

Becoming a Self-Governing People

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**Presented at the Vanishing Democracy: Challenging Corporate Power Conference
Minneapolis, Minnesota, March 29, 2003**

4 April 2003

CommonDreams.org

It is really great to see all of you here today, willing to spend an entire day at this very difficult time looking at some of the root causes of the many problems that we see around us. Before we hear from our keynote speaker, John Nichols, who's going to help us make some connections between the power of corporations and some of those problems, I'm going to talk about some of the legal history of corporations and how they came to have so much power.

The analysis I'm about to give you comes from the Program on Corporations, Law and Democracy, a think tank whose members have been researching, writing and doing workshops about corporate rule for the last 15 years. I've been privileged to attend several of these, including a week-long training just a year ago. POCLAD has collaborated with WILPF, the Women's International League for Peace and Freedom, to develop a study circle course on the history of corporate power, a national campaign to abolish corporate personhood, which you'll hear more about later today, and an upcoming Democracy Caravan which plans to take education about corporate rule on the road later this year.

POCLAD and WILPF would like to reframe the way we think about corporate power and the role that corporations play in our society. We have, over time, come to accept that corporations are a given, that they must be powerful, and that in their pursuit of profits they will do many things we don't like -- things that are harmful to the Earth and human health, like emitting toxic poisons, things that are inhumane, like exploiting workers, and things that are destructive of communities, like closing plants and laying off thousands of people. We usually don't even consider whether we could challenge their right to do these things. Instead, we define our role as citizens as trying to curb these destructive impulses -- to say, you can only pollute this much, you have to pay workers at least this much, and have this minimum of safety standards. When they don't, we try to pass more laws, enforce them better, or put citizen pressure on corporations through boycotts, letters to the editor, or moral persuasion.

In resigning ourselves to the belief that we have to let corporations define their role in society, and try what we can do to make them "behave" better, we have in effect turned over our authority as self-governing people to corporate owners. We are allowing our democracy to vanish.

In doing research into the history of corporate rule, the members of POCLAD discovered something that most people today find quite surprising. In the early days of the United States, right after the American Revolution, corporations did not have power. People back

then saw the corporation as a tool that existed to accomplish something for the public good. It had no inherent right to exist, or to do anything outside of what the people wanted it to do. Corporations were granted charters by the people, through their elected representatives in the state legislatures. And those charters had sunset dates, usually somewhere between five and 30 years. At that time the corporation would automatically dissolve unless its charter was renewed by an act of the legislature. Sometimes they were dissolved before their charter sunset date. This could happen if they exceeded the authority granted to them in their charter, or if they failed to fulfill their purpose -- or for no reason at all. And many did lose their charters. Here's an example. This is from the ruling in a case against the North River Sugar Refining Corporation by the New York State Court of Appeals, Justice Finch, in 1890.

"The judgment sought against the defendant is one of corporate death. The life of a corporation is, indeed, less than that of the humblest citizen. 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 when 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 or the violation of its corporate duty. The [North River Sugar Refining] corporation has violated its charter, and failed in the performance of its corporate duties, and that in respects so material and important to justify a judgment of dissolution. All concur."

The people didn't take North River Sugar Refining Corporation to court to get it fined. They took it to court to dissolve it. Corporate death.

And besides having a limited lifespan, corporations were limited in many other ways. They were not allowed to own property other than what they needed for their purpose. They were not allowed to give campaign donations or to lobby legislatures or Congress. They were not allowed to give charitable donations. Their owners, including stockholders, were personally liable for the debts and harms of the corporation. All of their records were public. They weren't allowed to buy or sell each other, or to have interlocking boards of directors. Violation of these could result in charter revocation -- corporate death.

Restrictions like these were put into the state laws because the people who lived in the British colonies -- the wealthy and the poor both -- had had enough of the abusive rule of corporations by 1776. Crown corporations formed during the colonial period existed to exploit resources and dominate commerce in various products, such as tea or spices. They also founded and ruled colonies -- Virginia, Carolina, Maryland, and others. Their authority to govern was in their charters. In 1776, the colonists rebelled against King George as king -- and King George as CEO.

With this experience, the framers of the federal and state constitutions were careful to keep the chartering of corporations at the state level, where it would be closer to the people, and to include the list of restrictions I read earlier, and many others, to make sure corporations had no power, and particularly not the power to govern. They were, in a sense, going against the historical trend of corporate power up until then -- of the use of the corporate form as a way of pooling investments and organizing business activity while protecting the individual investors from liability.

The corporation has a long history as a form of business organization -- and a long history of being used by wealthy people to accumulate more wealth and power. Many of the people making decisions in the new nation in the late 18th century wanted to change this, to make

the corporation serve the people in keeping with the principles of democracy that shaped the governing documents of the U.S. -- ideas from the French Enlightenment, as well as from Native American governance such as the Iroquois Confederacy.

I want to take a slight detour here and say just one or two things about the U.S. Constitution, and the people who wrote it and adopted it. In those days, "we the people" meant white males with property -- less than 10 percent of the population. The rest were not considered competent to govern. John Jay, one of the framers, has a famous quote: "The people who own the country ought to govern it." Alexander Hamilton: "The people are turbulent and changing; they seldom judge or determine right. Give therefore to the first class a distinct, permanent share in the government." We think of the U.S. Constitution as a document that protects our rights, and it is, but it also protects property and the people who own it.

My point is that the Constitution is not a sacred text, and we shouldn't be starry-eyed about it. When it was written and adopted, it primarily served the needs and interests of the small class of propertied white men who were considered "people." Nevertheless, its principles, particularly those embodied in the Bill of Rights, are valuable and strong, and the proof is that they have stood up to being stretched and expanded again and again. Even though most people were not legal persons in 1787, they took to heart that phrase "we the people," and thought it ought to include them, and began a heroic and still-unfinished struggle to extend the rights and freedoms guaranteed in the Constitution to all people.

And even though the people in these social movements like abolition, women's suffrage, labor, mostly were people who had not yet gained recognition as persons, they knew that the rights and protections in the Constitution were for people, not for corporations. They knew that corporations were tools, with no inherent right to exist but only the privilege to serve the public good as long as their charters lasted or as long as they continued to do something useful. To them, corporations were by definition subordinate to the people, all the people -- even those who weren't yet "people."

In other words, the corporation was a tool. Like a toaster. Created to fulfill a particular function. The people of those times, both the framers and ordinary folks, would have been appalled by the idea that a corporation could have constitutionally protected rights. Not only would this be a direct contradiction of democratic principles -- but a complete absurdity. Imagine a toaster having constitutional rights!

What do you do when your toaster doesn't toast the way it's supposed to? Do you lobby the legislature to pass a law requiring it to toast properly? Do you sue your toaster, boycott it, beg it to behave, negotiate with it? Of course not -- it's absurd to think of doing such things. Our ancestors in the 19th century would find it just as absurd that we try to deal with corporate harms in these ways. We don't treat destructive corporations as broken tools, and fix them -- or discard them.

We have learned to accept, however reluctantly, that we must try to persuade them to be less destructive, but we can't demand that they do what we want them to do. We have forgotten that they once were the people's tools, with no right to exist and certainly no right to do any amount of harm.

Even though strong sentiment existed after the American Revolution to keep corporations from becoming powerful, the ink was hardly dry on the Constitution before the corporate owners were looking for ways to do just that. Through the legal system, they sought reinterpretation of contract law in their favor. Through corrupt state legislatures, they got many charter restrictions removed. And through taking opportunistic advantage of the crisis created by the Civil War and the political corruption that followed it, they consolidated significant political and economic power by the mid-1860s.

But they were still subordinate to the people, still subject to democratic control. They continued to look for a way out of this, and they saw their big opportunity in 1868, when the 14th amendment was passed prohibiting any state from denying equal protection and due process of law to any person. This was, of course, added to the Constitution to protect the rights of freed slaves. The corporate attorneys immediately began to bring cases seeking to have corporations designated as persons protected by this amendment.

It took several tries, but in 1886, a federal court in California ruled in the case of *Santa Clara County vs. Southern Pacific Railroad* that corporations were persons under the law. The U.S. Supreme Court heard the case and did not rule on personhood, but a court clerk [named J.C. Bancroft Davis] who was a railroad shareholder (as were some of the California judges), added language to the case header stating that the justices did not rule on whether corporations are persons because they were already of the opinion that they were.

This precedent, illegitimate as it was, opened the way for a flood of cases cementing corporate personhood on every level. In the last two decades of the 19th century, the 14th amendment was used less than 20 times to protect the rights of formerly enslaved persons. It was used almost 300 times to secure personhood rights for corporations. This was before the majority of human beings had full personhood -- women got the vote in 1920, native Americans in the 1930s, and African-Americans, though technically persons after 1868, were not able to claim their rights until the past 40 years and arguably they still can't.

After this, through more cases, the corporate attorneys won for corporations all the specific rights in the Bill of Rights that they wanted -- most importantly, due process, free speech and press, and protection from search and seizure. They achieved the protection for their commercial speech and advertising, as well as campaign donations, as first amendment rights. They also secured the right not to speak, not to say what they didn't want to say, such as an energy company not being required to put conservation information in with its bills.

Right now they are seeking the right to lie in a case about Nike Corporation being heard very soon in the Supreme Court. They stopped surprise visits by government regulators such as the EPA or OSHA by claiming protection from search and seizure without due process. Of course, by the time the inspectors arrive with a warrant, everything's just fine.

These protections that corporations have achieved through their status as legal persons exercising individual rights are definitely outrageous, and it's easy to see how they violate democracy. But it gets worse. The reason I used the phrase "corporate rule" is because corporations don't just have too much power -- they have *de facto* governing authority through these rights that they claim under the Constitution. This is not an explicit governing authority such as what the crown corporations had. Rather it is what results when

corporations are accorded rights intended for you and me, and are given a place and a voice in the political system.

Primarily through the rights of due process and equal protection, corporate owners and attorneys have succeeded in defining almost everything corporations have and do, including non-tangible things like their ideas and their decisions, as property, protected by these rights.

Giant corporation owners make decisions that create the conditions of our lives, that establish how we will do things, that determine what choices we will have both in the marketplace and in terms of things like jobs, entertainment, food, information. Here are some of the corporate decisions that are private property and "none of our business."

- The owners of corporations decide what to produce -- things like sugary drinks and Lunchables, things like nuclear warheads and instruments of torture, violent video games and toys made of PVC.
- These same people decide how to produce those products -- with toxic chemicals, with huge amounts of fresh water, paying their workers as little as possible.
- It is a business decision, made by this same small group of owners, how they will treat workers -- denying their civil rights in the workplace, paying them less than a living wage, requiring mandatory overtime.
- These same people making business decisions create the jobs available in the economy -- service jobs with low pay, factory work in dangerous conditions, construction jobs using scarce resources.
- It's a business decision for these same people to determine how food is produced -- food sprayed with poison pesticides is called "conventional," even though no food was grown that way for all of human history until the last 70 years.
- These same people make business decisions about our transportation system -- undoubtedly you've heard about how the auto-related companies bought up the trolley systems that served many US cities including Minneapolis, tore out the tracks and burned the cars so we'd have to buy their autos, and car company executives are still deciding to make and market gas-guzzling vehicles, and are still keeping efficient technologies on the shelf -- it's a business decision.
- The same group of corporate decisionmakers are allowed to determine, as a business decision, what new enterprises can get loans -- it's easy for a giant corporation, not so for a small business person who doesn't have collateral, or who plans to do something that this group of owners wishes to discourage.
- It's also a corporate business decision, made by this handful of people, what information we will have access to -- what is "news," what songs get played on the radio, what books are published.

None of this is any of our business. We are so used to this. It may seem like, sure, business owners have to make decisions about their operations, what they make, how they make it, how their business runs. We can't be making all those decisions. Yes, these are business decisions. But they are also governing decisions. They are decisions that create the structures of our common life, the parameters within which we must live, as well as making choices for us about use of resources that are our common heritage, use of public space that is our social commons, restricting information, the lifeblood of democracy, and generating pollution that we all must live with and pay to clean up.

From the founding of the nation for more than a century, ordinary people knew that the owners of corporations should not be allowed to make such decisions for society. In the

1880s, the farmers of the Farmers Alliance wanted to free themselves from the cycle of increasing debt to the company store, which they were forced to rely on for seed and tools and to sell their cotton. The merchants charged a lot for seed and paid little for the cotton. So the farmers began to set up cooperatives, but they needed a whole network of them to make their vision work. The corporate bankers closed ranks and would not lend money to establish something that they could see would reduce the hold of corporations on the economy.

Those farmers, dirt-poor and without formal education, knew that it was undemocratic, against the principles of the nation, for the corporate banks to refuse them, so they developed a plan for a parallel banking system. Of course, this also failed. By then the corporations were too strong, and the farmers were too poor, and they weren't able to build enough solidarity with urban workers to challenge the corporations for control of the economy.

The populist movement, which grew out of the farmers alliance and had some electoral success for a few years, was the largest democracy movement in American history, a movement of millions of people who still understood that corporations were meant to serve the people, not the other way around. As the populist movement faded, the Progressives rose and established the regulatory system which we have relied on for a hundred years to keep corporate power under control. Has it worked?

The premise of the regulatory system is that corporations cannot be required to act in the public good, but only to comply with specific laws. The regulatory system allows corporations as much free rein as possible, as long as they don't behave too badly, produce too much pollution, or be too hard on their workers.

Only if a corporation is violating a law can regulatory pressure be applied, which means there must be laws passed about each thing that corporations might do that is harmful. They can't be regulated, for example, destroying a community and creating homelessness by moving a manufacturing plant to another country and leaving thousands of people out of work. There's no law against that, and there can't be such a law. If a toxic chemical isn't regulated -- risk assessment hasn't been done, safety standards haven't been established -- then no corporation can be penalized for emitting it. Out of the over 80,000 chemicals now in use, less than 30 percent have even been tested for toxicity or carcinogenicity. The other 56,000 in effect aren't regulated.

The Progressives did manage, through establishing regulation, to limit some of the worst of corporate activities in the early 20th century, price gouging and such. But they also succeeded in helping people to forget that corporations started out as tools, and that they are supposed to serve the public good. Regulation effectively made routine and legal a huge amount of harm done by corporations. The Progressives, although their legacy is a word that has a positive meaning today for people who work for social change, did great harm to democracy by putting an end to efforts of people like the populists to keep corporations subordinate, and by substituting regulatory penalties like fines for penalties like corporate death.

These changes in how corporate harms were dealt with added the final touch to corporate owners' century-long efforts to get out from under the people's control, and finished off our last shreds of sovereignty while helping to create our 20th-century belief that the best we can

hope for is to prevent corporations' worst offenses while we submit to being ruled by them.

The world has changed a great deal since corporations began to rule. We can't, and don't want to, "go back." At the time corporations gained personhood, most humans still weren't persons. Even though people in the 1880s understood the true nature of corporations in spite of the legal maneuvering that made them persons, most weren't able to participate as sovereign people in the system of self-government set up in the US Constitution.

And so we don't know how the amazing and rapid industrialization and technological progress of the last two centuries would have been different if "we the people" had been in charge, making careful decisions about how to manage the new developments for the common good, meet everyone's needs and preserve the commons for the benefit of all. How we the people might have used the corporations as tools for progress we defined, rather than allowing their owners to direct it for their benefit.

We can't go back. But we can learn from our ancestors as we determine how to go forward. We must learn from them to look at corporations a different way, not through the lens of regulation, but through the lens of sovereignty. We must learn again what the poor farmers of the Farmers Alliance knew: We are sovereign. We the people govern. Corporations are our creations and exist at our say-so. Defining the conditions of their existence is our job, not theirs -- and defining the conditions of our existence is also our job, not theirs.

What if we the people really were in charge, and corporations were our tools to build and operate the kind of world we want to live in? When polls show that 80 percent of people in this country want stronger environmental laws, significant percentages would like to avoid buying items made in sweatshops and large numbers support the international declaration on human rights, it's evident that we the people would design a much more sustainable and humane society than the one being designed for us by the owners and managers of corporations.

I'm going to leave you with some questions to ponder as you listen to John and attend the rest of the sessions today. What would it mean for us to stop trying to deal with corporations' harms through regulation, stop acknowledging their claims to personhood and individual rights, stop allowing them to rule over us? What would it look like for us to take up our sovereignty, make governing decisions ourselves and instruct our corporate creations how we want those decisions carried out? What would be different if we recovered our vanishing democracy and became for real, maybe for the first time, a self-governing people?

This talk was given at a conference entitled *Vanishing Democracy: Challenging Corporate Power* on March 29, 2003, in Minneapolis, Minn., by Betsy Barnum, a member of the Alliance for Democracy, the Women's International League for Peace and Freedom, and a supporter of the Program on Corporations, Law and Democracy. She can be reached at betsy@greatriv.org, or by mail through the Great River Earth Institute, P.O. Box 6021, Minneapolis, MN 55406.

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