

Abolish Corporate Personhood

Concerned about the rapid escalation of corporate power in the US and around the world, five years ago members of the US section of the Women's International League for Peace and Freedom (WILPF) began studying and researching how corporations became so powerful. Inspired by the Program on Corporations, Law and Democracy (POCLAD) we discovered the hidden history of "corporate personhood" — the legal phenomenon that provides constitutional protections to corporations. Not only is corporate personhood a key component of corporate power, it's one of the greatest threats to democracy that we've ever known, but most people have never even heard of it. In September, 2001 WILPF launched a campaign to abolish corporate personhood that has as its goal to delegitimize the institution of the corporation as a political entity. The following article is by WILPF members Jan Edwards and Molly Morgan.

The history of the United States could be told as the story of who is and who is not a person under law. Women, poor people, slaves, and even corporations had long been considered persons for purposes of following the law. This is because early laws were written "No person shall . . ." Corporate lawyers had tried to avoid these laws by claiming corporations were not persons and therefore not required to follow the law. So it was decided that *for purposes of following the law*, corporations were persons. This allowed corporations to sue and be sued in court among other things. But corporations were not persons with *rights in the law*, and neither were women, slaves, indentured servants, or poor people. We know some of the ongoing story of human beings' struggle to gain the rights of persons under law, but how did corporations gain these rights?

To understand the phenomenon of corporate personhood, we start by looking at the foundation of US law, the Constitution of the United States of America. This document was written by 55 gentlemen cleverly described by one historian as "the well-bred, the well-fed, the well-read, and the well-wed." As some of the wealthiest, most privileged people in the new country, they were highly aware that their power had everything to do with how much property they owned — land, crops, buildings, personal goods, and, for most of them, property in the form of human beings, their slaves. As some of the best-educated men in the world, at least by European standards, they also knew a lot about democracy, and they understood what a threat the real thing represented to their personal power. The kind of democracy they prized and wrote about so eloquently could only be practiced by people like them — certainly not by the rabble. Many of them wrote and spoke at length about the inability of the common people to be self-governing.

So the word "democracy" appears nowhere in the Constitution. What they created was a republic designed to protect property, not people. This didn't play very well with many people in the new United States — at least half of the population was very much opposed to the Constitution. They could see how much power it would take away from them, how much it would compromise the democratic ideals in the Declaration of Independence, and they wanted no part of it. But the Federalists who proposed the Constitution had the finances and the unity to promote their ideas strongly. After a lot of politicking they got the Constitution ratified — but only with the assurance that a Bill of Rights would be added to protect people from the abuses by the

government that would be possible under the new system. So let's look at the basic structure they created to protect property.

The Constitution only mentions two entities: We the People and the government. The people are on one side of a line, and we are sovereign and have individual rights. On the other side of the line is the government, which is accountable to the people and has specific duties to perform to the satisfaction of the people. We delegate some of our power to the government in order to perform tasks we want government to do. In a representative democracy, this system should work just fine.

The problem is that the phrase "We the People" is not defined in the Constitution. In 1787, in order to be considered one of "We the People" and have rights in the Constitution, you had to be an adult male with white skin and a certain amount of property. (The states determined who could vote; some states had religious restrictions.) At the time of the Constitution, this narrowed "We the People" down to about 10% of the population. Those who owned property, including human property, were very clear that this was rule by the minority — and that's the way they wanted it.

So here is the first definition of who gets to be a person in the United States. Ninety percent of the people — all the immigrants, indentured servants, slaves, minors, Native Americans, women, and people who don't own property (the poor) — are, legally, not persons. They were not persons with rights, but were persons for following the law. They're like subhumans. The law didn't label people this way in so many words — which is part of the brilliance of the system and why it's lasted so long — but the net effect was clear. By allowing only wealthy, white males to be "persons," a class system was put in place.

Those who *could* vote in the republic were able to elect people for the House of Representatives. So the United States held within its republican form the possibility of democracy. More human beings could become part of We the People. And they did. It was not easily won, but eventually all adult citizens became legal persons.

Without using the words "slave" or "slavery," the Constitution ensures that even if slaves get to free soil, their status as property remains the same. This is just one of the clauses defining property in the Constitution. It also defines contracts, labor, commerce, money, copyright, and war as the province of the federal government. So the Constitution, the foundation of all US law, was not written to protect people — it was written to protect property. The Constitution does contain some protection for people in Section 9, but the Bill of Rights is the concentration of rights for We the People.

Most people believe that the Constitution — specifically, the Bill of Rights — guarantees our rights to freedom of speech, religion, and press, to peaceably assemble, and so forth. People of all political stripes say this. But the truth is, it does no such thing. Almost all of our constitutional protections are expressed as the *absence of a negative* rather than the *presence of a positive*. So the First Amendment, for example, does not say, "All citizens are guaranteed the right to free speech"; it only says, "Congress shall make no law . . . abridging the freedom of speech . . ." The First Amendment just restricts the government from specific encroachments; it doesn't guarantee

anything. This was not a concern for the people because they had strong bills of rights in their state constitutions, and at that time, the states had more power than the federal government. The US Constitution allowed slavery throughout the United States, for example, but it was each state's constitution that created free or slave states. Over time, however, the states have lost power to the federal government. The federal laws are now usually ruled to supercede the states' laws. The federal Bill of Rights is where we look to protect our freedoms. The lack of positive protection of these rights weakens them greatly.

If those rights were actually guaranteed in the Constitution, people could, for example, take the Bill of Rights into the workplace, but we can't. Anyone who thinks workers have free speech while they're on corporate property should ask the workers or talk to a union organizer. Because corporations are property, and because the Constitution protects property rights above all, most people have to abandon the Bill of Rights in order to make a living. The way different groups of people — like African Americans and women — have, one by one, acquired rights and become persons under the law is by getting *protection from abuse by the government*, usually through amendments to the Constitution — *not* a guarantee.

Another word that appears nowhere in the Constitution is “corporation,” and the reason is that the writers of the Constitution had zero interest in using for-profit corporations to run their new government. In colonial times, corporations were tools of the king's oppression, chartered for the purpose of exploiting the so-called “New World” and shoveling wealth back into Europe. The rich formed joint-stock corporations to distribute the enormous risk of colonizing the Americas and gave them names like the Hudson Bay Company, the British East India Company, and the Massachusetts Bay Colony. Because they were so far from their sovereign — the king — the agents for these corporations had a lot of autonomy to do their work; they could pass laws, levy taxes, and even raise armies to manage and control property and commerce. They were *not* popular with the colonists.

So the writers of the Constitution left control of corporations to state legislatures (10th Amendment), where they would get the closest supervision by the people. Early corporate charters were very explicit about what a corporation could do, how, for how long, with whom, where, and when. Corporations could not own stock in other corporations, and they were prohibited from any part of the political process. Individual stockholders were held personally liable for any harms done in the name of the corporation, and most charters only lasted for 10 or 15 years. But most importantly, in order to receive the profit-making privileges the shareholders sought, their corporations had to represent a clear benefit for the public good, such a building a road, canal, or bridge. And when corporations violated any of these terms, their charters were frequently revoked by the state legislatures.

That sounds nothing like the corporations of today, so what happened in the last two centuries? As time passed and memories of royal oppression faded, the wealthy people increasingly started eyeing corporations as a convenient way to shield their personal fortunes. They could sniff the winds of change and see that their minority rule through property ownership was under serious threat of being diluted. States gradually started loosening property requirements for voting, so more and more white men could participate in the political process. Women were publicly agitating for the right to vote. In 1865 the 13th Amendment was ratified, freeing the slaves. Three

years later, the 14th Amendment provided citizenship rights to all persons born or naturalized in the United States, and two years after that, the 15th Amendment provided voting rights to black males. Change was afoot, and so the ruling class responded.

During and after the Civil War there was a rapid increase in the number and size of corporations, and this form of business was starting to become a more important way of holding and protecting property and power. Increasingly through their corporations, the wealthy started influencing legislators, bribing public officials, and employing lawyers to write new laws and file court cases challenging the existing laws that restricted corporate behavior. Bit by bit, decade by decade, state legislatures increased corporate charter length while they decreased corporate liability and reduced citizen authority over corporate structure, governance, production, and labor.

But minority rulers were only going to be able to go just so far with this strategy. Because corporations are a creation of the government — chartered by the state legislatures — they still fell on the government side of the constitutional line with *duties accountable to the people*. If minority rule by property was going to be accomplished through corporations, they had to become entitled to *rights* instead, which required them to cross the line and become persons under the law. And their tool to do this was the 14th Amendment, which was ratified in 1868. From then it took the ruling class less than 20 years to shift corporations from the duty side of the line, where they're accountable to the people, to the rights side, where they get protection from government abuse.

The 14th Amendment, in addition to saying that now all persons born or naturalized in the US are citizens, says that no state shall “deprive any person of life, liberty, or property, without the due process of law; nor deny to any person . . . the equal protection of the laws.” The phrase about not depriving any person of life, liberty, or property without the due process of the law is exactly the same wording as the Fifth Amendment, which protects people from that kind of abuse by the *federal* government; now with the 14th Amendment, the *states* can't abuse people in that way, either. These are important rights; they're written in a short, straightforward manner; and after the Civil War and all the agony over slavery, the people in the states that ratified the 13th, 14th, and 15th Amendments were clear that they were about righting the wrong of slavery.

But that clarity didn't stop the railroad barons and their attorneys in the 1870s and '80s. As mentioned before, those who wanted to maintain minority rule were losing their grip. There was real danger of democracy creeping into the body politic. Until the Civil War, slavery was essential to maintaining the entire economic system that kept wealth and power in the hands of the few — not just in the South, but in the North as well. It was the legalization of a lie — that one human being can own another. Slavery was at the core of a whole system of oppression that benefitted the few, which included the subjugation of women, genocide of the indigenous population, and exploitation of immigrants and the poor. Now that the slavery lie could no longer be used to maintain minority rule, they needed a new lie, and they used the 14th Amendment to create it. Because these rights to due process and equal protection were so valuable, the definition of the word “person” in the 14th Amendment became the focus of hundreds of legal battles for the next 20 years. The question was: who gets to be a person protected by the 14th Amendment?

The watershed moment came in 1886 when the Supreme Court ruled on a case called *Santa Clara County v. Southern Pacific Railroad*. The case itself was not about corporate personhood, although many before it had been, and the Court had ruled that corporations were not persons under the 14th Amendment. *Santa Clara*, like many railroad cases, was about taxes. But before the Court delivered its decision, the following statement is attributed to Chief Justice Waite: “The court does not wish to hear argument on the question whether the provision in the 14th 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.” The statement appeared in the header of the case in the published version, and the Court made its ruling on other grounds. How this statement appeared in the header of the case is a matter of some mystery and competing theories, but because it was later cited as precedent, corporate personhood became the accepted legal doctrine of the land.

What was it in the 14th Amendment that was so valuable to corporate lawyers and managers? Why did they pursue it so aggressively? At the time, as is still true today, corporations were chartered by state governments, and the 14th Amendment reads “No state shall . . .” If the word “person” in the 14th Amendment included corporations, then no state shall deny to corporations due process or equal protection of the laws. This allowed corporate lawyers to allege discrimination whenever a *state* law was enacted to curtail corporations. But this was also the beginning of federal regulatory agencies, so because corporations were now persons under the 14th Amendment, it would be discriminatory not to give them the same rights under *federal* laws. With the granting of the 5th Amendment right to due process (*Noble v. Union River Logging*, 1893), corporate lawyers could challenge — and the Supreme Court could find grounds to overturn — democratically legislated laws that originated at the federal as well as state levels.

Corporations acquired legal personhood at a time when all women, all Native Americans, and even most African American men were still denied the right to vote. And this was not an era of good feelings between the average person and corporations. It was the time of the robber barons, and the Supreme Court was filled with former railroad lawyers. It was the time of the Knights of Labor and the Populist movement. 1886 was the year of the Haymarket Massacre, the Great Southwestern Strike, and the next year the Pullman Strike. The people were struggling for real democracy and the wealthy ruling class did whatever it took to keep them down.

Ten years later, in *Plessy v. Ferguson*, the Supreme Court established the “separate but equal” doctrine that legalized racial segregation through what were known as “Jim Crow” laws. In less than 30 years, African Americans had effectively lost their legal personhood rights while corporations had acquired them. And for those still wondering whether the primary purpose of the Constitution and the body of law it spawned is about protecting property rather than people, consider this. Of the hundreds of 14th Amendment cases heard in the Supreme Court in the first 50 years after its adoption, less than one-half of one percent invoked it in protection of African Americans, and more than 50% asked that its benefits be extended to corporations. “Equal protection under the law” turns out to mean: whoever has enough money to go to the Supreme Court to fight for it. Railroad robber barons did; women didn’t; and African Americans most certainly didn’t. In fact, the pattern over more than two centuries of US legal history is that people acquire rights by amendment to the Constitution — a long and difficult, but democratic, process — and corporations acquire them by Supreme Court decisions.

Once corporations had jumped the constitutional line from the government side to the people side, their lawyers proceeded to pursue the Bill of Rights through more Supreme Court cases. As mentioned above, in 1893 they were assured 5th Amendment protection of due process. In 1906 they got 4th Amendment search and seizure protection (*Hale v. Henkel*). In 1922 they got the “takings” clause of the 5th Amendment (*Pennsylvania Coal Co. v. Mahon*), and a regulatory law was deemed to be a “takings.” In 1947 they started getting First Amendment protections (Taft-Hartley Act). In 1976 the Supreme Court determined that money spent for political purposes is equal to exercising free speech, and since “corporate persons” have First Amendment rights, they can basically contribute as much money as they want to political parties and candidates (*Buckley v. Valeo*). Every time “corporate persons” acquire one of these protections under the Bill of Rights, it gives them a whole new way of exploiting the legal system in order to maintain minority rule through corporate power. And since 1886, every time people have won new rights — like the Civil Rights Act — corporations are eligible for it, too.

It is important to remember what a corporation is to understand the implications of corporate personhood for democracy. A corporation is not a real thing; it’s a legal fiction, an abstraction. You can’t see or hear or touch or smell a corporation — it’s just an idea that people agree to and put into writing. Because legal personhood has been conferred upon an abstraction that can be redefined at will under the law, corporations have become superhumans in our world. A corporation can live forever. It can change its identity in a day. It can cut off parts of itself — even its head — and actually function better than before. It can also cut off parts of itself and from those parts grow new selves. It can own others of its own kind and it can merge with others of its own kind. It doesn’t need fresh air to breathe or clean water to drink or safe food to eat. It doesn’t fear illness or death. It can have simultaneous residence in many different nations. It’s not male, female, or even transgendered. Without giving birth it can create children and even parents. If it’s found guilty of a crime, it cannot go to prison.

Corporations are whatever *those who have the power to define* want them to be to maintain minority rule through corporations. As long as superhuman “corporate persons” have rights under the law, the vast majority of people have little or no effective voice in our political arena, which is why we see abolishing corporate personhood as so important to ending corporate rule and building a more democratic society. When the Constitution was written and corporations were part of the government, having duties to perform to the satisfaction of the people, the primary technique for enforcing minority rule was to establish that only a tiny percentage could qualify as “We the People” — in other words, that most people were subhuman. As different groups of people struggled to become persons under the law, the corporation acquired rights belonging to We the People and ultimately became superhuman, *still maintaining an artificially elevated status for a small number of people*.

Today the work of corporatists is to take this system global. Having acquired the ability to govern in the United States, the corporation is the ideal instrument to gain control of the rest of the world. The concepts, laws, and techniques perfected by the ruling minority here are now being forced down the throats of people everywhere. First, a complicit ruling elite is co-opted, installed, or propped up by the US military and the government. Then, just as slavery and immigrant status once kept wages nonexistent or at poverty levels, now sweatshops,

maquiladoras, and the prison-industrial complex provide ultra-cheap labor with little or no regulation. Just as sharecropping and the company store once kept people trapped in permanently subservient production roles, now the International Monetary Fund and World Bank's structural adjustment programs keep entire countries in permanent debt, the world's poorest people forced to feed interest payments to the world's richest while their own families go hungry. Just as genocide was waged against native populations that lived sustainably on the land, now wars are instigated against peoples and regimes that resist the so-called "free trade" mantra because they have the audacity to hold their own ideas about governance and resource distribution. Racism, sexism, classism, homophobia, and divisive religious, ethnic, ideological, and cultural distrust were all intentionally instituted to prevent people from making common cause against the ruling minority, and those systems continue their destructive work today.

What would change if corporations did not have personhood? The first and main effect would be that a barrier would be removed that is preventing democratic change — just as the abolition of slavery tore down an insurmountable legal block, making it possible to pass laws to provide full rights to the newly freed slaves. After corporate personhood is abolished, new legislation will be possible. Here are a few examples. If "corporate persons" no longer had First Amendment right of free speech, we could prohibit all corporate political activity, such as lobbying and contributions to political candidates and parties. If "corporate persons" were not protected against search without a warrant under the Fourth Amendment, then corporate managers couldn't turn OSHA and the EPA inspectors away if they make surprise, unscheduled searches. If "corporate persons" weren't protected against discrimination under the 14th Amendment, corporations like Wal-Mart couldn't force themselves into communities that don't want them.

So what can we do to abolish corporate personhood? Within our current legal system there are two possibilities: the Supreme Court could change its mind on corporations having rights in the Constitution, and/or we can pass an amendment to the Constitution. Either scenario seems daunting, yet it is even more difficult than that. Every state now has laws and language in their state constitutions conceding these rights to corporations. So corporate personhood must be abolished on a state as well as a national level. The good news is that almost anything we do towards abolishing corporate personhood helps the issue progress on one of these levels. If a city passes a non-binding resolution, declaring their area a "Corporate Personhood Free Zone," that is a step toward passing a constitutional amendment at their state and eventually at the national level. If a town passes an ordinance legally denying corporations rights as persons, they may provoke a crisis of jurisdiction that could lead to a court case. We think both paths should be followed. However, it was undemocratic for the Supreme Court to grant personhood to corporations, and it would be just as undemocratic for this to be decided that way again. An amendment is the democratic way to correct this judicial usurpation of the people's sovereignty.

As the rights of human persons in the United States are diminished and restricted by the Patriot Act on the one hand, they are also squeezed by corporate personhood on the other. We, the real people, have our rights caught between a rock and a hard place, while the rights of the corporate person continue to expand.

These systems of oppression weren't established overnight; they were gradually and sometimes surreptitiously introduced and refined in ways that made them acceptable. At the time of the

Constitution, corporations were widely reviled, but a century later they were a commonplace business institution, and a century after that they've become our invisible government. They accomplished this over decades, changing the law incrementally when most people weren't looking.

Resistance to these oppressions evolved in a similar way. Those who wished to end slavery, for example, worked for many years collecting information, refining their analysis, and debating among themselves. They came to understand the issue as one of human rights and that the whole institution of slavery was fundamentally wrong. They didn't come up with a Slavery Regulatory Agency or voluntary codes of conduct for slave owners. They called themselves Abolitionists — the whole thing had to go.

We look at corporate personhood the same way. We see that corporate personhood was wrongly given — not by We the People, but by nine Supreme Court judges. We further see that corporate personhood is a bad thing, because it was the pivotal achievement that allowed an artificial entity to obtain the rights of people, thus relegating us to subhuman status. And finally, because of the way corporate personhood has enabled corporations to govern us, we see that it is *so* bad, we must eradicate it.

Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person. Like abolishing slavery, the work of eradicating corporate personhood takes us to the deepest questions of what it means to be human. And if we are to live in a democracy, what does it mean to be sovereign? The hardest part of eliminating corporate personhood is believing that We the People have the sovereign right to do this. It comes down to us being clear about who's in charge.

June, 2003

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Some notes on the Timeline

– Jan Edwards

Jane Anne Morris, corporate anthropologist, told me, “The corporate lawyers have made you a road map. All you need to do is follow the road backwards.” I wanted to see this road more clearly, and so I began to lay out the law cases in this timeline.

On one side I put all the cases, win or lose, that pertained to corporations, but limited to firsts on the road toward corporate personhood. On the other side are some landmarks of people’s rights, especially those clearly linked to personhood. Much more could be added to the people’s side (for example, all the cases involving Native Americans) but the corporations side is rather complete concerning corporate personhood.

As one looks at the timeline, it is apparent that people get their rights primarily by constitutional amendment (the Bill of Rights being the first 10 amendments) and corporations get rights by Supreme Court rulings. This relates directly to the issue of democracy. Judge-made law (even though we sometimes like their rulings) is not democracy.

The Supreme Court has used different theories over time to decide cases regarding corporate rights. At the beginning of the Court and until 1886, they regarded corporations as artificial entities. We can see this in their written opinions. After 1886, corporations were regarded as legal persons by the Court. In the 1960s there was another shift in reasoning. The court seems to no longer care whether a corporation is a person or not. The new reasoning revolves around the question of what are the rights. What is the history and intent of, say, the First Amendment? What best serves the First Amendment? This shift in theory is interesting and important as we consider arguing a case at the Supreme Court.

The timeline contains excerpts of several famous judges’ dissents, beginning in the 1930s. The Court has not been unified on the issue of corporate personhood rights since. Many important recent rulings were 5 to 4. The judges do not split along traditional right-left lines on this issue, with Rehnquist writing great dissents, basically saying corporations are not persons. This is the view of a strict constructionist — corporations are not mentioned in the Constitution.

I will let the cases speak for themselves, except for a comment on *Somerset’s Case*. This English case is included on what is otherwise a US timeline because of its personhood significance. In 1772, four years before the Revolutionary War, the English Court ruled that slavery was illegal in England and a slave was free on free soil (England being free soil). This caused a uproar among the wealthy in the colonies as they feared it would not be long before slavery was outlawed there as well. This ruling convinced the Southern plantation owners to join the fight for independence. So impressed were the “Founding Fathers” with *Somerset’s Case* that they wrote the opposite into their new Constitution (Article 4, Sec.2). In 1857, the Supreme Court had a chance to decide virtually the same question with *Dred Scott* — is a slave free on free soil? — and they decided no. This infuriated the free states who felt their rights were being trampled and contributed to the chain of events leading to the Civil War.

The cases involving women and their fight for the 14th Amendment are a bit short-changed in the timeline. In sticking with my “first” rule, *Minor v. Happersett* is on the timeline, but there are other interesting cases worth mention. Susan B. Anthony went to the polls and cast a vote in 1872, justifying her right to vote on the 14th Amendment. She was found guilty in a lower court, and it never went to the Supreme Court. In *Bradwell v. Illinois* (1873) a married woman sued under the 14th Amendment to practice law. She was denied and the opinion of Justice Bradley is a particularly strong explanation of how a woman’s personhood comes from her husband. In *Commonwealth v. Welosky* (1931) the Massachusetts Supreme Court ruled that women cannot sit on juries, and explains “to the effect that the word ‘person’ in construing statutes shall include corporations . . . it has also been held not to include women.”1931! Women were finally protected under the 14th Amendment in 1971 in *Reed v. Reed*.

There may soon be another case added to the end of the timeline, when the Supreme Court decides *Nike v. Kasky*. The question probably will be narrowed to: Does a corporation have a right to protected political speech if the issue on which they are speaking has been made political by another party and they are speaking to defend themselves? The political speech that Nike Corporation seeks is the right to lie or to tell something other than truth. If this was truth, they need no protection. The question of commercial speech and the truth in advertising laws are in danger, as the slippery slope of what is a political issue and thus protected speech is argued in courts around the country.

The principles of corporate personhood have made their way into international law. All former English colonies have similar corporate personhood rights. More research needs to be done on other countries’ laws, but it is safe to say the wind is blowing in the direction of greater corporate rights worldwide. The takings clause of the 5th Amendment first granted to corporations in 1922 is now the basis for the North American Free Trade Act (NAFTA). And the whole concept of the World Trade Organization (WTO) is that corporations can govern. This is the idea behind corporate constitutional rights.

Many human people helped with this timeline and they are listed at the end. But I should also acknowledge Carl Mayer, whose article, “Personalizing the Impersonal,” (*Hastings Law Journal*, March, 1990) gave me a big start on the timeline cases.

I will end with another quote from Jane Anne Morris. “Scratch any issue activists are working on today, and underneath you will find corporate personhood.” This is why we think it is so important to work to Abolish Corporate Personhood.

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