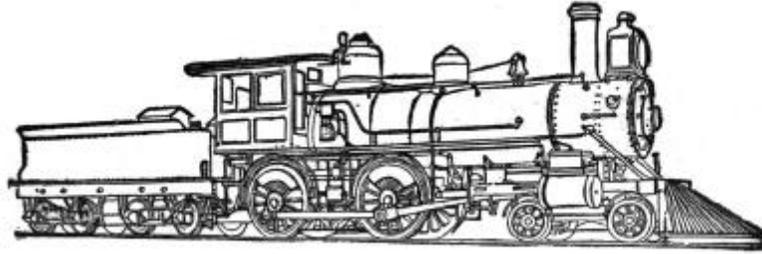


# The Santa Clara Blues: Corporate Personhood versus Democracy



by William Meyers

## What Corporate Personhood Is

Corporate Personhood is a legal fiction. The choice of the word "person" arises from the way the 14th Amendment to the U.S. Constitution was worded and from earlier legal usage of the word person. A corporation is an artificial entity, created by the granting of a charter by a government that grants such charters. Corporation in this essay will be confined to businesses run for profit that have been granted corporate charters by the States of the United States. The Federal Government of the United States usually does not grant corporate charters to businesses (exceptions include the Post Office and Amtrak).

Corporations are artificial entities owned by stockholders, who may be humans or other corporations. They are required by law to have officers and a board of directors (in small corporations these may all be the same people). In effect the corporation is a collective of individuals with a special legal status and privileges not given to ordinary unincorporated businesses or groups of individuals.

Obviously a corporation is itself no more a person (though it is owned and staffed by persons) than a locomotive or a mob. So why, in the USA, is a corporation considered to be a person under law?

In the United States of America all natural persons (actual human beings) are recognized as having inalienable rights. These rights are recognized, among other places, in the Bill of Rights and the 14th Amendment.

Corporate personhood is the idea (legal fiction, currently with force of law) that corporations have inalienable rights (sometimes called constitutional rights) just like real, natural, human persons.

That this idea has the force of law both resulted from the power and wealth of the class of people who owned corporations, and resulted in their even greater power and wealth. Corporate constitutional rights effectively invert the relationship between the government and the corporations. Recognized as persons, corporations lose much of their status as subjects of the government. Although artificial creations of their owners and the governments, as legal persons they have a degree of immunity to government supervision. Endowed with the court-recognized right to influence both elections and the law-making process, corporations now dominate not just the U. S. economy, but the government itself.

## The History of Corporate Personhood

Corporations were detested by the colonial rebels in 1776 when the Declaration of Independence severed the States from Great Britain. There had been only a few corporations in colonial America, but they had been very powerful. The Dutch West India Company had founded New York. Corporations had effectively governed Virginia, Maryland and the

Carolinas. The political history of the colonies up until 1776 was largely one of conflict between citizens trying to establish rule by elected government and the corporations or King ruling through appointed governors.

The new nation or confederation of 13 sovereign states had few native business corporations. The corporations that survived the revolution were mainly non-profit institutions such as colleges [Dartmouth College v. Woodward, 17 U.S. 518 (1819)]. There was not a single bank in the United States until 1780. Most of that first bank's stock was owned by the confederate (what we would later call Federal) government, and the bank's charter was revoked in 1785. "The agrarian charges were numerous... the bank was a monstrosity, an artificial creature endowed with powers not possessed by human beings and incompatible with the principles of a democratic social order." [Hammond, Bray, *Banks and Politics in America from the Revolution to the Civil War* (Princeton: Princeton University Press, 1991), pp. 48-54] By 1790 four banks had been granted corporate charters by states, but these banks were not originally purely private institutions. They served as financial institutions for the states that chartered them. [Ibid. 65-67]

The federal Constitution of 1788 did not mention corporations at all. But in the late 1700's and early 1800's corporations began to be chartered by the states. This was not without opposition. Thomas Jefferson said, "I hope we shall crush in its birth the aristocracy of our moneyed corporations which dare already to challenge our government in a trial of strength, and bid defiance to the laws of our country."

Like the banks, other early corporations were closely supervised by the state legislatures that granted their charters. When the Supreme Court of the United States in *Dartmouth College v. Woodward* in 1819, ruled that Dartmouth's charter granted in 1769 by King George III was a contract and could not be revoked by the New Hampshire legislature, a public outcry ensued. State courts and legislatures, supported by the people, declared that state governments had an absolute right to amend or repeal a corporate charter. [Richard L Grossman and Frank T. Adams, *Taking Care of Business, Citizenship and the Charter of Incorporation* (Cambridge: Charter, Ink., 1993), p. 11-12]

Until 1886 corporations were not considered persons. It was clear what they were: artificial creations of their owners and the state legislatures. They were regulated and taxed. They could sue and be sued. They were subject to all of the laws of the land as well as any restrictions placed in their charters. But from 1819 until 1886 the wealthiest business people sought to use the Federal government, particularly the courts, to get their corporations out from under the control of the states and their citizens.

During the 1800's the United States went through an enormous economic expansion, sometimes called the Industrial Revolution, but that term is misleading. The United States expanded geographically by grabbing native American Indian territories formerly claimed by France, Great Britain, and Mexico. The population exploded. Farm production exploded, and international trade exploded, with U.S. grain feeding both growing U.S. cities and Europe. Manufacturing in the U.S., protected by tariffs from British competition, also progressed rapidly. The favored form for large businesses became the corporation. And as these corporations came to dominate business life, they also began to dominate America's politicians, lawyers, courts and culture.

The Civil War accelerated the growth of manufacturing and the power of the men who owned the corporations. After the war corporations began a campaign to throw off the legal shackles that had held them in check. The systematic bribing of Congress was instituted by Mark Hanna, sugar trust magnate Henry Havemeyer, and Senator Nelson Aldrich and their associates. [Jonathan Shepard Fast and Luzviminda Bartolome Francisco, *Conspiracy For Empire, Big Business, Corruption and the Politics of Imperialism in America, 1876-1907* (Quezon City, Foundation for Nationalist Studies, 1985), p. 92-97] Most Supreme Court judges who were appointed were former corporate lawyers.

In 1886 the supreme court justices were Samuel F. Miller, Stephen J. Field, Joseph P. Bradley, John M. Harlan, Stanley Matthews, William B. Woods, Samuel Blatchford, Horace Gray, and chief justice Morrison R. Waite. Never heard of a one of them? These men subjected African Americans to a century of Jim Crow discrimination; they made corporations into a vehicle for the wealthy elite to control the economy and the government; they vastly increased the power of the Supreme Court itself over elected government officials. How quaint they are forgotten names. In all fairness, Justice Harlan dissented from the infamous *Plessy v. Ferguson* decision [163 U.S. 537 (1896)], which, as he said, effectively

denied the protection of the 14th Amendment to the very group of people (former slaves and their descendants) for whom it was designed.

In 1868 the 14th Amendment to the United States Constitution had become law. Section 1 of that Amendment states:

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"The one pervading purpose . . . [of the 14th Amendment] was the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." That is exactly what Justice Samuel F. Miller said in 1873 in one of the first Supreme Court opinions to rule on the 14th Amendment. [83 U.S. 36, 81 (1873)]

But the wealthy, powerful men who owned corporations wanted more power for their corporations. Their lawyers came up with the idea that corporations, which might be said to be groups of persons (though one person might in turn belong to (own stock in) many corporations), should have the same constitutional rights as persons themselves. If they could get the courts to agree that corporations were persons, they could assert that the States, which had chartered the corporations, would then be constrained by the 14th Amendment from exercising power over the corporations.

Beginning in the 1870's corporate lawyers began asserting that corporations were persons with many of the rights of natural persons. It should be understood that the term "artificial person" was already in long use, with no mistake that corporations were claiming to have the rights of natural persons. "Artificial person" was used because there were certain resemblances, in law, between a natural person and corporations. Both could be parties in a lawsuit; both could be taxed; both could be constrained by law. In fact the corporations had been called artificial persons by courts in England as early as the 16th century because lawyers for the corporations had asserted they could not be convicted under the English laws of the time because the laws were worded "No person shall..."

The need to be freed from legislative and judicial constraints, combined with the use of the word "person" in the U.S. Constitution and the concept of the "artificial person," led to the argument that these "artificial persons" were "persons" with an inconsequential "artificial" adjective appended. If it could be made so, if the courts would accept that corporations were among the "persons" talked about by the U.S. Constitution, then the corporations would gain considerably more leverage against legal restraint.

These arguments were made by corporate lawyers at the State level, in court after court, and many judges, being former corporate attorneys and usually at least moderately wealthy themselves, were sympathetic to any argument that would strengthen corporations. There was a national campaign to get the legal establishment to accept that corporations were persons. This cumulated in the Santa Clara decision of 1886, which has been used as the precedent for all rulings about corporate personhood since then.

Though it is not yet clear who hatched this plan or where the campaign began, the early cases mainly concerned railroads. In the late 1800's railroads were the most powerful corporations in the country. Most of the nation's farmers were dependent on them to haul their produce; even the manufacturing corporations were at their mercy when they needed coal, iron ore, finished iron, or any other materials transported. That the lawyers for the railway corporations had planned a national campaign to make corporations full, unqualified legal persons is demonstrated by the Supreme Court making several decisions in which this was an issue in 1877. In four cases that reached the Supreme Court [94 U.S. 155, 94 U.S. 164, 94 U.S. 179, 94 U.S. 180 (1877)] it was argued by the railroads that they were protected by the 14th Amendment from states regulating the maximum rates they could charge. In each case the Court did not render an opinion as to whether corporations were persons covered by the 14th Amendment. Bypassing that issue, they said that the 14th Amendment was not meant to prevent states from regulating commerce.

Similarly, in 1877, in *Munn v. Illinois* [94 U.S. 113 (1876)], the Supreme Court decided that the 14th Amendment did not prevent the State of Illinois from regulating charges for use of a business's grain elevators, ignoring the question of whether Munn & Scott was a person. Later, in *Northwestern Nat Life Ins. Co. v. Riggs* [203 U.S. 243 (1906)], having accepted that corporations are people, the court still ruled that the 14th Amendment was not a bar to many state laws that effectively limited a corporations right to contract business as it pleases.

Calling silence a victory, from 1877 to 1886 corporate lawyers assumed that corporations were persons, and their opponents argued that they were not. In *Santa Clara County v. Southern Pacific Railroad Company* [118 U.S. 394 (1886)], at the lower court levels the question of whether corporations were persons had been argued, and these arguments were submitted in writing to the Court. However, before oral argument took place, Chief Justice Waite announced: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does."

It is not half as strange that the Supreme Court judges would render such an opinion, given their allegiance to the propertied class, as the way that they rendered it. These guys loved to write long-winded, complex opinions; look at any Supreme Court opinion of the time (or any time) and you'll see that. This question had never been covered in a Supreme Court decision; it had been avoided. Here was the perfect chance for any of nine Supreme Court judges to make his place in history. All declined. No one wanted to explain how an amendment about ex-slaves had converted artificial entities into the legal equivalent of natural persons.

This opinion without explanation, given before argument had even been heard, became the law of the United States of America. No state or federal legislature passed it or even discussed; no Amendment to the Constitution was deemed necessary; the citizens were simply informed that they had a mistaken view about corporations, if they were informed at all. Future Supreme Courts refused to even consider the question, preferring to build on it, though occasionally future justices would try to raise the question again.

Was the 14th Amendment about corporations? One of the 1886 judges, Samuel F. Miller, had not thought so in 1872, only 6 years after the Amendment had become law, when the court was "called upon for the first time to give construction to these articles." In the *Slaughterhouse Cases* [83 U.S. 36 (1872)], he stated (and I quote at length because it is important not only to the question of corporate personhood, but to the question of civil rights):

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history, for in it is found the occasion and the necessity for recurring again to the great source of power in this country, the people of the States, for additional guarantees of human rights, additional powers to the Federal government; additional restraints upon those of the States. Fortunately, that history is fresh within the memory of us all, and its leading features, as they bear upon the matter before us, free from doubt.

The institution of African slavery, as it existed in about half the States of the Union, and the contests pervading the public mind for many years between those who desired its curtailment and ultimate extinction and those who desired additional safeguards for its security and perpetuation, culminated in the effort, on the part of most of the States in which slavery existed, to separate from the Federal government and to resist its authority. This constituted the war of the rebellion, and whatever auxiliary causes may have contributed to bring about this war, undoubtedly the overshadowing and efficient cause was African slavery.

...

They [Negroes] were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the rebellion, and who supposed that, by the thirteenth article of amendment, they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. They accordingly passed through Congress the proposition for the fourteenth amendment, and they declined to treat as restored to their full participation in the government of the Union the States which had been in

insurrection until they ratified that article by a formal vote of their legislative bodies.

...

We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all, and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him.

It has been argued that the men who wrote the 14th Amendment specifically meant for the word person to be a loophole which you could drive a giant corporation through. Apparently in one of the railroad cases an attorney who had been on the committee that drafted the amendment waived a paper before the court claiming that it documented such; but the paper was not entered as evidence, nor apparently was it shown to anyone, nor was it saved. However, careful research has shown that, John A. Bingham the member of Congress who is known to have been chiefly responsible for the phraseology of Section One when it was drafted by the Joint Committee in 1866, had, during the previous decade and as early as 1856-1859, employed not one but all three of the same clauses and concepts he later used in Section One. More important still, Bingham employed these guarantees specifically and in a context which suggested that free Negroes and mulattoes rather than corporations and business enterprise unquestionably were the persons' to which he then referred. [Graham, Howard Jay, *Everyman's Constitution*, State Historical Society of Wisconsin, 1968][See also Graham, Howard Jay, "The Conspiracy Theory of the Fourteenth Amendment," *The Yale Law Journal*, Vol. 47: 341, 1938]

Before the Supreme Court determined that corporations were persons and hence had constitutional rights female citizens had decided that the Fourteenth Amendment should be interpreted to give them the right to vote. In *Minor v. Happersett* the Supreme Court ruled that "women" were not persons for the purposes of the Fourteenth Amendment.

The moral and legal depravity of the Supreme Court during this period (though of course they saw their job as securing the property of those of their class), and the absurdity of treating corporations as persons with natural and constitutionally recognized rights, is illustrated by the deterioration of the legal position of the former slaves and their descendants during this time. A series of Supreme Court judgements [92 U.S. 214 (1875), 92 U.S. 542 (1875), 106 U.S. 629 (1882), 109 U.S. 3 (1883)] of cases where men classified as Negroes sought the protection of the 14th Amendment narrowed the scope of that protection. Finally, in the infamous *Plessy v. Ferguson* [163 U.S. 537 (1896)] decision, the Supreme Court ruled that a man who was 1 part slave by ancestry and 7/8 of white/free ancestry could be forced to sit in a "separate but equal" section of a passenger train. In effect this decision declared people with non-European ancestors to not be persons with constitutional rights. The decision would not be overruled by a future Supreme Court until *Brown v. Board of Education* in 1954.

Only justice John M. Harlan dissented in *Plessy v. Ferguson*. Of the justices who had ruled that corporations were people in *Santa Clara v. Southern Pacific*, three were still justices and rules that natural persons of the wrong skin color were not persons in *Plessy v. Ferguson*. These infamous three were Stephen J. Field, Samuel Blatchford, and Horace Gray.

Two Supreme Court judges, Hugo Black and William O. Douglas, later rendered opinions attacking the doctrine of corporate personhood. I supply here most of justice Black's opinion:

But it is contended that the due process clause of the Fourteenth Amendment prohibits California from determining what terms and conditions should be imposed upon this Connecticut corporation to promote the welfare of the people of California.

I do not believe the word 'person' in the Fourteenth Amendment includes corporations. 'The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law.' This Court has many times changed its interpretations of the Constitution when the conclusion was reached that an improper construction had been adopted. Only recently the case of *West Coast Hotel Company v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 108 A.L.R. 1330, expressly overruled a previous interpretation of the Fourteenth Amendment which had long blocked state minimum wage legislation. When a statute is declared by this Court to be unconstitutional, the decision until reversed stands as a barrier against the adoption of similar legislation. A constitutional interpretation that is wrong should not

stand. I believe this Court should now overrule previous decisions which interpreted the Fourteenth Amendment to include corporations.

Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection [303 U.S. 77, 86]. The historical purpose of the Fourteenth Amendment was clearly set forth when first considered by this Court in the Slaughter House Cases, 16 Wall. 36, decided April, 1873-less than five years after the proclamation of its adoption. Mr. Justice Miller, speaking for the Court, said:

'Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.

'These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced ... the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much. (Congressional leaders) accordingly passed through Congress the proposition for the fourteenth amendment, and ... declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies.' 16 Wall. 36, at page 70.

Certainly, when the Fourteenth Amendment was submitted for approval, the people were not told that the states of the South were to be denied their normal

relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations. This Court, when the Slaughter House Cases were decided in 1873, had apparently discovered no such purpose. The records of the time can be searched in vain for evidence that this amendment was adopted for the benefit of corporations. It is true [303 U.S. 77, 87] that in 1882, twelve years after its adoption, and ten years after the Slaughter House Cases, supra, an argument was made in this Court that a journal of the joint Congressional

Committee which framed the amendment, secret and undisclosed up to that date, indicated the committee's desire to protect corporations by the use of the word 'person.' Four years later, in 1886, this Court in the case of Santa Clara County v. Southern Pacific Railroad, 118 U.S. 394, 6 S.Ct. 1132, decided for the first time that the word 'person' in the amendment did in some instances include corporations. A secret purpose on the part of the members of the committee, even if such be the fact, however, would not be sufficient to justify any such construction. The history of the amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the Slaughter Houses Cases, supra, that: 'By 'any person' was meant all persons within the jurisdiction of the State. No distinction is intimated on account of race or color.' Corporations have neither race nor color. He knew the amendment was intended to protect the life, liberty, and property of human beings.

The language of the amendment itself does not support the theory that it was passed for the benefit of corporations.

The first clause of section 1 of the amendment reads: 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.' Certainly a corporation cannot be naturalized and 'persons' here is not broad enough to include 'corporations.'

The first clause of the second sentence of section 1 reads: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' While efforts have been made to persuade this Court to allow corporations to claim the protection of his clause, these efforts have not been successful.

The next clause of the second sentence reads: 'Nor shall any State deprive any person of life, liberty, or property, without due process of law.' It has not been decided that this clause prohibits a state from depriving a corporation of 'life.' This Court has expressly held that 'the liberty guaranteed by the 14th Amendment against deprivation without due process of law is the liberty of natural, not artificial persons.' Thus, the words 'life' and 'liberty' do not apply to corporations, and of course they could not have been so intended to apply. However, the decisions of this Court which the majority follow hold that corporations are included in this clause in so far as the word 'property' is concerned. In other words, this clause is construed to mean as follows:

'Nor shall any State deprive any human being of life, liberty or property without due process of law; nor shall any State deprive any corporation of property without due process of law.'

The last clause of this second sentence of section 1 reads: 'Nor deny to any person within its jurisdiction the equal protection of the laws.' As used here, 'person' has been construed to include corporations. [303 U.S. 77, 89] Both Congress and the people were familiar with the meaning of the word 'corporation' at the time the Fourteenth Amendment was submitted and adopted. The judicial inclusion of the word 'corporation' in the Fourteenth Amendment has had a revolutionary effect on our form of government. The states did not adopt the amendment with knowledge

of its sweeping meaning under its present construction. No section of the amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, (and all administrative actions under them) to censorship of the United States courts. No word in all this amendment gave any hint that its adoption would deprive the states of their long-recognized power to regulate corporations.

The second section of the amendment informed the people that representatives would be apportioned among the several states 'according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.' No citizen could gather the impression here that while the word 'persons' in the second section applied to human beings, the word 'persons' in the first section in some instances applied to corporations. Section 3 of the amendment said that 'no person shall be a Senator or Representative in Congress,' (who 'engaged in insurrection'). There was no intimation here that the word 'person' in the first section in some instances included corporations.

This amendment sought to prevent discrimination by the states against classes or races. We are aware of this from words spoken in this Court within five years after its adoption, when the people and the courts were personally familiar with the historical background of the amendment. 'We doubt very much whether any action of a State not directed by way of discrimination against [303 U.S. 77, 90] the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.' Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of 1 per cent invoked it in protection of the negro race, and more than 50 per cent. asked that its benefits be extended to corporations.

If the people of this nation wish to deprive the states of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own state boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.

- Hugo Black, dissenting, *Connecticut General Life Insurance Company v. Johnson* [303 U.S. 77, 1938]

Justice Black was not alone in his questioning of the legitimacy of corporate personhood. Justice Douglas, dissenting in *Wheeling Steel Corp. v. Glander* [337 U.S. 562 (1949)], gave an opinion similar to, but shorter than, the one quoted above, to which Justice Black concurred.

### **Why Corporate Constitutional Rights Are Anti-democratic**

Is corporate personhood (including the whole range of corporate constitutional rights) a bad thing? If you are a wealthy corporate stockholder who doesn't care about the environment or the fate of less wealthy human beings, the answer is no. In fact corporate personhood is right up there with corporations' limited liability as one of the good things in life. For the rest of us corporate personhood is a very bad thing.

Corporate personhood changes the relationship between people and corporations and between corporations and the government, and even between government and the people. The effects of this change in relationships range from loss of liberty and income for citizens to the destruction and poisoning of the earth and the corruption of the U.S. governments (including state and local governments). As outlined in the Declaration of Independence, the Articles of Confederation, the Constitution, the Federalist Papers, and the Anti-Federalist Papers, government derives its powers and responsibilities from the people. Corporations, chartered by governments, are subject to the people with the government acting as an intermediary. Corporate personhood allows the wealthiest citizens to use corporations to control the government and use it as an intermediary to impose their will upon the people. It is this basic about-face from democracy that should most concern us. But because of our corrupted legal system, corporate media, and corrupted elected officials, social activists usually focus their efforts on the bad, even horrible, results of corporate control of government and society. Reformers run around trying to get bureaucrats to enforce the minimalist regulations that have been enacted into law, rather than finding a way to prevent the corporate lawyers and lobbyists from writing the laws.

Take, for instance, the Environmental Protection Agency (EPA) and its feeble attempts to clean up the most toxic sites in the United States. Almost all of these sites were created by large corporations. Regulation of corporations was traditionally left to State governments; the Federal government regulated only interstate commerce (though in the 20th century it increasingly used its power to regulate interstate commerce as a means to regulate all commerce). Why did the State governments not prevent the creation of toxic sites in the first place?

One might claim that there was simply, in the past, a lack of knowledge on everyone's part about the environment and the dangers of toxins. This theory does not stand up to analysis. Poisoning wells was a crime from the earliest of times. Government standards for food purity and safety go back to at least the Middle Ages. Sanitation laws came into common existence in the U.S. during the 19<sup>th</sup> century. But toxic sites were the result of toxic dumping by large industrial corporations. They dumped toxic byproducts into the air, into waterways, and onto the ground. They continue to do so today with environmental law written to give them permission to pollute up to specified levels, and even at higher levels if they are willing to pay small fines. In addition, they have used their political power to force taxpayers to pay to clean corporate toxic spills. In some cases they have escaped financial liability through the corporate bankruptcy laws, which limit the liability of stockholders. Billions of dollars that were paid out in dividends to stockholders cannot be reclaimed by the people in order to cover the costs of toxic cleanup at taxpayers' expense.

After corporations were given personhood and constitutional rights in 1886 state governments began to find that attempts to regulate corporations were thwarted both by Supreme Court decisions and the "race to the bottom." The immediate effect of the Santa Clara decision was the protection of corporations from some (but not all) state regulation; state regulations could be tested in federal courts to see if they violated the corporations constitutional rights. If a state successfully, and with federal court approval, prohibited an industry from dumping waste in streams and rivers (and actually enforced such a law) the industry would simply move to a state that had no such law or enforced it laxly.

In recent decades the Supreme Court has ruled that corporations have the Fourth Amendment constitutional right to freedom from random inspection [See *v. City of Seattle*, 387 U.S. 541 (1967) and *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), among others]. Without random inspections it is virtually impossible to enforce meaningful anti-pollution, health, and safety laws.

What would it take to make corporations stop polluting and pay to clean up the messes they have created? They would have to be prohibited from lobbying, they would have to be prohibited from contributing to political campaigns, they would need to lose their limited liability status, they would need to have their charters limited and enforced, they would need to be subject to inspections without warrants, and they would have to have their ability to buy decisions in their favor in the courts ended. In order to remove any of this set of privileges we would need to make it legally clear that they do not have corporate personhood or the constitutional rights the courts pretend go with it.

Or consider subsidized corporate timber harvesting on government lands. One might see this as a case of simple, raw economic and political power. The timber companies wish to grab (privatize) the profits in a situation and pawn off (socialize) the costs by charging them to the taxpayers. They do this by writing the laws governing the sale of timber. It is sold cheap, and the government does not take into account its own costs (administration, building roads, etc.) in setting prices. The net result is that taxpayers lose money, the timber industry makes profits, and the environment is managed in an unsound manner. Corporate personhood does not, in itself, cause laws to be written to subsidize the wealthy holders of timber company stock with the income taxes laid on the backs of ordinary wage earners. But it has created the situation in which corporations are free to lobby and corrupt the political process. To prevent them from lobbying and contributing to political campaigns we must revoke their corporate personhood and constitutional rights.

Look at the recent consolidation of the media, from bookstores to cable television empires. This is part of the process of putting Americans in chains. Corporations are able to stifle individual liberty by driving out small local businesses and replacing them with cloned outlets. What does that have to do with corporate personhood? Well, some people, realizing that in the long run local communities prosper with locally owned businesses, have tried to limit the corporate chain's right unlimited expansion. In the case of *Liggett v. Lee* [288 U.S. 517 (1933)] the State of Florida had imposed a filing fee for licenses for stores that was progressive: a person opening one store would pay a \$5.00 fee, whereas a large chain was required to pay \$30.00 per store. J. C. Penny Company challenged the law and the Supreme Court of the U.S. ruled that this law violated the 14th Amendment's principle of equal protection. This was at a time when the Jim Crow system of discrimination against blacks was at its height; blacks were still not considered persons protected by the 14th Amendment, but corporations were. Judge Brandeis's dissent in the case is well worth reading for anyone interested in a critique of the growth of corporate power up to 1933.

If terrorists had tried to bomb independent bookstores out of existence in the 1990's, people would have been demanding police protection for our neighborhood bookstores. Instead the independents, which had survived fairly well against the earlier versions of bookstore chains, were bombed (economically) by Barnes & Noble and Borders. Now independent book publishers, who had long struggled to survive against the big corporate publishing empires, can have their books effectively censored by two "buyers", one working at each of the chains. Now the dream of owning a small bookstore and carrying the books that you love has been replaced by the nightmare of being a low-paid clerk in a chain bookstore. Corporate personhood offers little or no advantage to small, local stores and businesses: it is of advantage only to the national and international corporations.

The book industry is just one segment of the media industry that has consolidated at an accelerating pace at the end of the 20th Century. Laws could have been enacted insuring a multitude of voices on the radio and TV and in newspapers and magazines, but instead we are subjected to one voice: the voice of money. Endowed with corporate personhood, the media corporations have been able to lobby and influence politicians (with campaign contributions) to allow media empires to effectively extinguish meaningful freedom of the press in the United States.

Compare the position of most real persons in the U.S. at present. Most real persons are lucky if they can shake their congressperson's hand; few of us have the power to talk to any congressman on any committee that might help our personal interests. Most real persons were not consulted before Congress acted recently to toss out the New Deal era banking laws, allow the consolidation of the media industry, or change the rules for personal bankruptcy. But multinational corporations have unlimited access to Congress. They buy that access with campaign contributions (and often, lucrative jobs for ex-Congresspersons). The public is told what to think by a (almost always) unified media voice. The public is usually not even told when critical anti-democratic or economic changes are being considered by Congress.

Because of corporate personhood and corporate constitutional rights, the ordinary, natural person has become a second-class person in the eyes of the law. A person who has to work for wages as a corporate employee loses his Constitutional rights (such as free speech) when he steps onto corporate property, according to the courts. In any dispute he has with a corporate person he is confronted with the economic penalty of having to buy justice from lawyers and courts, which for the corporation is a tax-deductible expense. For an international corporation a million dollars in legal costs hardly affects the bottom line; for a real person, a thousand dollars in legal costs may mean missing a rent or mortgage payment. Even if ordinary people try to work together, as in a labor union, they are not afforded the same privileges as a corporate person.

Finally, look at the corporate contributions to politicians and their overall ability to influence political thought through the corporate media. Without ever giving a penny to a politician's campaign the corporate media would have enormous control of the political process through their ability to filter news and opinions. Dependent on other out-of-control corporations for their own advertising income, they have no reason to anger their real clients by impartially reporting the news. When you add to that the enormous amounts of money that corporations are able to use to affect the political process you have the makings of absolute control of government and society. There have been some efforts by states and the federal government to put some mild restrictions on corporate campaign spending. But in *First National Bank of Boston v. Bellotti* [435 U.S. 765 (1978)] the U.S. Supreme Court declared that corporate persons have the same free speech rights as natural persons, and could spend unlimited sums of money "speaking" in the form of ads and campaign contributions. The Massachusetts Supreme Court had unanimously upheld the validity of the campaign finance reform law in question.

Summing up, corporate personhood is bad because it is the basis of corporations being regarded by the Supreme Court with other rights such as equal protection under the law, free speech, the right to remain silent in criminal cases, and protection from searches. These rights in turn have been used by the corporations to corrupt our citizens, government and legal system, to treat workers and small businesses as economic prey, and to destroy the environment we all depend on to sustain life itself.

**What would change if corporations lost personhood?**

There are two broad areas that could change if we revoked corporate personhood. One is directly related to corporations not being persons for the purposes of the 1st, 4th, and 14th Amendments. The other is the critically important secondary effect of what can be achieved if we push corporations out of the political process, which can be achieved only if we remove their personhood. Knowing exactly what would or could change has to be based on what changes have been made, or prevented, since the establishment of corporate personhood as a legal principle in 1886.

Fortunately we do have a road map of sorts, a mirror image of this issue. In 1896 the U.S. Supreme Court, in *Plessy v. Ferguson*, effectively declared that "negros" were not protected by the Fourteenth Amendment, were not in fact the persons it was meant to protect. In 1956 in *Brown v. Board of Education*, the Supreme Court ruled so that suddenly "Negroes" again became full legal persons. I hope I don't need to describe the plight of African-Americans and other people of color during the period from 1896 to 1956, nor will I recount the campaign necessary to get the court to change its mind in 1956.

Were African-Americans (and others classified as non-white) suddenly better off the day after the 1956 ruling? Potentially yes, but factually no. It took years of protests, court cases, legislative changes, changes in people's awareness and semantics, and even many people's murders at the hands of those who opposed change, before African-Americans began to be treated, legally, socially, and economically, as citizens and persons. The process is not yet complete.

When corporate personhood is terminated, whether it be by a Supreme Court decision, an Amendment to the U.S. Constitution, or by citizens and States recovering the power to govern themselves democratically, the next day it may seem like nothing really has changed. But the potential for change will be as great as it was for people of color after *Brown v. Board of Education*.

Just as in 1956 you could predict that, finally guaranteed the protection of the Federal Government under the Fourteenth Amendment, people of color might soon be able to shop with white people, have the vote, elect people of color to office, and make substantial economic gains, we can predict what can happen after the ending of corporate personhood. But these things will not happen unless there are years of protests, court cases, legislation, and changes in people's awareness. We can't predict the details, but since we know what has been obstructed in the past, we can see what freedoms the people might gain once we begin to end corporate dominance.

Corporate personhood is at the root of such Supreme Court rulings as *First National Bank of Boston v. Bellotti* [435 U.S. 765 (1978)], which equate corporate donations to political campaigns with free speech. They allow corporate money to govern the political process. These rulings can be reversed once the 1886 decision is reversed, since they are directly dependent upon it. Then we should be able to force corporations out of the political process. We could do this through legislation or through the chartering process. Without personhood the corporations are not entitled to 1st Amendment rights; they will have only what privileges the people, through our government, gives them. We can and should prohibit them from making any kind of contribution to politicians, to lobbying groups, or to campaigns involving referenda. Any advertising that does not sell products, that is, any advertising not presenting factual information about the products or services a corporation offers, should be prohibited.

Later in this essay the secondary effects of removing corporations and their money from the political decision making (including regulatory) process will be examined. First other changes that are directly dependent upon revoking corporate personhood need examining.

Without the protection of the 14th Amendment, corporations could be purposefully discriminated against in legislation. It would even become possible to discriminate against particular types and sizes of corporations. The citizens would thereby gain much greater control over the economy, both nationally and at the local level. For instance, the Supreme Court in the past, based on corporate personhood, has held that States and localities cannot favor small or local businesses over corporate chain stores or out-of-state businesses, as in *Liggett v. Lee* [288 U.S. 517 (1933)]. Towns that want all business to be local, or even that want to keep out certain chains but allow others, will be able to have that control, if they wish. They could also finally have truly effective "bad boy" laws (which prohibit businesses with

criminal records from operating in a community), as opposed to the current ineffective ones (because we'll be able to limit corporations appeals to the courts).

Without personhood the due process used for corporations could be different than the due process used for individuals or unincorporated businesses. As an illustration, corporations might only be allowed a single hearing when their actions effect an endangered species, rather than the current system where they can spend millions of dollars of their own money, and of taxpayer money, and of the non-profit environmental groups that oppose them, in an unending series of appeals and diversionary legal filings.

Another example would be that corporate charters, granted by the states, might channel certain types of corporate wrongdoing into special courts where justice is swift and stern, including the immediate closing of businesses that violate environmental, consumer safety, or labor laws.

Another important constitutional "right" given to corporations is protection under the 4th Amendment, which states, "*The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons to be seized.*" The key Supreme Court decision here was *Hale v. Henkel* [201 U.S. 43 (1906)], which established that corporations have protection under the 4th Amendment based in part on their status as persons. It was decided that a subpoena issued by a federal grand jury to the secretary of a corporation, MacAndrews & Forbes Company, amounted to such an unreasonable search and seizure. This ruling made it difficult to enforce the Sherman anti-monopoly act, which naturally required the papers of corporations in order to determine if there existed grounds for an indictment. Oddly the same ruling recognized it would be very hard to give the 5th Amendment right that "nor shall any person ... be compelled in any criminal case to be a witness against himself," because a corporation, not being a natural person, cannot testify at all. It can be represented in court by natural persons, who cannot take the 5th on the corporation's behalf, because you only have the right to not incriminate yourself; you have no immunity to testifying against other persons.

The importance of the 4th Amendment right of corporate persons is shown, among other places, in *Marshall v. Barlow's, Inc.* [436 U.S. 307 (1978)]. The Occupational Safety and Health Act of 1970 (OSHA), enacted to try to get employees safe working environments, allowed for surprise inspections of workplaces. These inspections were struck down by the Supreme Court, which declared that OSHA inspections required either the corporation's permission or a warrant. Apparently the constitutional personhood rights of corporations trump the rights of real persons. Thousands of workers have died, been maimed, or poisoned since 1978, while on the job; many of these accidents were preventable, but the Supreme Court did not consider the liberty of the workers, only the liberty of corporations and their wealthy owners in making this murderous decision. No workplace that follows OSHA safety rules need fear a surprise inspection.

Revoking corporate personhood and 4th Amendment rights for corporations would allow the government to make reasonable inspections to insure worker safety, to insure that toxic substances are not being emitted, and to insure that corporations are operating as allowed by their charters and the law. Revoking personhood should not be feared by law-abiding, legitimate businesses and corporations who are obeying the law.

We now return to the possible secondary results of ending corporate personhood and getting corporations out of the political process.

With corporations out of the political process the whole nature of regulation would change for the better. Whether regarding the environment or food safety, we would not have to compromise with powerful corporate political machines. Do the people want to prohibit clear-cutting? Then the laws will prohibit clear-cutting, because no politician will be on a wood-products corporation's payroll. Do the people want zero emissions into streams and rivers? Then the law will prohibit any and all toxic emissions, because the politicians will rely on people for votes, not on polluting corporations for money to buy votes.

The main roadblock to single-payer, national health care has been the enormous amount of lobbying and campaign contributions from those corporations that profit from the current system. By prohibiting corporate-sponsored campaign contributions to politicians and corporate-sponsored propaganda on television, the national consensus in favor of national health care could no longer be thwarted.

Ending corporate personhood is no more a magic-bullet than was the *Brown v. Ferguson* ruling, or the passing of the Fourteenth Amendment itself. As long as there is a society there will be struggle over how resources, including political powers, are allocated. Ending corporate personhood and corporate constitutional rights would result, not in a level playing field, but in a field where We the People have the advantage again, where in any particular issue that is fought out in the public arena, the people are more likely to win than the owners of the corporations.

## **How We Can Revoke Corporate Personhood**

Corporate personhood and corporate constitutional rights are a lie. How do we get the courts and government to realize that?

The simple solution would be to somehow bring a case involving only corporate personhood to the Supreme Court and ask them to rule on it. Hopefully they would take a strict-constructionist line and recognize that the Constitution does not mean corporations when it says persons. This method is unlikely for a variety of reasons, the foremost being that the current Supreme Court is a product of the corporate-dominated legal system and appointees are designated by corporate-dominated presidents and approved by a corporate-dominated Congress. In addition, many roadblocks have been built into the system to prevent such a case from even coming to the Supreme Court. We would need a law in some State or locality specifically denying corporations personhood, but attorneys and judges have so far taken the view that any such law would be outside the allowable bounds for local jurisdictions. They can (and certainly will) advise elected officials that they cannot even allow such a law to come up for a vote or referendum.

But neither did the railroad attorneys simply declare corporations persons and a few days later have the Supreme Court agree with them. Powerful as they were, it took them 15 years to get corporate personhood enshrined in the system.

We will need a sustained grassroots campaign to abolish corporate personhood. This campaign has barely begun. We can win with education and action. We must try to pass laws abolishing corporate personhood in every local government and in every state. We must argue before the courts so that they become familiar with our ideas. We must pass referenda and then protest when our referenda are struck down by the corrupt judiciary. We must demand that elected representatives take a stand against corporate personhood if they want the votes of environmentalists, workers, and small business owners. And we must argue our points in the law schools where future generations of lawyers and judges are being trained.

Supreme Courts do not work in a vacuum. When the public cries out for an issue to be tried the Supreme Court loses its prestige, perhaps even its ability to govern the country, if it refuses to hear the issue. Even if, in the first case, the Supreme Court ruled in favor of corporate personhood, if they at least gave an actual rationale to their madness, we would be able to tear it apart. We could focus on each point of their argument and bring suits appropriate to overruling each point.

We could, and probably should, clarify our position by an Amendment to the Constitution that clarifies the legal status of corporations. Amending the Constitution is a very difficult process, but it is the ultimate expression of the people's authority.

The corporate media will not be on our side; we must communicate through our natural inter-connectivity as a grassroots campaign.

Other tactics are available besides education, legislation, and lawsuits. We can find corporations that will publicly and voluntarily renounce their corporate personhood. We can boycott corporations that lead the fight to retain corporate

personhood. We can add civil disobedience and direct action to our campaign. If a State revokes corporate personhood, and the Supreme Court overturns them, we could refuse to participate in the federal government and simply govern ourselves through the State government until the Supreme Court sees the light.

The struggle to abolish slavery was long and difficult. Even as abolitionists seemed to have won, by passing the 13th and 14th Amendments, counterattacks were being prepared. Corporations were pronounced persons in 1886, and in 1896 black people were declared to be sub-persons. In the 20th century we have seen the emergence of wage-slavery on a massive scale. We must ask ourselves: Are corporations to be our masters? Or are we to be free? What price are we willing to pay for our freedom, and what price do we pay now for our ongoing subjugation?

The Abolition of corporate personhood is part of the abolition of slavery. It is deeply connected to our need to save the earth from environmental destruction. This is not an optional campaign. Hard as it might be to fight now, it is better to fight now than in 20 years when corporations are even more entrenched and the average person has sunk even deeper into our modern style of slavery.

## **Frequently Asked Questions**

### **What would be the immediate effect of revoking corporate personhood?**

The only immediate effect of revoking corporate personhood, either at the state level or by the Supreme Court, would be to cause the legal status of corporations to revert back to that of artificial entities. (We should refuse to use the old terminology of artificial persons.) They could still be represented in courts by attorneys and would be subject to the law and taxation.

However, a whole body of Supreme Court decisions would have to be re-examined. The ability of States, when granting or renewing corporate charters, to restrict harmful activities of corporations would be greatly enhanced. New legislation to protect the environment, workers, small businesses, and consumers could be enacted without worrying that it would be struck down by the Supreme Court.

### **How would small businesses be affected?**

Small, incorporated businesses would become artificial entities under the law. Most small businesses have gained no meaningful advantage from corporate personhood. Small businesses do not have the kind of money it takes to corrupt the political process that large corporations have. Small businesses would be better situated to protect their interests since laws favoring local businesses over national and international corporations would become legal.

### **If corporations can't lobby, how can they get laws that are fair to them?**

Revoking corporate personhood would not immediately prevent corporations from lobbying, but it would allow laws to be passed (and enforced) that would restrict corporate lobbying and campaign contributions. If a state legislature or Congress is considering legislation that affects a particular industry they would be able to hold hearings and interrogate corporate representatives. If a corporation feels its needs a change in the laws, not for its own profits but in order to insure competition or public safety, it could petition the legislature to hold such a hearing.

### **What about past harms done by corporate personhood?**

That is an interesting question with no certain answer. The Constitution prohibits ex post facto laws (laws that punish for deeds committed before the law was written), and properly so. However, revoking corporate personhood does not create an ex post facto law. It may be possible to force corporations to rectify damage they did to the environment during the era of corporate personhood.

### **Would the media lose its freedom of the press and free speech?**

The ruling that corporate ads on political and social issues is free speech could be overturned, but the corporate media would continue to have freedom of the press. New legislation would be needed to restrict corporations to ownership of a single radio or TV station, newspaper, or magazine and to insure that individual and non-corporate voices could be heard as well.

### **How will revoking corporate personhood affect non-profit corporations?**

Non-profit corporations would continue to operate as the artificial entities that they are. However, it would be possible to restrict for-profit corporations from working for corporate interests.

### **Why don't unions have corporate personhood?**

Unions don't have corporate personhood, even though they are also, legally, artificial entities, because unions have never fought to get it. Unions have largely avoided the court system, correctly seeing it as the home court of their enemies.

### **Why do you want to restrict the freedom of stockholders and people who work for corporations?**

This is a trick question. Corporate lawyers and propagandists will try to get people who work for corporations to support corporate personhood by lying to them about the effects of revocation. In fact individuals, whether they work for corporations or not, will retain all of the freedoms recognized in the constitution. In addition, individuals will have their freedom enhanced by not having their liberty overpowered by the rule of corporations. Only the artificial entity of the corporation will be redefined to have restrictions on its liberty.

### **Wouldn't we lose the power to tax and regulate corporations?**

In the art of lying it is hard to surpass corporate lawyers. They have managed to place in the minds of law students, in the texts of some law books, and in the public mind, the idea that corporate personhood is necessary to bring corporations under rule of law. This is such a big lie it is amazing that they can tell it with a straight face. Corporations were taxed when they were artificial entities, long before they were granted personhood. They were more subject to the rule of law, not less, before receiving personhood. Read up on the history; don't be fooled again.

November 13, 2000

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In addition to reading the opinions of the justices in the Supreme Court cases discussed (which can be found on the Internet at [www.findlaw.com](http://www.findlaw.com) or at most public, college and law libraries), for those who want a deeper legal understanding of the issue I highly recommend:

"Personalizing the Impersonal: Corporations and the Bill of Rights" by Carl J. Mayer, *The Hastings Law Journal*, March 1990