjoyed in their persons. Reverend Revery Ransom, himself once a slave treated as property, was among the many to object, declaring "that the rights of men are more sacred than the rights of property."

Undeterred by such common sense, judges redefined corporate profits as property. Corporations got courts to assume that huge, wealthy corporations competed on equal terms with neighborhood businesses or with individuals. The courts declared corporate contracts, and the rate of return on investment, were property that could not be meddled with by citizens or by their elected representatives.

Within a few decades, judges redefined the common good to mean corporate use of humans and the earth for maximum production and profit. Workers, cities and towns, states and nature were left with fewer and fewer rights corporations were bound to respect.

Wielding property rights through laws backed by government became an effective, reliable strategy to build and to sustain corporate mastery.



Some citizens reacted to this hostile takeover by organizing to maintain their rights over corporations. Mobilizing their cities and towns, citizens pressured legislators to protect states' economic rights for many decades.

Others turned to the federal government to guarantee worker and consumer justice, to standardize finance and stock issues, to prevent trusts and monopolies, to protect public health and the environment.

The major laws which resulted, creating regulatory and managing agencies, actually give corporations great advantages over citizens. Some, like the National Labor Relations Act and the National Labor Relations Board, intended that the government aid citizens against the corporation.

But these laws and agencies were shaped by corporate leaders, then diminished by judges. They neither prevent harms, nor correct wrongs, nor restore people and places. These regulatory laws were -- and remain -- reporting and permitting laws, laws to limit competition and to manage destruction.

Congress, betraying its obligation to preserve, protect and defend the U.S. Constitution, has been giving away citizen sovereignty to the EPAs, OSHAs, NLRBs, FTCs, NRCs, SECs, BLMs, RTCs.

Agency administrators act under the assumption that corporations have prerogatives over labor, investment and production. They regard land, air and water as corporations' raw materials, and as lawful places to dump corporate poisons. Business leaders and politicians are given license to equate corporations' private goals with the public interest.

Regulators and regulatory laws treat labor as a cost and employees as disposable. They equate efficiency and freedom with maximum resource extraction, maximum production and maximum profits. They shift what had been the corporate burden to prove no harm onto the citizen, who must prove harm.

Corporations chartered by our states are the cause of political, economic, and ecological injury around the globe. Little wonder so many citizens lament today, as Thomas Paine did two hundred years ago:

Beneath the shade of our own vines are  
we attacked; in our own house, and on  
our own lands, is the violence committed against us.

## A Hidden History

For one hundred years after the American Revolution, citizens and legislators fashioned the nation's economy by directing the chartering process.

The laborers, small farmers, traders, artisans, seamstresses, mechanics and landed gentry who sent King George III packing feared corporations. As pamphleteer Thomas Earle wrote:

Chartered privileges are a burthen, under which the people of Britain, and other European nations, groan in misery.

They knew that English kings chartered the East India Company, the Hudson's Bay Company and many American colonies in order to control property and commerce. Kings appointed governors and judges, dispatched soldiers, dictated taxes, investments, production, labor and markets. The royal charter creating Maryland, for example, required that the colony's exports be shipped to or through England.

Having thrown off English rule, the revolutionaries did not give governors, judges or generals the authority to charter corporations. Citizens made certain that *legislators* issued charters, one at a time and for a limited number of years. They kept a tight hold on corporations by spelling out rules each business had to follow, by holding business owners liable for harms or injuries, and by revoking charters.

Side by side with these legislative controls, they experimented with various forms of enterprise and finance. Artisans and mechanics owned and managed diverse businesses. Farmers and millers organized profitable cooperatives, shoemakers created unincorporated business associations. Joint-stock companies were formed.

The idea of limited partnerships was imported from France. Land companies used various and complex arrangements, and were not incorporated. None of these enterprises had the powers of today's corporations.

Towns routinely promoted agriculture and manufacture. They subsidized farmers, public warehouses and municipal markets, protected watersheds and discouraged overplanting. State legislatures issued not-for-profit charters to establish universities, libraries, firehouses, churches, charitable associations, along with new towns.



Legislatures also chartered profit-making corporations to build turnpikes, canals and bridges. By the beginning of the 1800s, only some two hundred such charters had been granted. Even this handful issued for necessary public works raised many fears.

Some citizens argued that under the Constitution no business could be granted special privileges. Others worried that once incorporators amassed wealth, they would control jobs and production, buy the newspapers, dominate elections and the courts. Craft and industrial workers feared absentee corporate owners would turn them into "a commodity being as much an article of commerce as woolens, cotton, or yarn."

Because of widespread public opposition, early legislators granted very few charters, and only after long, hard debate. Legislators usually denied charters to would-be incorporators when communities opposed their prospective business project.

Citizens shared the belief that granting charters was their exclusive right. Moreover, as the Supreme Court of Virginia reasoned in 1809:

if the applicants' object is merely private or selfish; if it is detrimental to, or not promotive of, the public good, they have no adequate claim upon the legislature for the privileges.



Citizens governed corporations by detailing rules and operating conditions not just in the charters but also in state constitutions and in state laws. Incorporated businesses were prohibited from taking any action which legislators did not specifically allow.

States limited corporate charters to a set number of years. Maryland legislators restricted manufacturing charters to forty years, mining charters to fifty, and most others to thirty years. Pennsylvania limited manufacturing charters to twenty years. Unless a legislature renewed an expiring charter, the corporation was dissolved and its assets were divided among shareholders.

Citizen authority clauses dictated rules for issuing stock, for shareholder voting, for obtaining corporate information, for paying dividends and keeping records. They limited capitalization, debts, land holdings, and sometimes profits. They required a company's accounting books to be turned over to a legislature upon request.

The power of large shareholders was limited by scaled voting, so that large and small investors had equal voting rights. Interlocking directorates were outlawed. Shareholders had the right to remove directors at will.

Sometimes the rates which railroad, turnpike and bridge corporations could charge were set by legislators. Some legislatures required incorporators to be state citizens. Other legislatures bought corporate stock in order to stay closely engaged in a firm's operations.

Early in the 19th century, the New Jersey legislature declared its right to take over ownership and control of corporate properties. Pennsylvania established a fund from corporate profits which was used to buy private utilities to make them public. Many states followed suit.

Turnpike charters frequently exempted the poor, farmers or worshippers from paying tolls. In

Massachusetts, the Turnpike Corporation Act of 1805 authorized the legislature to dissolve turnpike' corporations when their receipts equaled the cost of construction plus 12 percent. Then the road became public. In New York, turnpike gates were

subject to be thrown open, and the company indicted and fined, if the road is not made and kept easy and safe for public use.

Citizens kept banks on particularly short leashes. Their charters were limited from three to ten years. Banks had to get legislative approval to increase their capital stock, or to merge. Some state laws required banks to make loans for local manufacturing, fishing, agriculture enterprises, and to the states themselves. Banks were forbidden to engage in trade.

Private banking corporations were banned altogether by the Indiana constitution in 1816, and by the Illinois constitution in 1818.

People did not want business owners hidden behind legal shields, but in clear sight. That is what they got. As the Pennsylvania legislature stated in 1834:

A corporation in law is just what the incorporating act makes it. It is the creature of the law and may be moulded to any shape or for any purpose that the Legislature may deem most conducive for the general good.



In Europe, charters protected directors and stockholders from liability for debts and harms caused by their corporations.

American legislators rejected this corporate shield. Led by Massachusetts, most states refused to grant such protection. Bay State law in 1822 read: "Every person who shall become a member of any manufacturing company . . . shall be liable, in his individual capacity, for all debts contracted during the time of his continuing a member of such corporation."

The first constitution in California made each shareholder "individually and personally liable for his proportion of all [corporate] debts and liabilities." Ohio, Missouri and Arkansas made stockholders liable over and above the stock they actually owned. In 1861, Kansas made stockholders individually liable "to an additional amount equal to the stock owned by each stockholder."

Prior to the 1840s, courts generally supported the concept that incorporators were responsible for corporate debts. Through the 1870s, seven state constitutions made bank shareholders doubly liable. Shareholders in manufacturing and utility companies were often liable for employees' wages.

Liability laws sometimes reflected the dominance of one political party or another. In Maine, for example, liability laws changed nine times from no liability to full liability between 1823 and 1857, depending on whether the Whigs or the Democrats controlled the legislature.

Until the Civil War, most states enacted laws holding corporate investors and officials liable. As New Hampshire Governor Henry Hubbard argued in 1842:

There is no good reason against this principle. In transactions which occur between man and man there exists a direct responsibility -- and when capital is concentrated . . . beyond the means of single individuals, the liability is continued.



The penalty for abuse or misuse of the charter was not a plea bargain and a fine, but revocation of the charter and dissolution of the corporation. Citizens believed it was society's inalienable right to abolish an evil.

Revocation clauses were written into Pennsylvania charters as early as 1784. The first revocation clauses were added to insurance charters in 1809, and to banking charters in 1814. Even when corporations met charter requirements, legislatures sometimes decided not to renew those charters.

States often revoked charters by using *quo warranto* -- by what authority -- proceedings. In 1815, Massachusetts Justice Joseph Story ruled in *Terrett v. Taylor*:

A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them . . . This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation.

Four years later, the U. S. Supreme Court tried to strip states of this sovereign right. Overruling a lower court, Chief Justice John Marshall wrote in *Dartmouth College v. Woodward* that the U.S. Constitution prohibited New Hampshire from revoking a charter granted to the college in 1769 by King George III. That charter contained no reservation or revocation clauses, Marshall said.

The court's attack on state sovereignty outraged citizens. Protest pamphlets rolled off the presses. Thomas Earle wrote:

It is aristocracy and despotism, to have a body of officers, whose decisions are, for a long time, beyond the control of the people. The freemen of America ought not to rest contented, so long as their Supreme Court is a body of that character.

Said Massachusetts legislator David Henshaw: "Sure I am that, if the American people acquiesce in the principles laid down in this case, the Supreme Court will have effected what the whole power of the British Empire, after eight years of bloody conflict, failed to achieve against our fathers."

Opponents of Marshall's decision believed the ruling cut out the heart of state sovereignty. They argued that a corporation's basic right to exist -- and to wield property rights -- came from a grant which only the state had the power to make. Therefore, the court exceeded its authority by declaring the corporation beyond the reach of the legislature which created it in



the first place.

People also challenged the Supreme Court's decision by distinguishing between a corporation and an individual's private property. The corporation existed at the pleasure of the legislature to serve the common good, and was of a public nature. New Hampshire legislators and any other elected state legislators had the absolute legal right to dictate a corporation's property use by amending or repealing its charter.

State legislators were stung by citizen outrage. They were forced to write amending and revoking clauses into new charters, state laws and constitutions, along with detailed procedures for revocation.

In 1825, Pennsylvania legislators adopted broad powers to "revoke, alter or annul the charter . . ." at any time they thought proper.

New York state's 1828 corporation law specified that every charter was subject to alteration or repeal. Section 320 declared that corporate acts not authorized by law were *ultra vires*, or beyond the rights of corporations, and grounds for charter revocation.

The law gave the state authority to secure a temporary injunction to prevent corporations from resisting while legal action to dissolve them was under way.

Delaware voters passed a constitutional amendment in 1831 limiting all corporate charters to twenty years. Other states, including Louisiana and Michigan, passed constitutional amendments to place precise time limits on corporate charters.

President Andrew Jackson enjoyed wide popular support when he vetoed a law extending the charter of the Second Bank of the United States in 1832. That same year, Pennsylvania revoked the charters of ten banks.

During the 1840s, citizens in New York, Delaware, Michigan and Florida required a two-thirds vote of their state legislatures to create, continue, alter or renew charters. The New York legislature in 1849 instructed the attorney general to annul any charter whose applicants had concealed material facts, and to sue to revoke a charter on behalf of the people whenever he believed necessary.

Voters in Wisconsin and four other states rewrote constitutions so that popular votes had to be taken on every bank charter recommended by their legislatures. Rhode Island voters said charters for corporations in banking, mining, manufacturing, and transportation had to be approved by the next elected state legislature before being granted.

Over several decades starting in 1844, nineteen states amended their constitutions to make corporate charters subject to alteration or revocation by legislatures. Rhode Island declared in 1857:

the charter or acts of association of every corporation hereafter created may be amendable or repealed at the will of the general assembly.

Pennsylvanians adopted a constitutional amendment in 1857 instructing legislators to "alter,

revoke or annul any charter of a corporation hereafter conferred . . . whenever in their opinion it may be injurious to citizens of the community . . ."

As late as 1855, citizens had support from the U.S. Supreme Court. In *Dodge vs. Woolsey*, the court ruled the people of the states [have not]:

released their powers over the artificial bodies which originate under the legislation of their representatives . . . Combinations of classes in society . . . united by the bond of a corporate spirit . . . unquestionably desire limitations upon the sovereignty of the people . . . But the framers of the Constitution were imbued with no desire to call into existence such combinations.

## **Struggles For Control**

Massachusetts mechanics who opposed a charter request by the men who wanted to start the Amherst Carriage Company in 1838 told the legislature:

We . . . do look forward with anticipation to a time when we shall be able to conduct the business upon our own responsibility and receive the proffits of our labor . . . we believe that incorporated bodies tend to crush all feable enterprise and compel us to Work out our dayes in the Service of others.

Contests over charters and the chartering process were not abstractions. They were battles to control labor, resources, community rights, and political sovereignty. This was a major reason why members of the disbanded Working Men's Party formed the Equal Rights Party of New York state. The party's 1836 convention resolved that lawmakers:

legislate for the whole people and not for favored portions of our fellow-citizens . . . It is by such partial and unjust legislation that the productive classes of society are compelled by necessity, to form unions for mutual preservation . . . [lawmakers should reinstate us] in our equal and constitutional rights according to the fundamental truths in the Declaration of Independence, and as sanctioned by the Constitution of the United States . . .

This political agenda had widespread support in the press. A New Jersey newspaper wrote in an editorial typical of the 1830s: "the Legislature ought cautiously to refrain from increasing the irresponsible power of any existing corporations, or from chartering new ones," else people would become "mere hewers of wood and drawers of water to jobbers, banks and stockbrokers."

With these and other prophetic warnings still ringing in their ears, citizens began to feel control over their futures slipping out of their communities and out of their hands. Corporations were abusing their charters to become conglomerates and trusts. They were converting the nation's treasures into private fortunes, creating factory systems and company towns. Political power began flowing to absentee owners intent upon dominating people and nature.

As the nation moved closer to civil war, farmers were forced to become wage earners. Increasingly separated from their neighbors, farms and families, they became fearful of unemployment -- a new fear which corporations quickly learned to exploit.

In factory towns, corporations set wages, hours, production processes and machine speeds. They kept blacklists of labor organizers and workers who spoke up for their rights.

Corporate officials forced employees to accept humiliating conditions, while the corporations agreed to nothing.

Julianna, a Lowell, Massachusetts, factory worker, wrote:

Incarcerated within the walls of a factory, while as yet mere children -- drilled there from five till seven o'clock, year after year . . . what, we would ask, are we to expect, the same system of labor prevailing, will be the mental and intellectual character of the future generations . . . A race fit only for corporation tools and time-serving slaves? . . . Shall we not hear the response from every hill and vale, "EQUAL RIGHTS, or death to the corporations?"



Recognizing that workers were building a social movement, industrialists and bankers pressed on, hiring private armies to keep workers in line. They bought newspapers and painted politicians as villains and businessmen as heroes. Bribing state legislators, they then announced legislators were corrupt, that they used too much of the public's resources and time to scrutinize every charter application and corporate operation.

Corporate advocates campaigned to replace existing chartering laws with general incorporation laws that set up simple administrative procedures, claiming this would be more efficient. What they really wanted was the end of legislative authority over charters.

Cynically adopting the language of early charter opponents, corporate owners and their lawyers attacked existing legislative charters as special privileges. They called for equal opportunity for all entrepreneurs, making it seem as if they were asking that everyone have the same chance to compete.

But these corporations were not just ordinary individual entrepreneurs. They were large accumulations of capital, and getting larger. By 1860, thousands of corporations had been chartered -- mostly factories, mines, railroads and banks.

Government spending during the Civil War brought these corporations fantastic wealth. Corporate managers developed the techniques and the ability to organize production on an ever grander scale. Many corporations used their wealth to take advantage of war and Reconstruction years to get the tariff, banking, railroad, labor and public lands legislation they wanted.

Flaunting new wealth and power, corporate executives paid "borers" to infest Congress and state capitals, bribing elected and appointed officials alike. They pried loose from the public trust more and more land, minerals, timber and water. Railroad corporations alone obtained over 180 million free acres of public lands by the 1870s, along with many millions of dollars in direct subsidies.

Little by little, legislators gave corporations limited liability, decreased citizen authority over corporate structure, governance, production and labor, and ever longer terms for the charters

themselves.

Corporations rewrote the laws governing their own creation. They "left few stones unturned to control those who made and interpreted the laws . . ."



Even as businesses secured general incorporation laws for mining, agriculture, transportation, banking and manufacturing businesses, citizens held on to the authority to charter. Specifying company size, shareholder terms, and corporate undertakings remained a major citizen strategy.

During the 1840s and 1850s, states revoked charters routinely. In Ohio, Pennsylvania and Mississippi, banks lost charters for frequently "committing serious violations . . . which were likely to leave them in an insolvent or financially unsound condition." In Massachusetts and New York, turnpike corporations lost charters for "not keeping their roads in repair."

"No constitutional convention met, between 1860-1900, without considering the problems of the corporations," according to Friedman.

In 1876, New York's constitutional convention authorized the attorney general to bring an action to "vacate the charters" of any corporation which violated the state chartering law or abused their rights and privileges. Eighteen years later, the Central Labor Union of New York City asked the attorney general to request the state supreme court to revoke the charter of the Standard Oil Company of New York. He did.

New York, Ohio, Michigan and Nebraska revoked the charters of oil, match, sugar and whiskey trusts. Courts in each state declared these trusts illegal because the corporations -- in creating the trusts -- had exceeded the powers granted by their charters." Roaming and piratical corporations" like Standard Oil of Ohio, then the most powerful corporation in the world, refused to comply and started searching for "a Snug Harbor" in another state.

Rhode Island enacted a law requiring corporate dissolution for "fraud, negligence, misconduct . . ." Language was added to the Virginia constitution enabling "all charters and amendments of charters to be repealed at any time by special act."

Farmers and rural communities, groaning in misery at the hands of railroad, grain and banking corporations, ran candidates for office who supported states' authority "to reverse or annul at any time any chartered privilege . . ."

The Farmers' Anti-Monopoly Convention, meeting in Des Moines in 1873, resolved that:

all corporations are subject to legislative control; [such control] should be at all times so used as to prevent moneyed corporations from becoming engines of oppression.

That same year, Minnesota Grangers resolved:

We, the farmers, mechanics and laborers of Minnesota, deem the triumph of the people in this contest with monopolies essential to the perpetuation of our free institutions and the promotion of our private and national prosperity.

Because these and other powerful resistance movements directly challenged the harmful corporations of their times, and because they kept pressure on state representatives, revocation and amendment clauses can be found in state charter laws today.

### **Judge-Made Law**

But keeping strong charter laws in place was ineffective once courts started aggressively applying legal doctrines which made protection of corporations and corporate property the center of constitutional law.

As corporations got stronger, government became easier prey; communities became more vulnerable to intimidation.

Following the Civil War, and well into the 20th century, appointed judges gave privilege after privilege to corporations. They freely reinterpreted the U.S. Constitution and transformed common law doctrines.

Judges gave certain corporations the power of eminent domain -- the right to take private property with minimal compensation to be determined by the courts. They eliminated jury trials to determine corporation-caused harm and to assess damages. Judges created the right to contract, a doctrine which, according to law professor Arthur Selwyn Miller, was put forward as a "principle of eternal truth" in "one of the most remarkable feats of judicial law-making this nation has seen."

By concocting the doctrine that contracts originated in the courts, judges then took the right to oversee corporate rates of return and prices, a right entrusted to legislators by the U.S. Constitution . They laid the legal foundation for regulatory agencies to be primarily accountable to the courts -- not to Congress.

Workers, the courts also ruled, were responsible for causing their own injuries on the job. The Kentucky Court of Appeals prefigured this doctrine in 1839: "Private injury and personal damage . . . must be expected" when one goes to work for a corporation bringing "progressive improvements." This came to be called the assumption of risk, what professor Cohen dismissed as "a judicial invention."

Traditionally under common law, the burden of damage had been on the business causing harms. Courts had not permitted trespass or nuisance to be excused by the alleged good works a corporation might claim. Nor could a corporation's lack of intent to cause harm decrease its legal liability for injuries it caused to persons or the land.

Large corporations -- especially railroad and steamship companies - pressured judges to reverse this tradition, too. Attentive to lawyers and growing commercial interests, judges creatively interpreted the commerce and due process clauses of the U.S. Constitution . Inventing a new concept which they called substantive due process, they declared one state

law after another unconstitutional. Wages and hours laws, along with rate laws for grain elevators and railroads, were tossed out.

Judges also established the managerial prerogative and business judgment doctrines, giving corporations legal justification to arrest civil rights at factory gates, and to blockade democracy at boardroom doors.

Corporations were enriched further when judges construed the common good to mean maximum production -- no matter what was manufactured, who was hurt, or what was destroyed. Unfettered corporate competition without citizen interference became enshrined under law.

Another blow to citizen constitutional authority came in 1886. The Supreme Court ruled in *Santa Clara County v. Southern Pacific Railroad* that a private corporation was a natural person under the U.S. Constitution, sheltered by the Bill of Rights and the 14th Amendment.

"There was no history, logic or reason given to support that view," Supreme Court Justice William O. Douglas was to write sixty years later.

But the Supreme Court had spoken. Using the 14th Amendment, which had been added to the Constitution to protect freed slaves, the justices struck down hundreds more local, state and federal laws enacted to protect people from corporate harms. The high court ruled that elected legislators had been taking corporate property "without due process of law."

Emboldened, some judges went further, declaring unions were civil and criminal conspiracies, and enjoining workers from striking. Governors and presidents backed judges up with police and armies.

By establishing "new trends in legal doctrine and political-economic theory" permitting "the corporate reorganization of the property production system," the Supreme Court effectively sabotaged blossoming social protest movements against incorporated wealth. Judges positioned the corporation to become "America's representative social institution," "an institutional expression of our way of life."



Legislative "chartermongering" attracted as many corporations as possible to their states. In exchange for taxes, fees and whatever else they could get their hands on, some state governments happily provided new homes to Standard Oil and other corporations.

Led by New Jersey and Delaware, legislators watered down or removed citizen authority clauses. They limited the liability of corporate owners and managers, then started handing out charters that literally lasted forever. Corporations were given the right to operate in any fashion not explicitly prohibited by law.

After such losses of citizen sovereignty, twenty-six corporate trusts ended up controlling 80 percent or more of production in their markets by the early 1900s. There were trusts for almost everything -- matches, whiskey, cotton, alcohol, corks, cement, stoves, ribbons, bread, beef.

During the Progressive Era, corporations operated as ruthlessly as any colonial trading monopoly in the 1700s. Blood was often spilled resisting these legal fictions.

Jo Battley, a West Virginia miner, was beaten severely and stabbed trying to organize a union at the Consolidated Coal Company. Mother Jones, one of his rescuers, said, "We tried to get a warrant out for the arrest of the gunmen, but we couldn't because the coal company controlled the judges and the courts."

Corporations owned resources, production, commerce, trade, prices, jobs, politicians, judges and the law. Over the next half century, as a United States congressional committee concluded in 1941, "The principal instrument of the concentration of economic power and wealth has been the corporate charter with unlimited power . . ."

Today, many U.S. corporations are transnational. No matter how piratical or where they roam, the corrupted charter remains the legal basis of their existence.

### **Taking Back The Charters Taking Back The Law**

We are out of the habit of contesting the legitimacy of the corporation, or challenging concocted legal doctrines, or denying courts the final say over our economic lives.

For most of this century, citizens skirmished with corporations to stop doing harm, but failed to question the legitimacy of the harmdoers. We do not use the charter and the chartering process to stop corporate harm, or to define the corporation on our terms.

What passes for political debate today is not about control, sovereignty, or the economic democracy which many American revolutionaries thought they were fighting to secure.

Too many organizing campaigns accept the corporation's rules, and wrangle on corporate turf. We lobby congress for limited laws. We have no faith in regulatory agencies, but turn to them for relief. We plead with corporations to be socially responsible, then show them how to increase profits by being a bit less harmful.

How much more strength, time, and hope will we invest in such dead ends?



Today, corporate charters can be gotten easily by filling out a few forms and by paying modest fees.

Legislatures delegate authority to public officeholders to rubber-stamp the administration of charters and the chartering process. The secretary of state and the attorney general are the officials most often involved. Sometimes they are elected; sometimes they are appointed.

In all states, legislatures continue to have the historic and the legal obligation to grant, to amend, and to revoke corporate charters. They are responsible for overseeing corporate activities. But it has been a long time since many legislatures have done what they are supposed to do.

In Illinois, the law reads:

12.50 Grounds for judicial dissolution. A Circuit Court may dissolve a corporation:

- a. in an action by the Attorney General, if it is established that:
  1. the corporation obtained its certificates of incorporation through fraud; or
  2. the corporation has continued to exceed or abuse the authority conferred upon it by law, or has continued to violate the law..
  3. in an action by a shareholder, if it is established that . . . the directors or those in control of the corporation have acted, or are acting, or will act in a manner that is illegal, oppressive or fraudulent; . . . or if it is established that dissolution is reasonably necessary because the business of the corporation can no longer be conducted to the general advantage of its shareholders.

After entering an order of dissolution, "the Court shall direct the winding up and liquidation of the corporation's business and affairs."

In Delaware, Section 284 of the corporation law says that chancery court can revoke the charter of any corporation for "abuse or misuse of its powers, privileges or franchises."

New York requires dissolution when a corporation abuses its powers, or acts "contrary to the public policy of the state . . ." The law calls for a jury trial in charter revocation cases.

The Model Business Corporation Act, first written in 1931 by the committee on corporate laws of the American Bar Association, and revised twice since, is the basis for chartering laws in more than half the states and the District of Columbia. Although strongly protecting corporate property, this model law gives courts full power to liquidate the assets of a corporation if they are "misapplied or wasted."

It requires the secretary of state "from time to time" to list the names of all corporations which have violated their charters along with the facts behind the violations. Decrees of involuntary dissolution can be issued by the secretary of state and by courts.

Corporations chartered in other states are called foreign corporations. Corporations chartered in other nations are called alien corporations. Legislatures allow foreign or alien corporations to go into business in their states through this same chartering process. Either may establish factories or do business after obtaining a state's certificate of authority.

In Illinois, foreign corporations are "subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed upon a domestic corporation of like character."





When we limit our thinking only to existing labor law, or only to existing environmental law, or only to the courts, or only to elections -- or when we abide by corporate agendas -- we abandon our Constitutional claim on the corporate charter and the chartering process.

When we forsake our Constitutional claim, we ignore historic tools we can use to define and to control the corporation. We pass up strategies which can inspire citizens to act. We fail to demand what we know is right.

We must name and stop what harms us. John H. Hunt, a member of the Equal Rights Party, wrote this resolution in 1837:

Whenever a people find themselves suffering under a weight of evils, destructive not only to their happiness, but to their dignity and their virtues; when these evils go on increasing year after year, with accelerating rapidity, and threaten soon to reach that point at which peaceable endurance ceases to be possible; it becomes their solemn duty coolly to search out the causes of their suffering -- to state those causes with plainness -- and to apply a sufficient and a speedy remedy.

His resolution was passed unanimously by cheering mechanics, farmers and working people during a mass rally in a New York City park.

Around the nation, citizens are no less willing -- and are quite well prepared -- to educate, to organize and to agitate.

Citizens who have been to folk schools or labor colleges understand that by learning together and teaching ourselves corporate history, we can hone the skills of citizen sovereignty and power.

We can read our state constitutions. Libraries containing our states' constitutional histories, corporate histories, and corporate case law can provide details about what earlier citizens demanded of corporations, what precedents they established, and which of their legal and organizing methods we can use to our advantage.

We can demand to see the charters of every corporation. We need to know what each charter prohibits, especially if it is an old charter. Armed with our states' rich legal precedents, and with our evidence of corporate misuse or abuse, we can amend or revoke charters and certificates of authority.

When corporations violate our Constitutional guarantees, we can take them to court ourselves. Corporate officers can be forced to give us depositions under oath, just as elected officials who spurned the Constitution were forced to do by the civil rights movement -- often in courtrooms packed with angry citizens.

New Yorkers used to get sufficient and speedy remedy through injunctions against corporations. We can revive this tradition. Surrounded by citizens and their peers, judges can be encouraged to enjoin corporate officials from doing further harm, or from stripping the

corporation's assets, or from moving the company away.

Stockholders have authority to seek injunctions and file dissolution suits if they fear managers are acting illegally, oppressively, fraudulently, or are misusing or wasting corporate assets.

As in the first half of the 19th century, would-be or on-going incorporators must be made to ask us for the privilege of a charter. We can set our own criteria: workers must own a significant or majority share of the company; the workforce must have democratic decision-making authority; charters must be renewed annually; corporate officers must prove all corporate harm has ceased. For starters.



Who defines the corporation controls the corporation. We cannot command the modern corporation with laws that require a few days' notice before the corporation leaves town, or with laws that allow the corporation to spew so many toxic parts per million. If we expect to define the corporation using the charters and putting legislators on our civic leash, we must also challenge prevailing judicial doctrines. We cannot let courts stand in the way of our stopping corporate harm.

Legal doctrines are not inevitable or divine. When the liberty and property rights of citizens are at stake, as former Supreme Court Justice Louis D. Brandeis said, "the right of property and the liberty of the individual must be remoulded . . . to meet the changing needs of society."

The corporation is an artificial creation, and must not enjoy the protections of the Bill of Rights.

Corporate owners and officers must be liable for harms they cause. No corporation should exist forever. Both business judgment and managerial prerogative must meet the same end as the colonial trading companies' delusion of divine authority.



Our sovereign right to decide what is produced, to own and to organize our work, and to respect the earth is as American as a self-governing peoples' right to vote.

In our democracy, we can shape the nation's economic life any way we want.

## Notes

### FRONTISPIECE

["Neither the claims..."]: Berle and Means, p. 310.

### RECLAIMING OUR POWER

["It concerned the People..."]: Thomas Allen quoted in Handlin, p. 16.

### A HOSTILE TAKEOVER

["...the history..."]: Felix Frankfurter quoted in Miller, P. 1.

["Corporations confronted..."]: Friedman, P. 456.

["...what each of us..."]: Cohen, P. 47.

["...that the rights..."]: Reverdy Ransom quoted in Meier, p. 185.

[" Beneath the shade..."]: Paine, p. 124.

### A HIDDEN HISTORY

[" Chartered corporations are..."]: Earle, p. 19.

["...a commodity being as much..."]: Hartz, p. 196. Page 8

["...object is merely.. "]: Virginia Supreme Court quoted in Horwitz, p. 112.

["...subject to be thrown open..."]: James Kent quoted in Dodd, p. 44.

["A corporation in law..."]: Report of the Packer Committee of the Pennsylvania Legislature, quoted in Goodrich, p. 374.

*For details on charter limitations and citizen authority clauses, see Berle and Means, Blandi, Cadman, Dodd, Friedman, Handlin, Hartz, Pisani (in Thelan).*

["Every person who shall..."]: Massachusetts law quoted in Berle notes.

["...individually and personally..."]: First California Constitution quoted in Cadman, p. 191.

["to an additional amount..."]: in Cadman, p. 191.

["There is no good reason..."]: Henry Hubbard quoted in Dodd, p. 395.

*For details on liability, see Blandi, Cadman, Dodd, Friedman, Hartz.*

["A private corporation..."]: Joseph Story quoted in Dodd, p. 60.

[" It is aristocracy..."]: Earle, P. 30.

["Sure I am that..."]: David Henshaw quoted in Blau, p. 182.

["... revoke, alter or annul..."]: Hartz, p. 239.

["...the charter or acts..."]: Rhode island Legislature in 1857 quoted in Berle notes.

["...alter, revoke or annul..."]: Pennsylvania Legislature in 1857

quoted in Hartz, p. 240.

["...released their powers..."]: *Dodge v. Woolsey*, U.S. Supreme Court quoted in Dodd, p. 130.

*For details on revocation clauses, see Berle notes, Blandi, Cadman, Hartz, Horwitz.*

### STRUGGLES FOR CONTROL

["We ... do look..."]: Amherst mechanics quoted in Handlin, Appendix F, p. 266.

["...legislate for the whole people..."]: Equal Rights Party resolution quoted in Byrdsall, p. 41.

["...the Legislature ought..."]: Trenton *Emporium & True American* quoted in Cadman, p. 76.

["Incarcerated within..."]: Juliana quoted in Baxandall *et al.*, p. 68.

["borers"]: Hartz, p. 309.

["...left few stones..."]: Ginsberg *et al.*, p. 8.

["...committing serious violations..."]: Dodd, p. 181.

["... not keeping their roads..."] 1: Dodd, p. 181.

["No constitutional..."]: Friedman, p. 446.  
["...vacate the charters..."]: New York Constitutional Convention, 1876, quoted in Lloyd, p. 425.  
["Roaming and piratical..."]: William W Cook, quoted in Friedman, p. 458.  
["...fraud, negligence, misconduct..."]: Rhode Island law quoted in Berle notes.  
["all charters..."]: Virginia Constitution quoted in Berle notes.  
["...to reverse or annul..."]: quoted in Martin, p. 510.  
["...all corporations are..."]: quoted in Martin, p. 513.  
["We, the farmers..."]: quoted in Martin, p. 510.

*For details on job blackmail by corporate managers, see Kazis & Grossman.*

#### JUDGE-MADE, LAW

["...principle of eternal truth..."]: Miller, p. 54.  
["Private injury..."]: Kentucky Court of Appeals quoted in Horwitz, p. 75.  
["a judicial invention"]: Cohen, p. 126.  
["There was no history..."]: William O. Douglas in *Wheeling Steel Corporation v. Glander*, 337 US 562, 1949.  
["...new trends in legal..."]: Sklar, p. 85.  
["America's representative social..."]: Drucker, p. 18.  
["...an institutional expression..."]: Ford Motor Co. executive William T Gossett, 1957, quoted in Williams, p. 343.  
["chartermongering"]: Nader, *et al.*, p. 44.  
["We tried..."]: Jones, p. 44.  
["The principal instrument..."]: quoted in Blair, p. 667.

*For details on judge-made law, see Alfange, Cohen, Friedman, Horwitz, Miller, Nader et al., Newmeyer (in Thelan), Pound, Sklar, Wright.*

#### TAKING BACK THE CHARTERS, TAKING BACK THE LAW

Illinois Business Corporation Act, Revised Statutes, Chapter 32, par 1.01 *et seq.*  
["...abuse or misuse of..."]: Delaware Code Ann. Title 8, 1 01, *et seq.*  
["...contrary to the public policy..."]: New York Business Corporation Law 101 *et seq.*  
["...misapplied or wasted..."]: Model Business Corporation Act, quoted in Clarkson *et al.*, Appendix G.  
["... from time to time..."]: *Ibid.*  
["...subject to the same..."]: Illinois Revised Statutes.  
["Whenever a people..."]: quoted in Byrdsall, p. 135.  
["...the right of property..."]: Louis D. Brandeis in *Truax v. Corrigan*, 257 US 312, 1921.

*For details on worker-controlled firms, see Adams and Hansen, Dahl.*

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