
It's really a wonder that I haven't dropped all my ideals, because they seem so absurd and impossible to carry out. Yet I keep them, because in spite of everything I still believe people are really good at heart.

-ANNE FRANK, FROM HER DIARY, JULY 15, 1944

This book is about the difference between humans and the corporations we humans have created. The story goes back to the birth of the United States, even to the birth of the Revolution. It continues through the writing of the Constitution and Bill of Rights in the 1780s and reaches its first climactic moment just under 100 years later, after the Civil War. The changes that ensued from that moment continue to unfold into the 21st century. And very few citizens of the world are unaffected.

In another sense, this book is about values and beliefs: how our values are reflected in the society we create, and how a society itself can work, or not work, to reflect those values.

Intentions and Culture

A culture is a collection of shared beliefs about how things are. These beliefs are associated with myths and histories that form a self-reinforcing loop, and the collection of these beliefs and histories form the stories that define a culture. Usually unnoticed, like the air we breathe, these stories are rarely questioned. Yet their impact can be enormous.

For example, for 6,000 to 7,000 years, since the earliest founding of what we call modern culture, there were the stories that "it's okay to own slaves, particularly if they are of a different race or tribe," and "women should be the property of, and subservient to, men."

But as time goes on, circumstances and cultures change: Beliefs that a questioned and aren't useful begin to fall away. This book will raise questions about some of our shared beliefs, asking, as many cultures have asked throughout history, "Do we want to keep this belief, or change to something that works better for us?"

The Story of Corporate Personhood

Here we find the nub of this book, continuing a theme in my earlier writings. In The Last Hours of Ancient Sunlight, I identified those stories (among others) and suggested that true cultural change comes about when we first wake up to our own self-defeating beliefs ... and then go about changing them. I also pointed out that the story that "we are separate and different from the natural world" is a toxic one, brought to us by Gilgamesh, then Aristotle, then Descartes, and it no longer serves us well.

In The Prophet's Way, I detailed how the story that "we are separate from divinity or consciousness" can perpetuate a helplessness and a form of spiritual slavery that are not useful for many individual humans or the planet as a whole. Mystics through the ages tell us a different story—the possibility of being personally connected to divinity. I suggested that, for many people, the mystic's story could be far more empowering and personally useful.

And in my books on Attention Deficit Disorder (ADD/ADHD), I suggested that neurologically different children are actually a useful asset to our culture (using Edison, Franklin, and Churchill as classic examples), and that we do ourselves a disservice—and we wound our children in the process—by telling them they have a brain disorder and tossing them
into the educational equivalent of the trash basket. (And the most recent studies sponsored by the National Institutes of Mental Health are explicitly backing up my position.)

In Unequal Protection, I'm visiting the stories of democracy and corporate personhood—ones whose histories I only learned in detail while researching this book. (It's amazing what we don't learn in school!) Corporate personhood is the story that a group of people can get together and organize a legal fiction (that's the actual legal term for it) called a corporation—and that agreement could then have the rights and powers given to living, breathing humans by modern democratic governments. Democracy is the story of government of, by, and for the people; something, it turns out, that is very difficult to have function well in the same realm as corporate personhood.

**A New But Highly Contagious Story**

Unlike the cultural stories I wrote about earlier, this last story is more recent. Corporate personhood tracks back in small form to Roman times when groups of people authorized by the Caesars organized to engage in trade. It took a leap around the year 1500 with the development of the first Dutch and then other European trading corporations, and then underwent a series of transformations in the United States of America in the 19th century, whose implications were every bit as world-changing as the institutionalization of slavery and the oppression of women in the holy books had been thousands of years earlier.

And in a similar fashion to the Biblical endorsement of slavery and oppression of women, this story of corporate personhood—which only came fully alive in the 1800s—was highly contagious: It has spread across most of the world in just the past half-century. It has—literally—caused some sovereign nations to rewrite their constitutions, and led others to sign treaties overriding previous constitutional protections of their human citizens.

**Giving Birth to a New "Person"**

Imagine: In today's America and most other democracies, when a new human is born, she is given a Social Security number (or its equivalent) and instantly, from the moment of birth, is protected by the full weight and power of the U.S. Constitution and the Bill of Rights (or their equivalent). Those rights, which have been fought for and paid for with the blood of our young men and women in uniform, fall fully upon her at the moment of birth.

This is the way we designed it; it's how we all agreed it should be. Humans get human rights. They're protected. We are, after all, fragile living things that can be suppressed and abused by the powerful, if not protected. And in American democracy, like most modern democracies, our system is set up so that it takes a lot of work to change the Constitution, making it very difficult to deny its protections to the humans it first protected against King George III and against numerous threats—internal and external—since then.

Similarly, when papers called articles of incorporation are submitted to governments in America (and most other nations of the world), another type of new "person" is brought forth into the nation (and most countries of the world). Just like a human, that new person gets a government-assigned number. (In the United States, instead of a Social Security number, it's called a Federal Employer Identification Number, or EIN.)

Under our current agreements, the new corporate person is instantly endowed with many of the rights and protections of personhood. It's neither male nor female, doesn't breathe or eat, can't be enslaved, can't give birth, can live forever, doesn't fear prison, and can't be executed if found guilty of misdoings. It can cut off parts of itself and turn them into new "persons," can change its identity in a day, and can have simultaneous residence in many different nations. It is not a human but a creation of humans. Nonetheless, the new corporation gets many of the
constitutional protections America's Founders gave humans in the Bill of Rights to protect them against governments or other potential oppressors:

- Free speech, including freedom to influence legislation
- Protection from searches, as if their belongings were intensely personal
- Fifth Amendment protections against double jeopardy and self-incrimination, even when a clear crime has been committed
- The shield of the nation's due process and anti-discrimination laws
- The benefit of the constitutional amendments that freed the slaves and gave them equal protection under the law

Even more, although they now have many of the same "rights" as you and I—and a few more—they don't have the same fragilities or responsibilities, either under the law or under the realities of biology.

What most people don't realize is that this is a fairly recent agreement, a new cultural story, and it hasn't always been this way:

- Traditional English, Dutch, French, and Spanish law didn't say that corporations are people.
- The U. S. Constitution wasn't written with that idea; corporations aren't even mentioned.
- For America's first century, courts all the way up to the Supreme Court repeatedly said, "No, corporations do not have the same rights as humans."
- It's only since 1886 that the Bill of Rights and the Equal Protection Amendment have been explicitly applied to corporations.

Even more, corporate personhood was never formally enacted by any branch of the U.S. government:

- It was never voted by the public.
- It was never enacted by law.
- It was never even stated by a decision after arguments before the Supreme Court.

This last point will raise some eyebrows because for 100 years people have believed that the 1886 case Santa Clara County v. Southern Pacific Railroad did in fact include the statement "Corporations are persons." But this book will show that this was never stated by the Court: It was added by the court reporter who wrote the introduction to the decision, called headnotes. And as any law student knows, headnotes have no legal standing.

This book is about how that happened and what it has meant as events have unfolded. And, like most things that are bent from their original intentions, there have been many far-reaching consequences that were never intended. Constitutional mechanisms that were designed to protect humans got turned inside out, so today they do a much better job of protecting corporations, even when the result is harm to humans and other forms of life.

**Should We Keep the Story of Corporate Personhood or the Story of Democracy?**

The real issue, rarely discussed but always present, is whether corporations truly are persons in a democracy. Should they stand shoulder to shoulder with you and me in the arena of rights, responsibilities, and the unique powers and equal protections conferred upon humans by the founders and framers of the United States Constitution and other democracies around the world that have used the United States as a model? And is it possible to have a viable and thriving democracy if we keep the story of corporate personhood, or have we already lost much of our democracy as a result of it?

In researching this book, I was amazed to learn that America's Founders and early Presidents specifically warned that the safety of the new republic depended on keeping corporations on a tight leash—not abolishing them, but keeping them in check. When I showed
early drafts of this book to different people, most of them were surprised to see how prophetic those early presidential warnings had been.

The essence of this book is the history of the corporation in America, its conflicts with democracy, and how corporate values and powers have come to dominate our world, for better or worse. Along the way over the past 2 centuries, those playing the corporate game at the very highest levels seem to have won a victory for themselves—a victory that is turning bitter in the mouths of many of the 6 billion humans on planet Earth. It's even turning bitter, in unexpected ways, for those who won it, as they find their own lives and families touched by an increasingly toxic environment, a fragile and top-heavy economy, and a hollow culture—all traceable back to the frenetic systems of big business that resulted from the doctrine that corporations are persons.

Corporations do much good in the world, and in my lifetime, I've started more than a dozen corporations, both for-profit and nonprofit. So it's important to say right up front that I'm not advocating dismantling the modern business corporation. It's a societal and business organizing system that has, in many ways, served us well, and has the potential to do much good in the future.

What I am suggesting, however, is that we should put corporations into their rightful context and place, as they had largely been until 1886. They are not human, even though they are owned and managed by humans. They are an agreement, not a living being. Corporations are just one of many methods humans can use to exchange goods, earn wealth, and create innovation; it's simply not appropriate that this single form should be granted "personhood" at a similar level to humans under the United States Constitution or that of any other nation that aspires to democracy.

It's my contention that corporations are not legally the same as natural persons, and that the 1886 Supreme Court reporter's comment in the *Santa Clara v. Southern Pacific Railroad* case was both in error and revealed a weakness in the Fourteenth Amendment that needs to be fixed by democratic citizen involvement today, if that is still possible.

As always, it's up to us to change the beliefs that no longer serve us. Indeed, in California and Pennsylvania, citizens have recently stood up and, through their local governments, begun to pass ordinances, laws, and resolutions that deny corporations the status of personhood. They don't ban corporations; they just say, "Corporations are not persons."

Why would this be such an issue? Why all the attention and effort?

If I've done my job well, by the end of this book your questions will be answered in full, and some positive, useful, forward-looking action steps will be well-heard, clearly visible, and in hand. And, perhaps, the world will have one less toxic story in circulation, as people wake up and take action to undo its consequences.

—Montpelier, Vermont
Prologue

There’s a new revolution happening in the United States, mirrored in communities all over the world, which has the potential to reshape the face of the planet.

It could make the world less toxic, people more free, children less anxious, and open literally millions of doors of opportunity for entrepreneurs, small-businesspeople, and medium-size companies.

"Nine states—most recently South Dakota and Nebraska—have adopted referenda prohibiting non-family-owned corporations from engaging in farming," says attorney Thomas Linzey of Chambersburg, Pennsylvania. His organization, the Community Environmental Legal Defense Fund, has helped eight township governments in Pennsylvania pass laws to keep out corporate factory farms.

But the revolution is not just about farming. "It's increasingly clear," Linzey says, "that the real issue is who, in a democracy, is supposed to make the basic decisions about community values, food production, and public health."

And who, in a democracy, should make such decisions? Who should have the right to vote and to influence the laws under which humans live? America's Declaration of Independence put it this way:

"We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness—That to secure these rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed ..."

"Corporate governance is incompatible with people's ability to create sustainable democratic communities," according to Linzey. He and others in this growing worldwide movement argue that governments should be of, by, and for human people—not of, by, and for corporations.

But more than a century ago, something happened that gave corporations human rights. That’s what people are working today to undo.

In Pennsylvania’s Thompson Township, the Chairman of the elected Township Supervisors, Bruce Bivens said, “A person is a living thing and a corporation is not.”

These are the first shots in a new American Revolution, one that will be fought with petitions and votes instead of guns and troops. It’s a revolution to win back democracy.
Part 1
The Nature of Community, Values, and Government

"History has informed us that bodies of men, as well as individuals, are susceptible of the spirit of tyranny."

-THOMAS JEFFERSON A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA, 1774

Chapter 1
The Values We Choose to Live By

"All honor to Jefferson, to the man who in the concrete pressure of a struggle for national independence by a single people, had the coolness, forecast, and capacity to introduce into a merely revolutionary document, an abstract truth, and so to embolden it there, that today and in all coming days, it shall be a rebuke and a stumbling block to the very harbingers of reappearing tyranny and oppression."

-ABRAHAM LINCOLN, LETTER TO H. L. PIERCE, 1858, REFERRING TO JEFFERSON'S "DEVOTION TO THE PERSONAL RIGHTS OF MEN, HOLDING THE RIGHTS OF PROPERTY TO BE SECONDARY"

What's going on?
I love to walk, and I love rivers. Just in the past 8 months, I've walked over or along rivers in two cities in Australia, in England, in central Germany, boated around the canals of Amsterdam, visited a river near Vancouver, and briefly visited the Grand River in Michigan that my wife and I used to canoe 30 years ago when we were first married.

On most days, I take an afternoon walk into downtown Montpelier in central Vermont. On the way, I cross a bridge over the Winooski River, one of the larger rivers in the state, which flows to Lake Champlain and then through the St. Lawrence Seaway and out to the Atlantic. All of these rivers, like most in the world, once teemed with fish and other wildlife. Early European visitors to North America reported that rivers from coast to coast were filled with "fish; the plains thundered with the sound of buffalo, elk, and deer; the air was thick with birds and butterflies."

"The number of dead Salmon on the Shores & floating in the river is incredible to say," wrote William Clark in his journal on October 17, 1805, as he and Meriwether Lewis came upon an Indian tribe in the midst of a fishing expedition in the northwest. "And they have only to collect the fish, Split them open, and dry them on their Scaffolds on which they have great numbers. ... I saw great numbers of Salmon on the Shores and floating in the water. . . . The water of this river is clear, and a Salmon may be seen at the depth of 15 or 20 feet."

In visiting all the rivers I mentioned, though, I've never seen a salmon. And only rarely any other type of fish, for that matter.

For the few remaining wild fish, storm water runoff brings to the rivers of the modern world what Ben Davis of the Vermont Public Interest Research Group calls "a witches' brew of heavy metals, pesticides, herbicides, auto emissions, gasoline, and polyaromatic hydrocarbons."

Silt from upstream erosion wipes out fish breeding areas. Agricultural wastes, including liquefied manure and pesticides, find their way into the river. Drugs—ranging from hormones to antibiotics to chemotherapy agents to tranquilizers—pass through human and livestock kidneys intact, then through city wastewater treatment facilities and into the river's waters, where they make an impact on reproductive cycles and metabolic processes in aquatic wildlife.
Mercury and arsenic rain from skies contaminated by oil- and coal-burning power plants and toxic waste incinerators across the world. And as rainwater crosses dark asphalt parking lots and roads, it warms in the sun before passing into the rivers, raising their temperatures to the point where, as Davis points out, "stock fish often die within hours of being put into rivers."

My favorite river, the Winooski, leads to Lake Champlain, where phosphorus from industrial and domestic wastewater promotes algal growth, sucking oxygen out of the waters and creating a few small "dead zones," and two-stroke engines from boats and jet skis dump over a half-million gallons of raw gasoline and oil every year.

And Vermont's rivers and lakes are among the cleanest and most beautiful in America, rich with wildlife compared with many in other states. As the World Water Council's vice president, William Cosgrove, told Reuters, "There is not a lake left on the planet that is not already being affected by human activities."

While government-mandated waterway cleanup in the developed world has made dramatic gains in the past 4 decades, the pressures of development and growth continue to threaten the world's rivers and lakes, producing, for example, a 7,000-square mile dead zone where the Mississippi River empties into the Gulf of Mexico. It's only one of many worldwide.

Other Ecosystems Crash

In November 2001, the Associated Press reported that marine animal populations around the world are crashing. Worldwide fish catches declined by 26.5 percent between 1988 and 2001, and biologists with the U. S. Fish and Wildlife Service reported that "sea otters in the 1,000-mile long chain of islands known as the Aleutian chain that extends from the Alaska Peninsula had declined by about 70 percent since 1992." (Alaska's coastal waters are home to about 90 percent of the world's sea otters.)

Rainforests covered 15 percent of the Earth's surface in 1950. Today, it's less than half that, as more than 200,000 acres are cut or burned every single day. Yet the biodiversity of our rainforests is astounding. More different species of fish than exist in all of Europe's rivers can be found in a single pond in Brazil. There are more species of birds in one rainforest preserve in Peru than in the entire United States. While all of North America has about 700 species of trees, an equal number of different tree species can be found in just 2 5 acres of Borneo rainforest.

Half the world's plant and animal species live in endangered rainforests that now cover only 6 percent of the world's land surface, and the vast majority of these species have not yet been even cataloged or analyzed.

As the Pulitzer Prize-winning biologist E. O. Wilson of Harvard wrote 2 decades ago, "The one process ongoing in the 1980s that will take millions of years to correct is the loss of genetic and species diversity by the destruction of natural habitats. This is the folly that our descendants are least likely to forgive us for."

At current rates of destruction, the world's rainforests—with all their plants and animals and planetwide weather-controlling canopies of trees—are expected to be more than 90 percent wiped out by the year 2030.

Human assault of the forests began millennia ago, and is first chronicled in the oldest known written story, The Epic of Gilgamesh, when the first king of the first city-state—Gilgamesh of Sumeria about 6,000 years ago—cut down the forests of Lebanon and destroyed his own people by the desertification that followed that act.

Delphin M. Delmas, a California attorney you'll meet again in this book, described his first encounter with a redwood forest in the 1800s. "Your first feeling is one of awe. Your very breath seems hushed by the solemn stillness of the place. Here the winds are mute. Their distant murmuring are unheard within the depths of the shaded solitude. Your step falls noiseless upon the thick carpet of marl—the cast off vesture of countless seasons—upon which you tread.
The crackling of a twig under your foot or the startled cry of a frightened bird but intensifies the silence which enfolds you like a shroud . . .

"A sense of humility overwhelms you as you gaze upon these massy pillars of Nature's temple, whose tops, lost amid the clouds, seem to support the vault of the blue empyrean. The spell, which the mystic light of some venerable cathedral may at times have thrown upon your soul, is tame compared to that which binds you here. That was man's place of worship; this is God's.

"In the presence of these Titanic offsprings of Nature, standing before you in the hoar austerity of centuries, how dwarfed seems your being, how fleeting your existence! They were here before you were born; and though you allow you thoughts to go back on the wings of imagination to your remotest ancestry, you realize that they were here when your first forefather had his being.

"All human work which you have seen or conceived of is recent in comparison. Time has not changed them since Columbus first erected an altar upon this continent, nor since Titus builded the walls of the Flavian amphitheater, nor since Solomon laid the foundations of the temple at Jerusalem. They were old when Moses led the children of Israel to the Promised Land, or when Egyptian monarchs piled up the pyramids and bade the Sphinx gaze with eyes of perpetual sadness over the desert sands of the Valley of the Nile.

"And if their great mother, Nature, is permitted still to protect them, here they will stand defying time when not a stone of this Capitol is left to mark the spot on which it now stands, and its very existence may have faded into the mists of tradition."

In the United States, forest cutting reached a fevered pitch in the late 19th and early 20th centuries, just before oil came to fully replace wood as a primary energy source. And even at that time, the redwoods were being cut for building materials at a rapid rate. As Delmas said, "You experience a feeling of profound sadness as you conjure up the picture of these venerable trees hacked and shivered, to become the commonplace materials of barter and trade. As you behold their lofty foliage stirred by the ocean breeze, you seem to hear them murmur a prayer to be saved from such desecration."

Delmas was so outraged by die clear-cutting of California's 2,000-year-old redwoods that he took on the case, pro bono, of fighting die loggers in the courts while working to pass laws to protect the ancient trees.

His speech to the California legislature, which resulted in the 1901 law preserving the remaining redwood forests, ended with an impassioned plea: "The slopes which surround this forest are already denuded. The work of devastation has reached the very edge of these woods.

"There, even while I speak, the axman stands ready to strike. If he pauses, it is only to await your decision. Two years from now his work will be done, and the last remaining fragment of the primeval trees, which clothe the mountains rising up at the very threshold of our metropolis, will have vanished. Vain, then, will be our regrets, and all attempts to repair the evil, vain. . . .

"Man's work, if destroyed, man may again replace. God's work God alone can re-create. Accede, then, to the prayers of the people. Save this forest. Save it now. The present generation approves the act; generations yet unborn, in grateful appreciation of your labors, will rise up to consecrate its consummation."

Delmas saved the last of the redwoods . . . until just a few decades ago, when cutting began anew.

**How is it Happening?**

Given that poisoned waterways, clear-cut rainforests and redwoods, and dying oceans aren't healthy or aesthetic for humans (much less any other life form), why are they happening? Why are our air, food, and water so toxic that about a third of Americans will develop cancer in
their lifetimes? Why are Third World nations being turned into toxic wastelands around industrial sites too dirty to exist in developed nations?

It's not just a problem of population or too many humans. It is, instead, a problem of values and law, a recent story in our culture.

Some among we humans have organized themselves together and formed a relatively new entity—the corporation—as a vehicle to accumulate wealth while minimizing risks and responsibilities. And a tiny percentage of these corporations have become so big and gained so much influence that they've effectively taken control of the governments the humans set up to protect themselves from tyranny—from forces that were too big for individuals to resist on their own.

Hiding behind the legal shield of government regulations that this elite corps themselves often helped write or lobbied to put in place, they have embarked on courses of action that are now collectively wiping out life forms across the planet even as they imperil the humans who created them. This book will explain how this came to be, will document some of the human harm that has resulted, and will lay out a plan for returning to our Founders' values.

It's not that this is the only way companies can "give people what they want." Technology is now so well advanced that virtually every area of industrial production and urban management can be done in far less toxic ways than we are currently following.

And it's important to note that the term wealth, which is what corporations are established to aggregate, comes from the Middle English term welthe, itself derived from the Old English weal, which was used to refer to one's state of well-being or the well-being of the commons (thus the Commonwealth of Massachusetts, for example).

It almost seems as if the world had been taken over by nonliving entities in a science fiction story—beings that look at everything as a resource to be tapped until it's used up, without consideration for how it affects any other living thing. Indeed, some time ago I suggested that the new and ascendant values of the world seemed like those of emotionless robots.

But a friend pointed out that when science fiction legend Isaac Asimov wrote his Three Laws of Robotics in 1950, the First Law said that robots must never harm human beings. Asimov later extended his model, adding a "Zeroth Law" that was even more important: Above all else, robots must not injure humanity. So the results we have today wouldn't even be consistent with the values given to Asimov's robots!

So again we ask, what values do allow this? What rules are we living by?

Corporate Values Versus Human Values


"The story began for my family on April 10, 1989. It was one of those unforgettably beautiful Oklahoma spring days: warm, calm, beautiful, sun shining, with the after-winter promise of many fair days soon to come. My son, Jim, had a side-impact collision in his 1984 ... pickup with the now-infamous sidesaddle gas tanks. The collision exploded the unprotected gas tank on impact. His truck went up in a ball of flame and he had no chance to get out."

"He survived the accident?" I said.

"And he died in the fire," she said. Jim Kincade was one of over 1,800 Americans who died in such automotive fires because one of America's largest automakers chose to ignore the advice of their engineers and listened instead to their marketing department. To produce a truck that would hold 40 gallons of gasoline—thus having twice the gas capacity and range of their competitors—that company mounted the gas tanks in pickup trucks on the sides of the vehicle, outside the heavy steel frame that protects the rest of the interior of the vehicle.
The other two large American auto manufacturers turned down the idea because it could turn a truck into a rolling firebomb in a side-impact collision. An internal engineering report from one of the companies that chose not to use sidesaddle gas tanks said, "A frame-mounted fuel tank mounted on the outside of the frame rail is not acceptable. . . . Any side impact would automatically encroach on this area and the probability of tank leakage would be extremely high."

The corporation that made B. J. Kincade's son's pickup, however, had commissioned an analysis of the cost of making the fuel tanks safe. It would have cost the company $2.20 per truck to make safer gas tanks, according to one of their chief engineers. Given the millions of additional trucks they would sell to capitalize on this market, however, it would be cheaper to pay death benefits than to build a safe pickup.

The story came out in documents pried out of the company with a lawsuit initiated by Kincade and supported by Ralph Nader's Center for Auto Safety, although to this day the automaker has succeeded in keeping from Kincade the identity of the person or persons who made that fateful decision. "I wish I knew," she said, but odds are she'll never find out.

Thinking of the 1,800 fiery deaths that resulted from this decision, deaths that company anticipated and accepted, one is forced to ask: How is it that a decision like this could be made by one of the most impressive human enterprises in the world? What value system drives humans to such inhuman decisions?

To a large extent, today's legal foundation for the problem started in America in the 1800s. But in no way is it limited to America. We no longer live in a world where local actions—even a Supreme Court decision—produce solely local results.

**Corporations Pursuing Their Values Across the World**

It's beyond the scope of this book to review the many well-documented cases of what happens when indigenous peoples seek to keep their land in the face of encroaching multinational oil, gold, uranium, logging, and mining corporations. Suffice it to say that the stories have much in common with the history of Native Americans, except that the language has been updated. Today, when people rise up and protest exploitation of themselves or the natural resources of their lands—even local and peaceful protests—they can be branded terrorists and the full weight of police, prisons, and armies is used against them.

This book isn't about those stories, it's about the underlying legal issues. But two contemporary stories illustrate the situation the world is in, broadening the case for action.

I personally experienced how angry these "invasions" can make the people whose lands and lives are affected.

We'd spent the day walking through the refugee camps of Uganda in East Africa, watching people die of malnutrition, malaria, and a dozen other diseases associated with the consequences of war and famine.

It was 1981, and Dick Gregory, the comedian and activist, had accompanied me to Uganda to view the devastation left in the wake of the Tanzanian invasion that expelled Idi Amin. I was working as a volunteer with the international Salem Children's Trust relief organization, and Dick was on our advisory board. I'd been in Uganda a year earlier, and had returned with Dick to see how our new famine-relief station in Mbale was doing, and to enlist Dick's help in our fund-raising efforts for the orphans of the war.

We were staying in Kampala, which was, at the time, a city slowly recovering from the ravages of both Amin and the recent war. There had been no consistent running water in 2 years, and electricity was sporadic. The sun sets quickly on the equator, the transition from daylight to night being so abrupt as to catch a person unawares, and after night fell, bands of teenage Tanzanian soldiers and a newly forming Ugandan army, often dressed in rags and carrying Soviet-made AK-47 assault rifles, enforced a rigid curfew by gleefully shooting at
anything or anybody who moved. The nights were sometimes punctuated by rapid-fire rifle shots and occasional screams. In the mornings, during my two visits to Uganda, we sometimes stepped over bodies on the Kampala sidewalks before going up north to the camps where the refugee situation was the worst.

Our second day in Kampala, Dick remembered that he had a relative who knew a former Ugandan diplomat. We made inquiries through our host, the Minister of Rehabilitation, and got the diplomat's address. He lived about a block from our hotel, and when we stopped at his house we learned he was out but would be back that night.

It was the end of the day, just after sunset, and we were safely back in our bulletproof cinder block hotel. In a characteristic burst of enthusiasm, Dick said, "Let's go visit that guy!"

"We'll get shot trying to run through the streets!" I said.

He grinned at me with a twinkle in his eye. "We're faster than them. I got a scholarship to Southern Illinois University as a runner! Can you keep up with me?"

I didn't answer because he was already halfway out the door.

Out of breath but still alive, we arrived at the home of the diplomat. He was a gentle man in his mid-sixties, and lived in a home that had once been elegant but had, during the war, been robbed of many of its furnishings. Our host's skin was the beautiful deep chocolate color of so many Ugandans, his hair graying, his carriage erect although he was thin and frail. After some small talk about Dick's relation, the discussion turned to the current government of Milton Obote, and then to Idi Amin, who had converted to Islam and therefore was then (and is now) living in a palace in Saudi Arabia.

I made a comment about Amin's brutality, and this very gentle man turned fierce. "You have no right to speak of Amin," he said, his voice thick with anger, his finger in my face. "It was your companies who kept him in power, who helped cover up his crimes, who flew in supplies for his cronies, and who paid for his torture chambers. He murdered over 100,000 of my countrymen, some of them my relatives. Long after it was obvious to us and to the world what kind of a monster he was, your companies—which had the power at any time to dispose of him by simply stopping their trade with him—helped him keep our people in terror and slavery."

It was a searing indictment, and I sat back in the old sofa, shocked. "I didn't have anything to do with that," I said lamely.

"You drank coffee and ate sugar," he said, trembling. "You had complicity even if you didn't know it. You could have found out. You could have stopped him."

"I'm sorry," I said, looking at the stained old Persian rug on the floor.

Dick moved the discussion in another direction and the evening became pleasant, as if the old man had relieved himself of some deep burden. After a few hours talk, we said our goodbyes and ran like madmen to make it back to our hotel without getting shot.

It was that evening that I realized how fully, in many regards, multinational corporations have become the tail that wags the dogs of the governments of the world.

From Uganda to Nigeria

It's not just American companies who are playing this role around the world. In Nigeria, a European corporation pumps crude oil that provides much of the revenues that supported a corrupt and brutal military regime, not unlike the situation I saw in Uganda. When the people of the Ogoni tribe rose up to oppose the despoiling of their lands, their leaders were arrested and tried—by a military tribunal. Nigerian author Ken Saro-Wiwa, said in his closing statement of his trial:

"We all stand before history. I am a man of peace, of ideas. Appalled by the denigrating poverty of my people who live on a richly endowed land, distressed by their political marginalization and economic strangulation, angered by the devastation of their land, their ultimate heritage, anxious to preserve their right to life and to a decent living, and determined to
usher to this country as a whole a fair and just democratic system which protects everyone and every ethnic group and gives us all a valid claim to human civilization, I have devoted my intellectual and material resources, my very life, to a cause in which I have total belief and from which I cannot be blackmailed or intimidated....

"On trial also is the Nigerian nation, its present rulers and those who assist them. Any nation which can do to the weak and disadvantaged what the Nigerian nation has done to the Ogoni, loses a claim to independence and to freedom from outside influence. I am not one of those who shy away from protesting injustice and oppression, arguing that they are expected in a military regime. The military do not act alone. They are supported by a gaggle of politicians, lawyers, judges, academics and businessmen, all of them hiding under the claim that they are only doing their duty, men and women too afraid to wash their pants of urine. We all stand on trial, my lord, for by our actions we have denigrated our Country and jeopardized the future of our children. As we subscribe to the sub-normal and accept double standards, as we lie and cheat openly, as we protect injustice and oppression, we empty our classrooms, denigrate our hospitals, fill our stomachs with hunger and elect to make ourselves the slaves of those who ascribe to higher standards, pursue the truth, and honor justice, freedom, and hard work.

"I predict that the scene here will be played and replayed by generations yet unborn. Some have already cast themselves in the role of villains, some are tragic victims, some still have a chance to redeem themselves. The choice is for each individual."

On November 10, 1995, after 17 months in prison, and despite the protests of Nelson Mandela and governments and civil rights groups around the world, the Nigerian military government executed Ken Saro-Wiwa and eight other Ogoni activists. Ken's last words were "Lord take my soul, but the struggle continues."

What does the oil company say of this? Its Web site says (as of this writing) they "cannot interfere in domestic politics," although they do note that as a company they had said Ken had a right to freely hold and air his views, that the company publicly supported a fair legal process for him, and that the former chairman of the company had sent a letter to the Nigerian Head of State appealing for clemency for Ken on humanitarian grounds after the trial.

It must be noted that this oil company has done better than any of the others in the region—after the executions, human rights group Amnesty International said this was the only company in Nigeria that has acknowledged any corporate responsibility for upholding human rights. Yet as of this writing, 7 years after the executions, they continue to pump oil in Nigeria, while the government of Nigeria continues to perpetrate human rights abuses.

But the oil company is simply doing what it was chartered to do—earn a profit extracting oil, wherever it can be found. There's no mystery; that's what the owners (the shareholders) hire executives to do, through the board of directors.

A Hunt for Understanding, Not Villians

Before we pursue this question further, I need to make an important point: My purpose in this book is not to identify "culprits"—it's to point out a flaw in our social system, and propose a solution. There are no villains here.

During the Victorian era, a four-part story structure became popular; it was called the villain story. The model was that a social ill was identified, then a villain was identified who was responsible for it. In part three, the villain would be destroyed or have a change of heart, so that in the end, the social ill was eliminated. A good example is Charles Dickens' Victorian-era story of Ebenezer Scrooge, A Christmas Carol.

Victorian-era villain stories implicitly assumed that specific humans are to blame for societal problems. Part of the social shortsightedness of the era (perhaps of every era) was that nobody thought to examine the structure of the era's institutions as a source of problems. Instead, the cause was laid at the feet of individual people.
Similarly today, there are those who suggest that corporations that are convicted of crimes or misdoings (and some of the largest corporations in the world have been convicted of substantial crimes) committed their wrongs because of rogue humans. "If only ethical people ran the company," the refrain goes, "then the problems would be solved."

But there is no use trying to find villains, because the problem is in the structure of the situation.

Executives of some corporations today make decisions and issue orders that degrade our environment, infiltrate and manipulate cultural institutions (government, universities, even charities) for their own benefit, and abuse workforces, even children, in Third World factories that rival the abuses written about by Dickens. But the problem, at its deepest level, is not one of human nature or of human villains.

Instead, as we will see, when these abuses happen, the human harm that results—whether it affects the citizens of Vermont or B. J. Kincade's son or children in Indonesian sweatshops—arises from a combination of two factors.

First is the nature and structure of corporate charters and the growing reality that corporate purpose in today's world is increasingly singularly focused on seeking profits and shareholder dividends, without attaching any measurable value to other considerations.

But this in and of itself isn't the heart of the problem—that same structure embraces millions of small, ethically profitable companies. Running a for-profit company that's beneficial to humans and the community is not just possible: it's normal. Entrepreneurs and small companies have historically been the engines that have fueled the great majority of new jobs new economic opportunity, and innovation.

The Unintended Outcome

The problem comes when this singular purpose of profits is combined with rights, personhood, and massive size, so that an imbalance results—an imbalance that was never intended by those who wrote the laws that authorize the existence of corporations.

This combination, warned about by U. S. presidents from Jefferson to Eisenhower, places the corporation in a position of unbalanced power over human citizens and allows it to manipulate governments, which then lose their connections to their own citizens and instead become instruments to further the corporate agenda of accumulating wealth.

Much of this happens where we don't see it. Many large American corporations have set up the environmentally dirty or labor-intensive parts of their operations just over the border in Mexico, or in South America or Asia, while keeping their corporate headquarters in relatively pristine U. S. suburban areas. The poor people who do the labor aren't stockholders, so their concern over their local environment, or their protests over wages that often top out at a dollar an hour, are invisible to the U. S. stockholders.

The market even rewards such corporate actions: When companies export jobs to the developing world, their stock often goes up. Within the context of a cultural story of profit as the prime objective, such companies are not acting immorally or improperly. In many cases, humans and other life forms only figure into the equation when the company is penalized, and then only as items on the balance sheet or profit-and-loss statement.

Increasingly, today, the bottom-line question for the world’s democracies is, "Whose values will determine the future of the planet and her occupants—people or corporations?"

First, let's examine where government comes from. After all, once upon a time there was no government—only people. What happened? What is the role of government?
Chapter 2
Banding Together for the Common Good: Corporations, Government, and “The Commons”

A corporation has no rights except those given it by law. It can exercise no power except that conferred upon it by the people through legislation, and the people should be as free to withhold as to give, public interest and not private advantage being the end in view.

-WILLIAM JENNINGS BRYAN

In the beginning, there were people.

For thousands of years, it was popular among philosophers, theologians, and social commentators to suggest that the first humans lived as disorganized, disheveled, terrified, cold, hungry, and brutal lone-wolf beasts. But both die anthropological and archeological records prove it a lie.

Even our cousins the apes live in organized societies, and evidence of cooperative and social living is as ancient as the oldest hominid remains. For 100,000 years or more, even before the origin of Homo sapiens, around the world we primates have organized ourselves into various social forms, ranging from families to clans to tribes to nations and empires.

As psychologist Abraham Maslow and others have pointed out, the value system of humans is first based on survival. Humans must breathe air, eat drink water, make ourselves warm, and sleep safely. Once the basic survival and safety needs are accounted for, we turn to our social needs—family, companionship, love, and intellectual stimulation. And when those are covered, we work to fulfill our spiritual or personal needs for growth.

Our institutions reflect this hierarchy of needs. Families, be they tribal nomads or suburban yuppies, first attend to food, water, clothing and shelter needs. Then they consider transportation, social interaction, and livelihood. And when those basics are covered, our families turn to our intellectual and spiritual needs.

The Three Legal Entities

As populations grew, particularly in agriculture-based societies, humans recognized that some form of centralized coordination was needed to keep societies organized, defended, and provided for. Thus government was born.

The value system of governments is always rooted in the survival and well-being of humans (or, at the very least, the survival and well-being of those who control the government). If big projects needed to be done, from building aqueducts to raising pyramids to conquering foreign lands, either the government undertook the task or it was financed and organized by wealthy individuals or churches made up of congregations of people functioning as a form of government. This was pretty much the way the world worked until the mid-1800s, with only a few exceptions.

Thus, there were historically two distinctly different legal entities: humans and families, and the governments they created. (Religious institutions, until the last 4 centuries or so, operated either as governments or as families/clans. King David ruled a theocratic kingdom, and the popes and mullahs and gurus exercised political authority over their followers. Those that didn't rise to such power worked as a social collection of humans that was functionally an extended family or tribe.)

Some of our governments have been pretty tyrannical, but even they rarely behaved in ways that were openly and directly toxic to the survival of all humans. Even the most brutal, despotic regime’s operated in a way to ensure that water supplies were intact, food continued to flow,
and those in power had a place to sleep. There were often huge disparities in the quality of these commodities between the least and most powerful in the society, but at least the humans who controlled them kept in mind the full spectrum of human needs. When they failed to, they either collapsed or were overthrown, as we see in a long line of civilizations that have risen and then collapsed.

It's instructive to consider how various governments have come to power. For about the last 6,000 years, it's happened in one of two ways. Either someone claimed divine authority from the god or gods of those people, or a warlord seized power with brute force.

**Ruled By The Gods**

A good example of leadership by divine appointment is the Japanese empire. The oldest Japanese history books, the *Kojiki* and *Nihon Shoki*, explicitly say that the first emperor was crowned at least 2,660 years ago because he was a descendant of the Sun Goddess, Amaterasu Omikami, the greatest of the goddesses in the Japanese Shinto religion. The lineage from that first emperor to today's Japanese emperor is believed to be unbroken, although during the intervening millennia the emperors have often shared power with warlords or Shoguns.

Similarly, the Inca ruler Pachacuti organized the Inca into a huge empire in the early 15th century after claiming that he was a direct descendant of the Sun God, Inti.

While the Catholic line of popes couldn't claim a birth-lineage back to the first person they recognized as a human descendant of God, they do claim direct lineage by appointment and blessing. Like the Japanese and Incan emperors, the popes used the powers that come with divine claims to rule much of Europe for millennia. Claiming divine inspiration, they started numerous wars and repeatedly mustered military forces and police-like agencies.

Similar scenarios have played out in nearly every part of the world where agriculture-based cultures have risen to power.

**Ruled By Warlords**

Taking power by military conquest is such a familiar story that it hardly seems necessary to recount it. But it's interesting to personally witness artifacts of the warlord days, before there were war machines and weapons of mass destruction. It makes real the fact that long ago, people came to power by expanding the area they controlled.

When my family and I lived in rural Germany in 1986 and 1987, a pleasant weekend walk through the forest took us to the ruins of an ancient castle called Nordeck. It's been a ruin for nearly 1,000 years, surrounded now by a deep forest, on a steep hillside overlooking the Steinach River. But back in the 10th century, local warlords controlled commerce in that region of the Frankenwald by their control of the river.

From small starts like this, early in the history of modern Europe, local warlords took over increasingly large areas of land, building larger and larger armies and castles, conquering first villages and then states and then entire nations.

Similar scenarios played out in Asia as the Chinese emperors rose to power, and then the Huns attacked and were turned back by them. The Huns headed west to Europe and aided the Goths in defeating the Roman army, led by Emperor Valens, at Adrianople in 378 A.D. Warlords were on the march.

**Ruled By Warlords From The Gods**

Often when warlords took over an area, they would claim that their victory was the will of the local god and/or goddess. A few years ago, my wife, Louise, and I saw an ancient sign of this when we were walking through the temples at Luxor in Egypt, and came across a set of
hieroglyphic inscriptions on one wall that were clearly of a different style and period than those surrounding diem. We asked an archeologist friend, Ahmed Abdelmawgood Fayed, what the hieroglyphs meant, and he said that die Greek-born Alexander the Great had them carved into the wall after his conquest of the region.

"The hieroglyphics say that he was descended from the Egyptian god Amun, the greatest of the gods," Ahmed said. Claiming lineage from Amun was Alexander's way of consolidating his local power among the Amun-worshiping Egyptians.

The warlord-blessed-by-divinity strategy played out in much of the world. To this day, on British coins you will find the inscription D.G. REG. FD. The D.G. stands for Dei Gratia, Latin for "by the grace of God;" REG is short for Regina, or "Queen" in Latin; and the ED. represents Fidei Defensor, "defender of the faith."

As British attorney and author L. L. Blake notes in defense of the British system, "That is a good description of the natural order: First of all, there is God, and it is by His Grace that we have our system of Government; then there is the Queen, whose rule is utter service to the goodness which exists in men; finally there is the faith of the people, which needs to be maintained and defended."

Democratic Governments and Republics

The first documented rise of democracy came in response to a warlord-governor, Peisistratus, who seized power in Athens three different times during the 6th century BCE (which stands for "Before the Common Era," a term equivalent to BC that is increasingly preferred by historians). A hundred years after the Greek poet and statesman Solon suggested a constitutional reform package with democratic aspects, in 508 BCE the Greek politician Cleisthenes successfully led a radical reform movement that brought about the first democratic constitution in Athens the next year.

Over the next 50 years, Ephialtes and Pericles presided over an increasingly democratic form of government that finally—for the first time in the history of what we call civilization—brought to power people from the poorest parts of Athenian society.

Most people today don't realize how brief that democratic experiment in Athens was. It came to an end in 322 BCE, when the warlord Alexander the Great conquered the nation. Later, it fell under the rule of Rome.

The American Model

Democracy wouldn't return to Greece for over 2,000 years, in the Greek Revolution of 1821, which was largely inspired by and patterned after the American and French Revolutions.

Those revolutions brought forth the idea that governments should overtly and explicitly be controlled by and operate to the benefit of their citizens. When the Declaration of Independence said, "Governments are instituted among Men, deriving their just Powers from the Consent of the Governed," it was quite a departure from the governments that maintained authority through raw power or "divine right" (backed up by force). The new model was what Abraham Lincoln described in his Gettysburg Address as "government of the people, by the people, for the people."

It's important to understand how different this was from all previous governments because it illustrates the priorities of the people who framed American government and set in place the beginnings of modern democracies worldwide.

Being learned men, they knew well the long history of popes, czars, kaisers, and kings who had claimed the divine right of rule, usually with one official state religion, and they were determined that such a thing would never arise in their part of North America. When the Bill of Rights was framed, the very first amendment guaranteed that individuals are free to practice the
religion of their choice. And it doesn't stop there—it explicitly keeps government out of the religion business by declaring, "Congress shall make no law respecting an establishment of religion."

Clearly, the founders were focused on protecting the freedom, rights, and liberty of the individual, in the model of Ephialtes and Pericles—the last elected officials to have explicitly governed in such a fashion.

The Third Entity Arises: Corporations

Meanwhile, back in the 1500s, European kingdoms had concluded that there were some human enterprises that were beyond the scope of government. This included organized religions, charities, international trade, and projects like discovering and administering distant lands.

The need for this started with problems like the ownership of land and other large assets including buildings or ships. Governments could own things, and people could own things, but if a church or a business wanted land and buildings, historically it had been the property of either a local government (usually a town) or a family. This brought up problems of government involvement in religion and trade, and issues of who in a family would inherit what.

A third type of entity was necessary to enable owning property independent of either the government or any one particular person or family. It was called the corporation, and is today the third legal entity in the triad that begins with humans and then continues with their two subordinate agents: governments and corporations. This new corporate entity was, of course, not something that was physically real; it was an agreement, a so-called legal fiction authorized by a government.

The first corporations were the Dutch trading companies, chartered in the 1500s. They came into being by declaration of the government, but were owned and operated by wealthy and powerful individuals. The corporation had a status that allowed it to own land, to participate in the legal process, and to hold assets such as bank accounts. It could buy and sell things.

But while even 16th-century European kingdoms were acknowledging that humans had at least some "natural rights," corporations were explicitly limited to those rights granted them by the governments that authorized them. In the early days, everybody knew that corporations weren't governments or humans. They were few and far between until the Industrial Revolution.

The United States Constitution doesn't mention the word "corporation," leaving the power to authorize the creation of corporations to the states. The Founders were far more worried about governments usurping human rights and privileges than they were worried about corporations taking over. They had put the East India Company in its place with the Boston Tea Party, and that, they thought, was the end of that.

American revolutionaries Thomas Paine and Thomas Jefferson, and decades later even the French observer Alexis de Tocqueville, fretted about a return of despotic government to America, running roughshod over the rights of citizens. Few, however, seriously considered the possibility of corporations rising up to take over the people of the world and then to take control of the people's governments. It was only after he had left the presidency that Thomas Jefferson wrote in 1816 about the rise of power of the "moneyed corporations."

“The Commons” As a Limited Resource

In colonial times and before, a piece of land that was subject to common use was called a commons. The famous Boston Common is one example: It was originally the common grazing ground for the townspeople's cattle. The peculiar twisting streets of old Boston reflect the cow paths that were used as people walked their cattle to and from the Common.
The metaphor of the commons has been extended over the years to embrace all sorts of shared resources (as listed at the end of this chapter). The nature of a commons and how it's been considered at different times in history is central to the issue of why we have government in the first place, for the common welfare.

In 1883, William Forster Lloyd published an essay titled "The Tragedy of the Commons." It was, in part, a response to the Darwinist theory of economics that was then popular in England, which suggested that if the rich were unconstrained in their activities, the result would be a social benefit because the strong would survive and social benefits would trickle down.

Lloyd, writing 100 years after Adam Smith, said it wasn't so; people acting in their self-interest would deplete the commons. He wrote, "Suppose two persons to have a common purse, to which each may freely resort" (in other words, from which each may take as much as he wants).

With this limited common bag of money, Lloyd said, neither man has an incentive to keep adding to it. The result would be predatory behavior— whoever took the most coins out of the bag the fastest would end up the richest—and, as Lloyd said, "the motive for economy entirely vanishes."

Author Garret Hardin, in his 1968 essay of the same title, revived Lloyd's work for a worldwide public. He pointed out how Lloyd had used the example of a pastureland used in common by several shepherds. So long as the shepherds and their sheep are few in number, the pastureland is easily shared and rejuvenated. If one of the shepherds, however, were to dramatically increase the size of his flock, it could cause the pastureland to be wiped out, both for him and for the other shepherds.

Even decisions made on a much smaller scale—each person adding one animal at a time—would result in depletion, Hardin said, because for each farmer, buying another animal seems to benefit each one of them . . . until the commons is wiped out by overgrazing. Notice that this argument rests on two assumptions, neither of which was widely held in 18th-century America.

The first is that the commons are limited, so it would be possible for humans to use up so much of the available resources that the commons could collapse. This might be true in a single town, with a single grazing ground, but in those days the world as a whole seemed so vast that it was ludicrous to imagine running out.

The second assumption was that people will always operate in their own self-interest, even when it means they violate the interests of others or the interests of the community as a whole.

It's easy to see the importance of these assumptions in understanding the roles of governments and individuals regarding the commons. It speaks directly to the issue of our spoiled waterways, our spoiled air, and even the impact of business decisions on local communities in the sweatshop countries.

The Limitless Commons

In 1776, humans had been around for at least 100,000 years, but the population of the world was less than a billion. North America was so vast as to be almost unimaginable to the European mind. (Imagine if we today discovered a new planet we could live on, several times bigger than our own—we would think all our problems were solved.)

It was so vast that most of it had never even been surveyed or mapped by Europeans. The rivers teemed with fish, the forests were full of game, the prairies were thick with buffalo and elk. When human waste was dumped into rivers, it seemed to have no appreciable effect; it simply vanished. The smokestacks of the Industrial Revolution had not yet begun to foul America's air.

This was a starkly different view from what Lloyd and Hardin said later: In 1776, the American commons seemed limitless. It was on this assumption that Jefferson and Madison fought so hard to keep government small, limited, and uninvolved even in matters of commerce.
But as humans began to use coal and oil to aggressively convert the commons of the world to cropland, and the bountiful food supply fed an explosion of human populations, things changed. It's estimated that the world hit its first billion people in 1800, just as industry was beginning to take hold in America. The planet had 2 billion humans in 1930, doubling its population in just 130 years. The third billion humans took only 30 years to add, by 1960. The fourth billion came in 14 years (1974), and the fifth billion in just 13 years (1987). In the 13 years between 1987 and 1999, we added fully another billion humans to reach 6 billion as the century and the millennium turned.

The first 2 billion people took 100,000 years. The next 2 billion took 44 years. The next 2 billion took 27. The human "flock" has increased beyond the ability of the "pasture" to easily support it. The proof of this is that over 2 billion people (twice the population of the entire planet in Jefferson's day) will go to sleep tonight malnourished, knowing that tomorrow and most likely for the rest of their lives they will have no access to safe water or sanitation.

Many of our Founders believed that the limited commons was not a valid assumption, and the discovery of North America had turned Lloyd's argument on its side. Today, with six times as many people on the same planet, no matter how much we may love our Founders' ideals and rhetoric, in this arena the standards they defined for management of the "commons" no longer apply.

**Enlightened Self-Interest**

The other idea popular among America's Founders was that a wise and informed electorate, and the politicians they elect, would reliably behave with "enlightened self-interest" or, as Alexis de Tocqueville wrote in 1840, "self-interest rightly understood." This was the opposite of Lloyd and Hardin's assumption that people will ultimately act as selfish individuals once population becomes great enough to strain a commons.

The core of the early American ideal was that every individual would see themselves as part of a larger community, and so would make decisions in the best interest of the entire community. The community serves the individual needs, while the individual serves the community needs. (It was an early form of a principle Karl Marx would later state as "From each according to his abilities, to each according to his needs.")

Such sentiments have been echoed in writings ranging from Thomas Jefferson to Ayn Rand to contemporary conservative pundits. They're at the core of Libertarian philosophy as preached by Rand.

And, in small communities, they work. There's some fascinating math that may underlie this, something that's suggestive of a key factor that's shifted as our population has grown.

**Who Knows You in Your Community?**

Dr. Robin Dunbar of the University of Liverpool studied two dozen species of primates and found that for each, there was a specific average group or community size. This size was a function of what he called the neocortex ratio, a measurement of the brain's physical size. He found that as the ratio increases, community sizes grow.

Analyzing the size of human brains, and extrapolating from the two dozen primates he studied, Dr. Dunbar concluded that the largest community or group within which a human should be able to maintain consistent relationships was 150 people. Indeed, looking out at the world of human interactions, he found that number over and over again as typical clan sizes—from Australian Aborigines to Native Americans. Even Brigham Young, when he was organizing the first Mormon communities in Utah, "divided [his early Mormon followers] into smaller groups that could operate independently of each other and co-ordinate the activities of their members with maximum efficiency." The group size Young chose was 150 people.
This is also consistent with the observation that communism (with a small "c") works well on an Israeli kibbutz with 100 residents, but failed in the Soviet Union with 262 million people. And, as a foreshadowing of topics we'll visit later, in America, tens of thousands of small companies rarely behave in environmentally destructive or criminal ways, while virtually all of the serious corporate crime convictions of the past century have occurred among companies that are large enough for people to behave with some anonymity.

Dr. Dunbar's research suggests that we have the ability to know and maintain relationships with up to 150 people, but our brains can't handle more than that.

I'm going to go out on a limb for a moment and speculate that in a world where the community of leaders was less than 150—like colonial America—those leaders might well make choices that support the common good. Everybody knew everybody else, and there was social accountability. It wasn't possible to "perpetrate and hide"—you were known.

Keep in mind that 56 people signed the Declaration of Independence (which was written by one person and edited by three), and the Constitutional Congress that wrote the United States Constitution had only 55 attendees, 39 of whom signed it. Among such manageable numbers, I find it entirely credible that individuals might think they could manage the common resources of this newly conquered land in a way that would benefit all. Little to no government intervention would be necessary: There was easily enough to go around, and in those areas where things got tight, communities were small enough that everybody pulled together.

But today we live in a different time and a different world. There are both individuals and corporations who work avidly to grab from the common purse, or to do whatever they want with the common resources of the world for their own benefit—just as was predicted by Lloyd and Hardin. When laws stand in the way of taking from those resources, they work to change those laws to suit their own desires, and if their influence in government increases, they frequently win.

We have also learned that as our towns and schools increase in size, it becomes easier for people to vanish within their little group of 150-or-fewer friends—and thus behave in any way they want toward others, without getting caught at it in the larger community. This is the second time the issue of accountability has arisen. It's not the last.

**Anonymous Plundering of the Commons**

A few years ago, Louise and I owned a small piece of undeveloped land in central Vermont. In the cool crispness of late October, we were walking the land under a bright blue afternoon sky. Deep in the forest, partway to the river, we found the carcass of a small deer. She had been shot out of season and the poacher had field-dressed her, leaving behind only the bones, viscera, and parts of her hide as he carried away the meat.

We stood there for a long, shocked moment, confronted with the bloody remains of this sudden and methodical violence. A light wind rustled the brown leaves on the forest floor, and a nearby chipmunk made angry, insistent chirping noises, perhaps upset that humans were again invading his territory.

"Probably somebody from one of the poorer families down the road," I finally said. "Meat for the long winter."

Louise nodded and sighed, and after a brief ceremony, we continued our walk.

The story of the deer illustrates the reality behind one of the fables of our culture: that the commons will provide whatever we need, and will dispose of our waste, without limit.

The person who shot and field-dressed that doe probably didn't think they were stealing or doing anything similarly unethical. It's unlikely they thought of poaching as anything other than bending or breaking relatively small rules. After all, deer roam freely all over the northeastern United States and Canada, and there are plenty of them.
Instead, if he considered it, he probably thought he was taking from the commons—the millions of acres of woodland and hundreds of thousands of deer that are considered the joint property of individuals, corporations, and governments. "Nobody will notice one missing deer," he probably thought, "and it'll provide a few weeks' food for my family."

And as for leaving the waste behind, there's a good chance he left as quickly as he could—to escape accountability.

**Government and the Commons**

As human populations increased and the pressure on the commons grew, people authorized their governments to administer the commons "to promote the general welfare." One of the reasons so many of the early American writers and philosophers were disdainful of government was that the commons seemed limitless: There was no need to administer it.

Today, there is a general consensus among most humans that the commons are endangered and need to be managed. We pay more for a gallon of drinking water than we do for gasoline. Homes have air filters and ionizers, and cars have "recirculate" buttons, partially so that in downtown areas we don't have to breathe the exhaust of other automobiles. Our shared transportation systems (at least the roads and airports) get huge amounts of government funding, and we task our government with carefully monitoring and inspecting our common food supply. Education and health care are major concerns to most people, and thus considered part of the commons in most nations.

These are the commons that determine our quality of life and even our ability to live. They are rightfully the concern of humans and the governments that humans create to look after their interests. They're even the concern of the 27 million small and medium-size American companies where owners and managers interact daily with employees...where everybody knows each other.

**Enter the Behemoths**

The principle of the commons is founded on the idea of equal participation. Thus, one final consideration regarding the use of the commons is that our biggest corporations are very, very far from having a position of equal participation when they delve into the commons. In a planet of 6 billion humans, with 27 million companies in America, there is an enormous concentration of wealth at the top:

- 99.6 percent of American corporations have less than $10 million in capitalization.
- Only 2,500 American companies exceed $500 million.
- The Fortune 1,000 companies control about 70 percent of the American economy.
- In the entire world, fewer than 500 corporations have a net value exceeding $12 billion.
- Just 200 corporations conduct almost a third of the entire planet's economic activity and employ less than one-quarter of one percent of the world's workforce.
- Among the 100 largest "economies" in the world today, over half are corporations, not countries.

This situation must have been unimaginable when our country was founded. This is a dramatic concentration of power among companies far too big for everyone to know each other and thus exercise the sort of social pressure-based control that would protect the commons.
Is There A Problem?

My point here is not that size is inherently bad. Some very large corporations have outstanding records of treating their people well and being assets to the local human community (and that's not to mention the innovations they've brought to the economy and its citizens). Rather, my point is that the situation today is very different from the assumptions that were considered valid when the Constitution was framed. There is clear evidence that the commons is being depleted, and rapidly.

One issue addressed in this book is the abundant evidence that many corporations use government influence to take advantage of the commons for their self-interest, not the public interest. For instance, through lobbying and campaign contributions, mining and drilling corporations get the federal government to give them free or inexpensive access to government-owned lands—commons held in trust for you and me and all U.S. citizens—to extract gold, uranium, lead, tin, oil, coal, gas, and other public resources, which they sell.

We'll see that corporations, asserting their due process rights as "persons," commonly insert themselves into the regulatory process to influence government control of how they can take advantage of the commons, which has the effect of legalizing their actions.

Hide It Where Nobody Can See It

Consider injection wells. These wells are the reverse of the traditional concept of a well (something from which water or oil is drawn). Instead, an injection well exists to insert untreated toxic wastes into the earth below ground, where they're not visible.

On the Environmental Protection Agency's Web site, there is information about the Underground Injection Control (IUC) program. Through this program, the EPA says: The UIC Program works with state and local governments to oversee underground injection of waste in order to prevent contamination of drinking water resources. Some of the wastes die UIC program regulates include:

- Over 9 billion gallons of hazardous waste every year
- Over 2 billion gallons of brine from oil and gas operations every day
- Automotive, industrial, sanitary, and other wastes that are injected into shallow aquifers

In nearly every case, the wastes could be treated and rendered nonhazardous by conventional technologies. But the oil industry, the chemical industry, and the nation's biggest agricultural corporations don't want to pay the cost. The EPA even says so, on its page touting the UIC program: "Facilities across the United States and in Indian Country discharge a variety of hazardous and nonhazardous fluids into more than 400,000 injection wells. While treatment technologies exist, it would be very costly to treat and release to surface waters the billions and trillions of gallons of wastes that industries produce each year. Agribusiness and the chemical and petroleum industries all make use of underground injection for waste disposal."

So what do the companies do? Rather than bearing responsibility for the cost of processing their wastes, the industries have gotten government permission to just put them underground, thus legalizing potentially destructive behavior. (Note the familiar underlying assumption that there will be no long-term consequences; the commons will be able to handle it.)

If our economy were structured in such a way that the cost of restoring the commons was built into their industry and products, the waste produced while doing business would be a self-correcting issue—the people who generate the waste would also clean it up. But that's not how the system operates, by and large, and big business argues that if they have to pay to clean up their own waste it may even produce a reduction in overall economic activity because of increased prices.
Others point out that consumers are already paying the price in the form of treatment for cancers, asthma, and other diseases that are by-products of industrial pollution. And these are driving the economy as well, although by the corporate value of profit and cash flow instead of human values.

In March of 1968, Robert E Kennedy raised this issue, challenging the dearly held concept that pure economic activity in and of itself—usually measured as gross national product (GNP)—is a truly useful and honest way to measure the impact of corporate activity on the human community and the life of the planet.

"Our gross national product now is over 800 billion dollars a year," Kennedy said, "but that gross national product, if we judge the United States of America by that, counts air pollution, and cigarette advertising, and ambulances to clear our highways of carnage. It counts special locks for our doors and the jails for die people who break them. It counts the destruction of the redwoods and the loss of our natural wonder in chaotic squall. It counts napalm, and it counts nuclear warheads, and armored cars for the police to fight the riots in our cities. It counts Whitman's rifles and Speck's knives and the television programs which glorify violence in order to sell toys to our children."

There are also important things that only measuring the flow of cash misses, Kennedy said. "Yet, the gross national product does not allow for the health of our children, the quality of their education, or the joy of their play. It does not include the beauty of our poetry or the strength of our marriages, the intelligence of our public debate or the integrity of our public officials. It measures neither our wit nor our courage, neither our wisdom nor our learning, neither our compassion nor our devotion to our country. It measures everything in short, except that which makes life worthwhile."

And the quality of the commons is not generally part of the equation used to calculate GNP (now more commonly called GDP, or gross domestic product).

**What Are The Commons today?**

Where do the commons begin and end? What are the things on which our quality of life depends and that we humans share in common? Different people have answered this question in different ways repeatedly over the years.

- At one time, telephone service was considered the commons, and telephone companies were both subsidized in bringing phone service to remote areas and regulated in what they could charge.
- During the Civil War era, the nation's railroad tracks were considered part of the commons.
- Today, the nation's transportation airspace is considered die commons, as government pays most of the cost of managing it and local communities pay the cost of building airports.
- Our water supplies and septic disposal infrastructure are considered part of the commons, as are our police, fire, and prisons.
- Education is in the realm of the commons right now, as is health care in most of the developed world, with the exception of the United States.
- National parks and vast tracts of forestland, pastureland, and other government-owned lands are part of the commons.
- Our banking system was often considered part of the commons: The privatizing of it was a huge and running battle in the United States throughout the first half of the 19th century. Since 1913, the 12 Federal Reserve Banks that handle the nation's money supply have been owned by commercial corporations (the member banks), as are all other U. S. banks, and the Federal Open Market Committee—which sets the nation's interest rates—does not allow the public into its meetings, does not publish transcripts of its meetings, and is responsible only to itself for its own budget.
• In some communities, electricity is part of the commons, although in most it has been taken over by for-profit corporations. But the electric utilities still have the right of eminent domain to take private land for power transmission lines, as if that land were still part of the commons. In the mid-1930s, for-profit corporations were not providing electricity to rural Americans, so in 1934 Franklin Delano Roosevelt passed the Rural Electrification Act (REA) which got electricity to rural America. The situation repeated itself with regard to telephony, requiring Harry Truman to extend the REA to telephone service.

• The nation’s radio and television airwaves were considered part of the commons until they were sold at auction during the Reagan era to help finance other priorities.

• The nation’s system of highways and public streets are part of the commons, as is our public library system and post office (both created by Ben Franklin, a booster of die commons).

• The beaches, sky, waterways, oceans, and land held by government are part of the commons.

Because the commons is so close to home—it being those things that we rely on for our health, safety, and "pursuit of happiness"—it has incredible profit potential: Everyone needs it.

Right now, water is the hottest part of the commons, with some of the world’s largest corporations pushing hard for water to be internationally defined as a marketable commodity, and for local water supplies to be turned over to them. During hard times, people may put off buying a new car or new clothes, but they must have water each and every day. No matter how poor or how frugal a person may be, they have no choice but to drink, and the battle for the commons of water is becoming global.

Because corporate behavior is rewarded only when it increases present value (the value of the assets held now by a corporation, its profitability, and/or its stock price), decision making in corporations works to extract future values and make them present values. For example, consider a corporation that makes money in a manufacturing process that produces toxic by-products. It's in their best interests in terms of present values to either lobby to allow those toxins to be released into the environment, or move their manufacturing process to a nation that allows that, instead of cleaning it up as they go along. Thus, somebody else in the future will have to deal with the toxins (in the United States, it's taxpayers paying for Superfund sites), and deal with the side effects of the toxins, such as cancer, neurological problems, and environmental damage, while the company's managers and directors direct profits to themselves in the present.

The core concept here is that the commons are something we all share, and therefore something that should be in the hands of "we, the people" to ensure its viability, rather than in the hands of private parties whose first goal is to milk the commons for profits. Once the latter happens, democracies and plutocracies arise—a form of creeping feudalism that threatens peace, prosperity, and, perhaps most important, the future.

The stage is now set. We have looked at the nature of the problem—activities conducted by a small number of parties that are harmful to many. These activities are often a natural consequence of the way corporations are chartered—to make a profit. We have looked at the nature of government, particularly governments designed to serve the people, including managing the commons—the shared resources used by everyone in the community.

We have said that when the people within a company make a decision that harms the common welfare, they are often not held accountable for their actions because they claim "it was the corporation that did it." Yet we have also seen that these same parties have claimed, and won, constitutional protections for the legal fiction that we call corporations, protections that were originally designed to protect people from the dangers of despotic governments.
Let's now review the formative years of American government and worldwide modern democracies. In researching this book, I've discovered some rare manuscripts from those days that shed new light on the thinking of our Founders, as we lead up to the *Santa Clara* case in 1886 and then to today.
Part 2
From the Birth of American Democracy Through the Birth of Corporate Personhood

I shall therefore conclude with a proposal that your watchmen be instructed, as they go on their rounds, to call out every night, half-past twelve, “Beware of the East India Company.”

-PAMPHLET SIGNED BY “RUSTICUS,” 1773

Chapter 4
Jefferson’s Dream: The Bill of Rights

Let monopolies and all kinds and degrees of oppression be carefully guarded against.

-SAMUEL WEBSTER, 1777

Although the first shots were fired in 1775 and the Declaration was signed in 1776, the war had just begun. These colonists, facing the biggest empire and military force in the world, fought for 5 more years — the war didn't end until General Cornwallis surrendered in October 1781. Even then, some resistance remained; the last loyalists and British left New York starting in April 1782, and the treaty that formally ended the war was signed in Paris in September 1783.

The first form of government, the Articles of Confederation, was written in 1777 and endorsed by the States in 1781. It was subsequently replaced by our current Constitution, as has been documented in many books. In this chapter, we want to take a look at the visions that motivated what Alexis de Tocqueville would later call America’s experiment with democracy in a republic.

The First Glimpses of a Powerful American Company

Very few people are aware that Thomas Jefferson considered freedom from monopolies to be one of the fundamental human rights. But it was very much a part of his thinking during the time when the Bill of Rights was born.

In fact, most of the founders of America never imagined a huge commercial empire sweeping over their land, reminiscent of Hewes' "ships of an enormous burthen" with "immense quantities" of goods. Rather, most of them saw an America made up of people like themselves: farmers.

In a speech before Congress on April 9, 1789, James Madison referred to agriculture as the great staple of America. He added, "I think [agriculture] may justly be styled the staple of the United States; from the spontaneous productions which nature furnishes, and the manifest preference it has over every other object of emolument in this country."

In a National Gazette article on March 3, 1792, Madison wrote, "The class of citizens who provide at once their own food and their own raiment, may be viewed as the most truly independent and happy. They are more: they are the best basis of public liberty, and the strongest bulwark of public safety. It follows, that the greater the proportion of this class to the whole society, the more free, the more independent, and the more happy must be the society itself."

The first large privately owned corporation to rise up in the new United States during the presidential terms of Jefferson (1801 to 1809) and Madison (1809 to 1817) was the Second Bank of the United States. By 1830, the bank was one of the largest and most powerful private
corporations, and was even sponsoring its directors and agents as candidates for political office in order to extend its own power.

In President Andrew Jackson's annual message to Congress on December 3, 1833, he explicitly demanded that the bank cease its political activities or receive a corporate death sentence—revocation of its corporate charter. He said, "In this point of the case the question is distinctly presented whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."

Jackson succeeded in forcing a withdrawal of all federal funds from the bank that year, putting it out of business. Its federal charter expired in 1836, and was only revived as a state bank authorized by the state of Pennsylvania. It went bankrupt in 1841.

Although thousands of federal, state, county, city, and community laws restrained corporations vastly more than they are today, the presidents who followed Jackson continued to worry out loud about the implications if corporations expanded their power.

In the middle of the 30-year struggle, in May 1827, James Madison wrote a letter to his friend James K. Paulding about the issue. He said, "With regard to Banks, they have taken too deep and too wide a root in social transactions, to be got rid of altogether, if that were desirable. . . . they have a hold on public opinion, which alone would make it expedient to aim rather at the improvement, than the suppression of them. As now generally constituted, their advantages whatever they be, are outweighed by the excesses of their paper emissions, and the partialities and corruption with which they are administered."

Thus, while Madison saw the rise of corporate power and its dangers during and after his presidency, the issues weren't obvious to him when he was helping write the United States Constitution decades earlier. And that may have been significant when the Bill of Rights was being put together.

The Federalists Versus the Democratic Republicans

Shortly after George Washington became the first President of the United States in 1789, his Secretary of the Treasury, Alexander Hamilton, proposed that the federal government incorporate a national bank and assume state debts left over from the Revolutionary War. Congressman James Madison and Secretary of State Thomas Jefferson saw this as an inappropriate role for the federal government, representing the potential concentration of too much money and power in the federal government. (The Bill of Rights, with its Tenth Amendment reserving powers to the states, wouldn't be ratified for 2 more years.)

The disagreement over the bank and assuming the states' debt nearly tore apart the new government, and led to the creation by Hamilton, Washington, and Vice President John Adams (among others, including Thomas and Charles Pinckney, Rufus King, DeWitt Clinton, and John Jay) of the Federalist Party.

Several factions arose in opposition to the Federalists, broadly referred to as the Anti-Federalists, including two groups who called themselves Democrats and Republicans. Jefferson pulled them together by 1794 into the Democratic Republican Party, united in their opposition to the Federalists' ideas of a strong central government that could grant the power to incorporate a national bank and bestow benefits to favored businesses through the use of tariffs and trade regulation.

During the Washington and Adams presidencies, however, the Federalists reigned, and Hamilton was successful in pushing through his programs for assuming state debts, creating a United States Bank, and a network of bounties and tariffs to benefit emerging industries and businesses.

In 1794, independent whiskey distillers in Pennsylvania revolted against Hamilton's federal taxes on their product, calling them "unjust, dangerous to liberty, oppressive to the poor, and
particularly oppressive to the Western country, where grain could only be disposed of by distilling it."

The whiskey distillers tarred and feathered a tax collector and pulled together a local militia of 7,000 men. But President Washington issued two federal orders and sent in General Henry Lee commanding militias from Pennslyvania, Maryland, New Jersey, and Virginia. To demonstrate his authority as commander-in-chief, Washington rode at the head of the soldiers in their initial attack.

The Whiskey Rebellion was put down and the power of the Federalists wasn't questioned again until the election of 1800, which Jefferson's Democratic Republican party won in an election referred to as the Second American Revolution or the Revolution of 1800.

In the election of 1804, the Federalists carried only Delaware, Connecticut, and part of Maryland against Jefferson's Democratic Republicans (later to become the Democratic Party), and by 1832, as the Industrial Revolution was taking hold of America, the Federalists were so marginalized that they ceased to exist as an organized party.

**Jefferson and Natural Rights**

Back in the earliest days of the United States, Jefferson didn't anticipate the scope, meaning, and consequences of the Industrial Revolution that was just starting to gather steam in Europe about the time he was entering politics in the Virginia House of Burgesses. He distrusted letting companies have too much power, but he was focusing on the concept of "natural rights," an idea which was at the core of the writings and speeches of most of the Revolutionary-era generation, from Thomas Paine to Patrick Henry to Benjamin Franklin.

In Jefferson's mind, "the natural rights of man" were enjoyed by Jefferson's ancient tribal ancestors of Europe, were lived out during Jefferson's life by some of the tribal peoples of North America, and were written about most explicitly 60 years before Jefferson's birth by John Locke, whose writings were widely known and often referenced in pre-Revolutionary America.

Natural rights, Locke said, are things that people are born with simply by virtue of their being human and born into the world. In 1690, in his "Second Treatise on Government," Locke put forth one of the most well-known definitions of the natural rights that all people are heirs to by virtue of their common humanity. He wrote, "All men by nature are equal... in that equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man... being all equal and independent, no one ought to harm another in his life, health, liberty or possessions ..."

As to the role of government, Locke wrote, "Men being... by nature all free, equal and independent, no one can be put out of his estate and subjected to the political power of another without his own consent which is done by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living ... in a secure enjoyment of their properties ..."

This natural right was asserted by Jefferson first in his "Summary View of the Rights of British America," published in 1774, in which he wrote, "The God who gave us life gave us liberty at the same time; the hand of force may destroy, but cannot disjoin them." His first draft of the Declaration of Independence similarly declared, "We hold these truths to be sacred and undeniable; that all men are created equal and independent, that from that equal creation they derive rights inherent and unalienable, among which are the preservation of life, and liberty, and the pursuit of happiness."

*Individuals* asserted those natural rights in the form of a representative government that they controlled, and that same government also protected their natural rights from all the forces that in previous lands had dominated, enslaved, and taken advantage of them.
The Danger of People Having Full Natural Rights

Hamilton and Adams' Federalists, as we can read in *The Federalist Papers*, strongly objected to Jefferson and Madison's notion that a government should be entirely elected and controlled by its people, with minimal taxation and military powers.

They were worried that if there wasn't a strong federal government, with a perpetual army, taxation powers, and at least half the legislature (the Senate) made up of an elite appointed by professional politicians from the states, the newly born United States might be too weak to fend off external foes like the French and Spanish—who both had stakes in North America at that time—or to put down possible future internal rebellions.

They suggested that Jefferson and Madison were idealists and dreamers, trying to recreate a Utopian society in a dangerous world. Hamilton wrote about the risks of such idealism, responding to Madison, in *Federalist* No. 30, saying, "Reflections of this kind may have trifling weight with men [like you] who hope to see realized in America the halcyon scenes of the poetic or fabulous age; but to those [among us Federalists] who believe we are likely to experience a common portion of the vicissitudes and calamities which have fallen to the lot of other nations, they must appear entitled to serious attention. Such men [as those of us who would lead this nation] must behold the actual situation of their country with painful solicitude, and depreciate the evils which ambition or revenge might, with too much facility, inflict upon it."

Nonetheless, over the strong objections of the Federalists, James Madison pressed through Congress the Bill of Rights, which he had worked out in correspondence with Jefferson. Made up of the first 10 amendments to the Constitution, the Bill of Rights in its entirety was designed by Madison and Jefferson to prevent government from ever taking for itself the rights that they considered to be natural and God-given.

The Three Threats

Thomas Jefferson's vision of America was quite straightforward. In its simplest form, he saw a society where people were first and institutions were second. In his day, Jefferson saw three agencies that were threats to humans' natural rights. They were:

- Governments (particularly in the form of kingdoms and elite groups like the Federalists)
- Organized religions (he rewrote the New Testament to take out all the "miracles" so that in *The Jefferson Bible* Jesus became a proponent of God-given natural rights)
- Commercial monopolies and the "pseudo aristoi," or pseudo aristocracy (in the form of extremely wealthy individuals and overly powerful corporations)

Instead, he believed it was possible for people to live by self-government in a nation in which nobody controlled the people except the people themselves. He found evidence for this belief both in the cultures of Native Americans such as the Cherokee and the Iroquois Confederation, which he studied extensively; in the political experiments of the Greeks; and in histories that documented the lives of his own tribal ancestors in England and Wales.

Jefferson Considers Freedom Against Monopolies a Basic Right

Once the Revolutionary War was over, and the Constitution had been worked out and presented to the states for ratification, Jefferson turned his attention to what he and Madison felt was a terrible inadequacy in the new Constitution: It didn't explicitly stipulate the natural rights of the new nation's citizens, and didn't protect against the rise of new commercial monopolies like the East India Company.
On December 20, 1787, Jefferson wrote to James Madison about his concerns regarding the Constitution. He said bluntly that it was deficient in several areas. "I will now tell you what I do not like," he wrote. "First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations."

Such a bill protecting natural persons from out-of-control governments or commercial monopolies shouldn't just be limited to America, Jefferson believed. "Let me add," he summarized, "that a bill of rights is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inference."

In 1788, Jefferson wrote about his concerns to several people. In a letter to Mr. A. Donald, on February 7, he defined the items that should be in a bill of rights. "By a declaration of rights, I mean one which shall stipulate freedom of religion, freedom of the press, freedom of commerce against monopolies, trial by juries in all cases, no suspensions of the habeas corpus, no standing armies. These are fetters against doing evil, which no honest government should decline."

Jefferson kept pushing for a law, written into the Constitution as an amendment, which would prevent companies from growing so large that they could dominate entire industries or have the power to influence the people's government.

On February 12, 1788, he wrote to Mr. Dumas about his pleasure that the U.S. Constitution was about to be ratified, but also expressed his concerns about what was missing from the Constitution. He was pushing hard for his own state to reject the Constitution if it didn't protect people from the dangers he foresaw. "With respect to the new Government," he wrote, "nine or ten States will probably have accepted by the end of this month. The others may oppose it. Virginia, I think, will be of this number. Besides other objections of less moment, she [Virginia] will insist on annexing a bill of rights to the new Constitution, i.e. a bill wherein the Government shall declare that, 1. Religion shall be free; 2. Printing presses free; 3. Trials by jury preserved in all cases; 4. No monopolies in commerce; 5. No standing army. Upon receiving this bill of rights, she will probably depart from her other objections; and this bill is so much to the interest of all the States, that I presume they will offer it, and thus our Constitution be amended, and our Union closed by the end of the present year."

By midsummer of 1788, things were moving along and Jefferson was helping his close friend James Madison write the Bill of Rights. On the last day of July, he wrote to Madison, "I sincerely rejoice at the acceptance of our new constitution by nine States. It is a good canvass, on which some strokes only want retouching. What these are, I think are sufficiently manifested by the general voice from north to south, which calls for a bill of rights. It seems pretty generally understood, that this should go to juries, habeas corpus, standing armies, printing, religion, and monopolies."

The following year, on March 13, he wrote to Francis Hopkinson about continuing objection to monopolies, "You say that I have been dished up to you as an anti-federalist, and ask me if it be just. My opinion was never worthy enough of notice to merit citing; but since you ask it, I will tell it to you. I am not a federalist.... What I disapproved from the first moment also, was the want of a bill of rights, to guard liberty against the legislative as well as the executive branches of the government; that is to say, to secure freedom in religion, freedom of the press, freedom from monopolies, freedom from unlawful imprisonment, freedom from a permanent military, and a trial by jury, in all cases determinable by the laws of the land."

All of Jefferson's wishes, except two, would soon come true. But not all of his views were shared universally.
The Rise of an American Corporate Aristocracy

Years later, on October 28, 1813, Jefferson would write to John Adams about their earlier disagreements over whether a government should be run by the wealthy and powerful few (the pseudo-aristoi), or a group of the most wise and capable people (the "natural aristocracy"), elected from the larger class of all Americans, including working people.

"The artificial aristocracy is a mischievous ingredient in government," Jefferson wrote to Adams, "and provision should be made to prevent its ascendancy. On the question, what is the best provision, you and I differ; but we differ as rational friends, using the free exercise of our own reason, and mutually indulging its errors. You think it best to put the pseudo-aristoi into a separate chamber of legislation [the Senate], where they may be hindered from doing mischief by their coordinate branches, and where, also, they may be a protection to wealth against the agrarian and plundering enterprises of the majority of the people. I think that to give them power in order to prevent them from doing mischief, is arming them for it, and increasing instead of remedying the evil."

Adams and the Federalists were wary of the common person (who Adams referred to as "the rabble"), and many subscribed to the Calvinist notion that wealth was a sign of certification or blessing from above and a certain minimum level of morality. Since the Senate of the United States was elected by the state legislatures (not by the voters themselves, until 1913) and entirely made up of wealthy men, it was mostly on the Federalist side. Jefferson and the Democratic Republicans disagreed strongly with the notion of a Senate made up of the wealthy and powerful.

"Mischief may be done negatively as well as positively," Jefferson wrote to Adams in the next paragraph of that 1813 letter, still arguing for a directly elected Senate. "Of this, a cabal in the Senate of the United States has furnished many proofs. Nor do I believe them necessary to protect the wealthy; because enough of these will find their way into every branch of the legislation, to protect themselves. ... I think the best remedy is exactly that provided by all our constitutions, to leave to the citizens the free election and separation of the aristoi from the pseudo-aristoi, of the wheat from the chaff. In general they will elect the really good and wise. In some instances, wealth may corrupt, and birth blind them; but not in sufficient degree to endanger the society."

Jefferson's vision of a more egalitarian Senate—directly elected by the people instead of by state legislators—finally became law in 1913 with the passage of the Seventeenth Amendment, promoted by the Populist Movement and passed on a wave of public disgust with the corruption of the political process by giant corporations.

Almost all of his visions for a Bill of Rights—all except "freedom from monopolies in commerce" and his concern about a permanent army—were incorporated into the actual Bill of Rights, which James Madison shepherded through Congress and was ratified December 15, 1791.

But the Federalists fought hard to keep "freedom from monopolies" out of the Constitution. And they won. The result was a boom for very large businesses in America in the 19th and 20th centuries, which arguably brought our nation and much of the world many blessings.

But as we'll see in the way things have unfolded, some of those same principles have also given unexpected influence to the very monopolies Jefferson had argued must be constrained from the beginning. The result has sometimes been the same kind of problem the Tea Party rebels had risked their lives to fight: a situation in which the government protects one competitor against all others, and against the will of the people whose money is at stake—along with their freedom of choice. As the country progressed through the early 1800s, corporations were generally constrained to act within reasonable civic boundaries.
Chapter 5
The Early Role of Corporations in America

An effort is being made to build a railroad from Springfield to Alton. A corporate charter has been granted by the legislature, and books are now open for subscriptions to the stock. The chief reliance for taking the stock must be on the eastern capitalists; yet, as an inducement to them, we, here must do something. We must stake something of our own in the enterprise, to convince them that we believe it will succeed, and to place ourselves between them and subsequent unfavorable legislation, which, it is supposed, they very much dread.

-ILLINOIS CONGRESSMAN ABRAHAM LINCOLN, ADDRESSING THE LEADERS OF SANGAMON COUNTY, ILLINOIS, JUNE 30, 1847

Jane Anne Morris is a corporate anthropologist and writer in Madison, Ohio, and affiliated with POCLAD (the Program on Corporations, Law and Democracy), one of the leading organizations doing research and work in illuminating the story of corporate personhood.

She discovered that on the eve of his becoming Chief Justice of Wisconsin's Supreme Court, Edward G. Ryan said ominously in his 1873 address to the graduating class of the University of Wisconsin Law School, "[T]here is looming up a new and dark power... the enterprises of the country are aggregating vast corporate combinations of unexampled capital, boldly marching, not for economical conquests only, but for political power... The question will arise and arise in your day, though perhaps not fully in mine, which shall rule—wealth or man [sic]; which shall lead—money or intellect; who shall fill public stations—educated and patriotic freemen, or the feudal serfs of corporate capital."

In researching 19th-century laws regulating corporations, Morris found that in Wisconsin—as in most other states at that time:

- Corporations' licenses to do business were revocable by the state legislature if they exceeded or did not fulfill their chartered purpose(s).
- The state legislature could revoke a corporation's charter if it misbehaved.
- The act of incorporation did not relieve corporate management or stockholders/owners of responsibility or liability for corporate acts.
- As a matter of course, corporation officers, directors, or agents couldn't break the law and avoid punishment by claiming they were "just doing their job" when committing crimes, but instead could be held criminally liable for violating the law.
- State (not federal) courts heard cases where corporations or their agents were accused of breaking the law or harming the public.
- Directors of the corporation were required to come from among stockholders.
- Corporations had to have their headquarters and meetings in the state where their principal place of business was located.
- Corporation charters were granted for a specific period of time, like 20 or 30 years (instead of being granted "in perpetuity," as is now the practice).
- Corporations were prohibited from owning stock in other corporations in order to prevent them from extending their power inappropriately.
- Corporations' real estate holdings were limited to what was necessary to carry out their specific purpose(s).
- Corporations were prohibited from making any political contributions, direct or indirect.
- Corporations were prohibited from making charitable or civic donations outside of their specific purposes.
• State legislatures could set the rates that some monopoly corporations could charge for their products or services.
  • All corporation records and documents were open to the legislature or the state attorney general.

Similar laws existed in most other states. It is important to understand that tens of thousands of entrepreneurs did business in the early Colonies and continue to do so today without being incorporated—the proverbial butcher, baker, and candlestick maker. To do business in America or most of the world does not require a corporate structure—people can run partnerships, individual proprietorships, or simply manufacture and sell products or offer services without any business structure whatsoever other than keeping track of the money for the IRS.

It's only when a group of people get together and put capital (cash) at risk and want to seek from the government legal limits on their liability and to legally limit their possible losses, that a corporate form becomes necessary. In exchange for these limitations on liability, governments demand certain responsibilities from corporations. The oldest historic one was that corporations "operate in the public interest" or "to the public benefit." After all, if the people, through their elected representatives, are going to authorize a legal limitation of liability for a group of people engaged in the game of business, it's quite reasonable to ask that the game be played in a way that throws off some benefit to the government's citizens, or at least doesn't operate counter to the public welfare.

But the bigger they got, the less America's corporations (or their investors) seemed to like regulation, and the more they started to seek more flexibility. Railroads, in particular, were finding themselves increasingly subject to local and state taxes, regulations, and tariff and passenger fare limits, which were specifically designed to keep prices affordable for the people and to limit the profits of the railroads to what the people's governments considered fair for state-authorized monopolies.

So, starting in the 1870s, the railroads and their owners began directing massive legal attacks against the power of governments to regulate them.

**CORPORATIONS UNDER CONTROL**

From the 1500s until 1886, corporations were considered the artificial creations of their owners and the state legislatures that authorized them. Because they were artificial legal entities, created only and exclusively by the states and sometimes referred to in the law as artificial persons, they were subject to control by the people of the state in which they were incorporated, who asserted their will through representative government. In American Republican democracy, government's role is to serve the people and protect them from the predations of both foreign and domestic threats to their "life, liberty, and the pursuit of happiness." This has historically included control of corporate behavior.

Although until 1886 corporations operated in many of the same ways as today's corporations do, the local, state, and federal legislatures had what the owners of America's largest corporations considered a distressing tendency to limit their behaviors.

Pennsylvania corporate charters were required to carry revocation, clauses starting in 1784, and in 1815, Massachusetts Justice Joseph Story said explicitly that corporations existed only because they were authorized by state legislatures. In his ruling in the *Terrett v. Taylor* case, he said, "A private corporation created by the legislature may lose its franchises by a misuser or nonuser of them... This is the common law of the land, and is a tacit condition annexed to the creation of every such corporation."
The Supreme Court Takes Over

But the states, as Charles and Mary Beard write in *The Rise of American Civilization,* "had to reckon with the Federalist interpretation of the Constitution by John Marshall, who, as Chief Justice of the Supreme Court of the United States from 1801 to 1835, never failed to exalt the [pro-business] doctrines of Hamilton above the claims of the states."

Marshall, appointed to the Court by Federalist John Adams (who had appointed—for life—only Federalists to all federal judgeships), was what would today be called a judicial activist. As the Beards wrote, "By historic irony, he [Marshall] administered the oath of office to his bitterest enemy, Thomas Jefferson; and for a quarter of a century after the author of the Declaration of Independence retired to private life, the stern Chief Justice continued to announce old Federalist rulings from the Supreme Bench."

In 1803, during the second year of Jefferson's presidency, Marshall took on a power for himself and future Supreme Courts, which made President Jefferson apoplectic. In the *Marbury v. Madison* case, as the Beards relate it, "Marshall had been in his high post only two years when he laid down for the first time in the name of the entire Court the doctrine that the judges have the power to declare an act of Congress null and void when in their opinion it violates the Constitution. This power was not expressly conferred on the Court [by the Constitution]. Though many able men had held that the judicial branch of the government enjoyed it, the principle was not positively established until 1803 [by Marshall's ruling itself against James Madison in this case] . . ."

Jefferson, shocked, bluntly expressed his concern to his old friend Judge Spencer Roane, the son-in-law of Patrick Henry and a Justice of the Virginia Supreme Court. "If this opinion be sound," Jefferson wrote, "then indeed is our Constitution a complete *felo de se* [legally, a suicide]. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to mat one too, which is unelected by, and independent of the nation. . . ."

"The Constitution," Jefferson continued in full fury, "on this hypothesis, is a mere tiling of wax in the hands of the judiciary, which they may twist and shape into any form they please. It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the Constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the Constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal. . . ."

"A judiciary independent of a king or executive alone is a good thing; but independent of the will of the nation is a solecism [an error or blunder], at least in a republican government."

In his decision putting the Supreme Court above the elected officials (the legislature and president), Marshall was echoing Hamilton's Federalist mistrust of any form of government constrained solely by those elected by the people. Kings had faced challenges, the Federalists argued, and fought back because as kings they could force decisions without having to wait for a consensus by the people. This powerful federal judiciary, only partially answerable to the people, the Federalists believed, was essential to the survival of the nation.

As Hamilton wrote in *The Federalist Papers* (No. 23), in a heated argument with James Madison about whether there should be constraints in the constitution that would prevent the U.S. government from operating outside the will of its people, "These [constitutional] powers ought to exist without limitation, BECAUSE IT IS IMPOSSIBLE TO FORSEE OR DEFINE THE EXTENT AND VARIETY OF NATIONAL EXIGENCIES, OR THE CORRESPONDENT EXTENT
AND VARIETY OF THE MEANS WHICH MAY BE NECESSARY TO SATISFY THEM [capitals Hamilton's]. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed."

Madison, an ally of Jefferson, replied with equal heat in numerous places, perhaps most eloquently in *Federalist* No. 39, when he wrote: "It is ESSENTIAL [capitals Madison's] to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans, and claim for their government die honorable title of republic."

Jefferson further elaborated his arguments for three *independent* and *equal-in-power* branches of government as well in numerous writings during the early years as the Constitution was being formed.

But that was then and this was 1803: The deed was done by Marshall, and the Federalists had won. That said, there is also no doubt that Marshall, like Hamilton, believed he was doing the best thing for the nation that he had served as a soldier during the Revolutionary War. In the 1819 *McCullough v. Maryland* decision, for example, he referenced government deriving all its power from and "by the people" no fewer than 11 times in his majority opinion. It was just that his notion of who "the people" were was more in line with Hamilton's and Adams' than with Jefferson's and Madison's.

**Rulings and Laws On Revoking Corporate Charters**

In a sense, a corporate charter is like a driver's license: It is permission to operate in a particular way, granted by the government. (The comparison is imperfect in technical details, but this point doesn't depend on those details.) Like a driver's license, a charter can be revoked if the privilege is abused.

In 1819, Marshall used the power he had given himself and the Supreme Court to alter the states' power to regulate or dissolve corporations.

King George III had chartered Dartmouth College in 1769 as a private college, but one part of Jefferson's agenda was to make a college education available to any citizen regardless of their ability to pay. In keeping with Jefferson's Democratic Republican philosophy of free public education, the state of New Hampshire dissolved Dartmouth's corporate charter and rechartered it as a public state school. Dartmouth sued to retain their private corporate charter status, claiming that their corporate charter granted by King George before the Revolution was still valid, and the case went to the Supreme Court.

Chief Justice Marshall, in an opinion clearly reflective of Federalist thought and opposed to Jefferson's plans, ruled that because the original corporate charter of Dartmouth College didn't contain a clause that would allow for its own revocation, and the charter "was a contract between the state and the College, which under the federal Constitution no legislature could impair," the State of New Hampshire had no authority to revoke the college's charter.

Even at this, Marshall was explicit about the need for restrictions on corporations, including that they are not citizens. As corporate historian and law professor James Willard Hurst notes, "The Dartmouth College case put states on warning that regulation of their corporate creatures must be compatible with the contract clause of the federal Constitution. Concerned to respect state control of corporate activity, the Court took pains to deny that a corporation was a 'citizen' of the chartering state so that it might claim in other states the benefits of the Constitution's privileges and immunities clause."

Even with this qualification, the response from the states—feeling that the Marshall Court had usurped their power to control or dissolve corporations—was furious. Newspapers wrote
scathing editorials about the decision, citizens were outraged, and over the following years, numerous state legislators took action.

In response to the Dartmouth decision, Pennsylvania's legislature passed a law in 1825 that declared the legislature had the power to "revoke, alter or annul the charter" of corporations. New York state passed a similar law in 1828, including "Section 320" that said any acts by a corporation not specifically authorized in their charter were ultra vires (Latin for "beyond the power," it basically means "you can't do that because you lack the legal authority") and grounds for revocation of the corporation's charter. Michigan, Louisiana, and Delaware all passed laws in 1831 limiting the time of corporate charters.

In the following decade, Michigan, Delaware, Florida, and New York all passed laws that corporate charters could only be created or renewed by a two-thirds vote of the legislature. All together, during the 19th century 19 states passed laws in response to Marshall's ruling in the Dartmouth case, each specifying they had the authority to control corporations. Rhode Island's 1857 law is characteristic: "The charter or acts of association of every corporation hereafter created may be amendable or repealed at the will of the general assembly."

In 1855, the U. S. Supreme Court went along with the trend, ruling in the Dodge v. Woolsey case that the states have not "released their powers over the artificial bodies which originate under the legislation of their representatives." The Court added that, "combinations of classes in society... united by the bond of a corporate spirit. . . unquestionably desire limitations upon the sovereignty of the people. . . . But the framers of the Constitution were imbued with no desire to call into existence such combinations."

Early Presidents Wary of Corporations

The Founders of America knew that without business there would be little progress in the new nation they had helped birth. Yet on commerce, Madison and many of the Founders were of mixed minds. They had seen firsthand the abuses of large monopolistic trusts and corporations like the East India Company, yet they also knew that the future of America was based in part on people pursuing entrepreneurial, mercantile dreams. In a letter to Edmond Randolph on September 30, 1783, Madison wrote, "Wherever Commerce prevails there will be an inequality of wealth, and wherever [an inequality of wealth prevails] a simplicity of manners must decline."

On the other hand, given the widespread nature of trade in his day, Madison knew it foolish to try to restrain it, at least unless it got as big as the ill-fated Bank of the United States. For example, in a speech to Congress on April 9, 1789, Madison said, "I own myself the friend to a very free system of commerce, and hold it as a truth, that commercial shackles are generally unjust, oppressive and impolitic—it is also a truth, that if industry and labour are left to take their own course, they will generally be directed to those objects which are the most productive, and this in a more certain and direct manner than the wisdom of the most enlightened legislature could point out."

When commerce was taken over by large corporate enterprises, however, Madison knew exactly where he stood. In 1817, he wrote, "There is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ... corporations. The power of all corporations ought to be limited in this respect. The growing wealth acquired by them never fails to be a source of abuses."

And in a letter to James K. Paulding on March 10, 1817, Madison made absolutely explicit a lifetime of thought on the matter. "Incorporated Companies," he wrote, "with proper limitations and guards, may in particular cases, be useful, but they are at best a necessary evil only. Monopolies and perpetuities are objects of just abhorrence. The former are unjust to the existing, the latter usurpations on the rights of future generations. Is it not strange that the Law which will not permit an individual to bequeath his property to the descendants of his own loins
for more than a short and strictly defined term, should authorize an associated few, to entail perpetual and indefeasible appropriations ...

Because the Founders of America tended to agree with Thomas Hobbes that corporations had the potential to be "worms in the body politic," governments at all levels—municipal, county, state, and federal—had laws carefully circumscribing the behaviors of corporations.

After the American Revolution, it was a basic principle of democratic government to protect the people it represented from unrestrained corporate power. Thus, during the first few decades of the existence of the new United States of America, there were only a handful of corporations, most formed for international trade or banking.

Seeing in even these few corporations the possible reincarnation of an East India Company type of corporate plutocracy, in 1816 Thomas Jefferson wrote, "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."

Those "moneyed corporations" grew in power and influence through Jefferson's lifetime and after his death in 1826. As mentioned in chapter 4, the rise of the Second Bank of the United States caused considerable consternation. Legislators railed against it for decades, particularly when the bank started involving itself in politics, and tried to terminate its corporate charter, an effort that finally succeeded when the bank went under in 1841.

President Martin Van Buren, in his first annual message to Congress in December 1837, said, "I am more than ever convinced of the dangers to which the free and unbiased exercise of political opinion—the only sure foundation and safeguard of republican government—would be exposed by any further increase of the already overgrown influence of corporate authorities."

**Early Growth of the Railroads – And Their Legal Tactics**

During the middle of the 19th century—roughly from the late 1820s to the early 1870s—the first incarnations of our modern economy evolved out of a previously agrarian and local small business economy. Other than the Second Bank of the United States, which was out of business by 1841, the dominant industries in America were the plantations, largely staffed by slaves, and the textile mills of the northeast, largely staffed by indentured immigrants from Europe.

Cheap coal, the cheap steel it made possible, and the telegraph brought dramatic changes to the landscape of America between 1820 and 1850. During this time, the railroads grew from obscurity to dominate die corporate and political landscape of die nation. Just 26 years after the steam locomotive was invented in England, the first public railway in the world opened in England in 1823. Four years later, with subsidies from the city of Baltimore, the first railroad in America—the Baltimore & Ohio, or B&O Railroad—was incorporated. In 1830, the first scheduled passenger train began operation, using the first U. S.-built steam locomotive, "The Best Friend of Charleston." In 1833, there were only 380 miles of track laid in the United States, and that year President Andrew Jackson became the first sitting president to ride a railroad, creating a new mass-transport sensation.

By 1840, though, more than 2,700 miles of track were in use in the United States, serving seven states, and by 1850, the total had exploded to over 9,000 miles of track. By 1860, largely through government subsidies to the new rail companies, over 30,000 miles of track were in regular use in the United States, and the railroads were the largest and most powerful corporations the nation had ever seen. By 1890, over 180 million acres of taxpayer-owned land had been deeded to the owners of the nation's largest railroads by various federal, state, and county governments.
Abe Lincoln Reluctantly Joins the Railroads

As the railroads grew in size, they also grew in political power. And they hired some of the nation’s best lawyers. For example, in May 1853, the Illinois Central Railroad Company chose not to pay its property taxes to McLean County, Illinois, and sued the county in the Circuit Court to prevent collection. James F. Joy of Detroit, the head lawyer for the railroad, contacted a former Illinois state representative, now an attorney in private practice in the McLean County city of Bloomington, with an offer of employment.

But the young lawyer, who had already gained quite a reputation as an attorney and from his days in the legislature, felt that his personal loyalties in the case were with the county and not the railroad. So the attorney— young Abraham Lincoln—wrote a letter to T. R. Webber, the Champaign County Clerk of Court, asking for the job of defending the county against the railroad.

"An effort is about to be made to get the question of the right to so tax the [Railroad] Co. before the court and ultimately before the Supreme Court," Lincoln wrote, "and the [Railroad] Co. are offering to engage me for them. . . .

"I am . . . feeling that you have the first right to my services, if you choose to secure me a fee something near such as I can get from the other side."

Lincoln knew that the case would be big, the issues important, and the fee an attorney could earn from it would be a big help to his family. "The question in its magnitude to the [Railroad] Co. on the one hand and the counties in which the Co. has land on the other is the largest law question that can now be got up in the State," he wrote to the County's Clerk, "and therefore in justice to myself, I cannot afford, if I can help it, to miss a fee altogether."

The county didn't answer his letter, and so Lincoln wrote to the railroad's attorney, Mason Brayman, saying, "Neither the County of McLean nor anyone on its behalf has yet made any engagement with me in relation to its suit with the Illinois Central Railroad on the subject of taxation, so I am now free to make an engagement for the [railroad], and if you think of it you may 'count me in.'"

Brayman immediately sent Lincoln a check for $200 as a retainer, and Lincoln went to work for the railroad along with James Joy.

Lincoln’s Case Foreshadows a Corporate Claim of Personhood

The case sailed through the Circuit Court and immediately went to the Illinois Supreme Court. In the May term of the court in 1854, Brayman and Lincoln represented the Illinois Central Railroad.

A brief written by Lincoln noted that Section Two, Article Nine of the Illinois State Constitution of 1847 required "uniform taxation" of all "persons using and exercising franchises and privileges." Arguing for the railroad, Lincoln claimed that they were a "person," and thus the nonuniform taxation of different railroad properties at different tax rates was unfair and unconstitutional under the Illinois State Constitution.

Lincoln both lost and won the case. The Illinois Supreme Court ruled unanimously that, on the one hand, the state legislature could "make exceptions from the rule of uniformity" with regard to corporations it had chartered, thus losing him the corporate personhood argument. On the other hand, however, the Supreme Court ruled that the railroad's charter—which functioned also as a sort of contract between it and the state, since early railroad charters were more similar to modern-day state-subsidized public utilities than traditional private corporations—allowed for direct taxation of the railroad by the state based on its revenues, and therefore the county didn't have the authority to tax the railroad and the railroad didn't have to pay the tax bill.
Lincoln Sues the Railroad

Lincoln sent the Illinois Central Railroad—whose directors all lived in New York and thus had its headquarters there—a bill for his services in the case: He asked for $5,000. James F. Joy refused to pay him that much, suggesting that Lincoln was asking for more than he was worth. (Joy’s fee had been only $1200 for his work on the case.) “The simple truth is that the whole trouble was with Mr. James F. Joy... whom Mr. Lincoln afterward despised,” a company memo later noted.

To resolve the issue, the railroad’s president, William H. Osborne, suggested that Lincoln should simply sue the railroad and let a judge decide how much he should be paid. Lincoln preferred not to sue his client, and almost 3 years later, in March 1857, he traveled by railroad to New York, but was unsuccessful in prying his fee out of the railroad. With no other option, Lincoln filed a lawsuit against the railroad in McLean County Circuit Court, asking for his $5,000 legal fee.

The case opened on Thursday, June 18, 1857, then was postponed to the following Tuesday when it was well-attended, as Lincoln was a rising star and there was a huge curiosity factor. In the courtroom that day was a young law student, Adlai E. Stevenson, who, when he was later Vice President of the United States (1893 to 1897) would recall that, "It appeared to me in the nature of an amicable suit." In a process that took only a few minutes, the railroad agreed to pay Lincoln's $5,000 fee except that he had to reduce it by $200 as they had already advanced him that amount as a retainer. Lincoln admitted that he had forgotten about the $200 and agreed to the terms.

The Great Corporate Crash

Lincoln left the courtroom having won the judgment, but without any money. The railroad procrastinated in paying him, and on August 1, 1857 Lincoln had the sheriff issue a writ. On August 12, 1857, he was paid his $4,800 in a check, which he deposited and then converted to cash on August 31, 1857.

It was a fortunate date for Lincoln to get his cash, because just over a month later, in the Great Panic of October 1857, both the bank on which the check was drawn and the railroad itself were "forced to suspend payment."

Of the 66 banks in Illinois, the Central Illinois Gazette (Champaign) reported that by the following April, "27 have gone into liquidation" in a recession/depression that the Chicago Democratic Press declared on September 30, 1857, "The financial pressure now prevailing in the country has no parallel in our business history."

The Railroad’s President and His Generals

Attesting to the power of the railroads as an employer is that Lincoln, throughout the entire time he was negotiating with and suing the railroad, continued to work as their attorney. One of the railroad’s attorneys noted, "We had a contract that Lincoln was to take no case against us and that I could call on him to help me when he was there; and when my clients [the railroads] wanted help I always got Lincoln."

Lincoln enjoyed, as did all of the railroad’s lawyers, a free pass for unlimited travel, which no doubt helped when he was floating his candidacy for President—he served as a railroad lawyer up until the day of his nomination for President.

On March 19, 1860, just 2 weeks before the opening of the Republican Convention in Chicago where he was nominated as a candidate for President (on May 18), Lincoln defended the railroads in court in that same city and won the case, helping cement his credentials as a candidate for the Republicans.
Perhaps most interesting, and demonstrative of how tightly knit the railroads of the day were into the present and future leaders of the nation, is that while working for the railroad in Illinois, Lincoln met and befriended three men: George B. McClellan was, when Lincoln was first suing the railroad, the Vice President and Chief Engineer of the Illinois Central Railroad. Ambrose E. Burnside was Treasurer of the railroad. And a veteran of the Mexican war, Ulysses Grant, "was without success trying to win a livelihood at Galena, Illinois" and had apparently approached the railroad for employment.

Lincoln's biographer, Albert J. Beveridge, noted, "Within five years Lincoln was to make each of these [three] men a general in the Union army."

As the History of the Illinois Central Railroad notes, "Stephen A. Douglas, Abraham Lincoln, George B. McClellan, Ulysses S. Grant and Edward Harriman all played a major or minor role in the [railroad] line's development."

The Emergency of the Civil War

The Civil War was a huge boom for the largest corporations in America because government spending exploded for just about every conceivable commodity that was needed by the troops. By the time the war was over, several corporations that supplied war materials and transportation, particularly the railroads, were operating in multi-state and monopolistic ways that were raising alarm bells among citizens and in legislatures across the nation.

On July 1, 1862, President Lincoln signed into law under "military necessity" the Pacific Railway Bill, which granted to the Union Pacific and the Central Pacific Railroads ten sections of land along a right-of-way from Iowa to San Francisco. The bill also included government loans for building rail lines of $16,000 per mile for level ground, $32,000 per mile for railways crossing deserts, and $48,000 per mile for rails crossing mountains. The national railroad-building campaign became a frenzied activity, sloshing with money and manpower.

But the money was everywhere, and it spawned rampant corruption. As Attorney General Edward Bates wrote in his diary on March 9, 1863, "The demoralizing effect of this civil war is plainly visible in every department of life. The abuse of official powers and the thirst for dishonest gain are now so common that they cease to shock."

In his classic biography of Lincoln, Carl Sandburg wrote, "A procession of mouthpieces and fixers twined in and out of Lincoln's office from week to week..."

Sandburg notes that General James Grant Wilson wrote to Lincoln, "every contractor has to be watched" because "some of the most competent and most energetic contractors were the most dishonest, [and] could not be content with a fair profit." He quotes Blackwood Magazine of England as noting, "A great war always creates more scoundrels than it kills."

Between just June 1863 and June 1864, the War Department paid out more than $250,000,000. In the last year of the war, on November 21, 1864, Lincoln looked back on his actions and the growing power of the now-unleashed and enriched corporations, and wrote the following thoughtful letter to his friend Colonel William F. Elkins.

"We may congratulate ourselves that this cruel war is nearing its end. It has cost a vast amount of treasure and blood. The best blood of the flower of American youth has been freely offered upon our country's altar that the nation might live. It has indeed been a trying hour for the Republic; but I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country.

"As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety than ever before, even in the midst of war. God grant that my suspicions may prove groundless."
The Railroads Rise to Power

During the Civil War, the railroads rose to become the most powerful of the American corporations. Lincoln mentioned both their "great enterprise" and the conflicts that they were causing all over the nation by defying state and federal attempts to regulate them, and charging whatever prices they wanted for transportation of goods and people. Because most of the railroads were essentially monopolies (except where they met in large cities), as "the only game in town" they could charge whatever prices they wanted for transportation of goods and people.

The resulting expenses caused by this domination of the transportation industry by a few very large railroad corporations were increasingly passed along to consumers, government, and smaller companies who received their workmen or materials by rail. The unrestrained price increases that drove their profits were also driving a general inflation, even as they helped inter-connect and build the nation.

"The great enterprise of connecting the Atlantic with the Pacific states by railways and telegraph lines has been entered upon with a vigor that gives assurance of success," Lincoln noted in his fourth annual message to the nation on December 6, 1864, "notwithstanding the embarrassments arising from the prevailing high prices of materials and labor."

At the same time, under the growing influence of railroad money and power, courts and legislatures were making business more risk-free for the railroad corporations. In 1864, Congress passed the Contract Labor Law, which allowed employers to exchange a year's low-cost or free labor for passage and immigration from a foreign nation to the United States. The main effect—and one of the main goals—of this legislation was to break up strikes and lower labor costs by increasing the labor pool and thus introducing greater competition among humans for jobs.

While the courts ruled that if a corporation broke a contract with another corporation, the aggrieved company would still have to pay for what it had already received, they also ruled that if a human broke a Contract Labor Law contract with a railroad corporation, that corporation wasn't obligated to pay the worker anything. As historian Howard Zinn points out, "The pretense of the law was that a worker and a railroad made a contract with equal bargaining power," the same as if two powerful corporations had entered into a contract with each other with equal legal resources. Thus, the railroads always won.

The first transcontinental railroad line, proposed by Lincoln during his campaign and started during his presidency, was completed on May 10, 1869. By 1871, over 45,000 miles of railroad track crisscrossed the nation. John D. Rockefeller was 11 years away from forming the Standard Oil Trust, and Andrew Carnegie's steel monopoly and J. P. Morgan's banking monopoly were rising in power and influence but not yet dominant forces in American business. At that time, railroads were king, the first truly huge American corporations, as the power to transport people and goods and crops from place to place and state to state energized the American economy and drove the westward expansion of the new nation.

The growth of the railroads, while supported in part by government grants of millions of acres of free land and millions of dollars of subsidies and tax abatements, also drew expressions of concern from the president and state legislatures. Transportation is a fundamental need, and people quickly became dependent on the railroads for fast long-distance transport, so the public became prey for predatory pricing practices.

On December 4, 1882, President Chester Arthur said in his annual address to Congress and the nation, "One of the incidents of the marvelous extension of the railway system of the country has been the adoption of such measures by the corporations which own or control the [rail]roads as have tended to impair the advantages of healthful competition and to make hurtful discriminations in the adjustment of freightage [prices]. These inequalities have been corrected in several of the States by appropriate legislation, the effect of which is necessarily restricted to the limits of their own territory."
As President Arthur noted, the states considered the railroad's ability to charge whatever they pleased as unfair, and by the mid-1880s, virtually all states had passed laws setting maximum fees and prices for fares (for people) and tariffs (for freight), or otherwise regulating the railroads. There was nationwide sentiment in favor of continuing to regulate the behavior of the country's largest and most aggressive corporations, particularly the railroads.

**How Freeing the Slaves Became the Railroad's Secret Weapon**

On July 9, 1868, just after the Civil War, three-quarters of the states ratified the Fourteenth Amendment to the U. S. Constitution as part of a set of laws to end slavery. The intent of Congress and the states was clear: to provide full constitutional protections and due process of law to the now-emancipated former slaves of the United States. The Fourteenth Amendment's first article says, in its entirety, "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."

Along with the Thirteenth Amendment ("Neither slavery nor involuntary servitude . . . shall exist within the United States") and the Fifteenth Amendment ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude"), the Fourteenth Amendment guaranteed that freed slaves would have full access to legal due process within the United States.

Acting on behalf of the railroad barons, attorneys for the railroads repeatedly filed suits against local and state governments that had passed laws regulating railroad corporations. The main tool the railroad's lawyers tried to use was the fact that corporations had historically been referred to under law not as corporations but as artificial persons. Based on this, they argued, corporations should be considered persons under the free-the-slaves Fourteenth Amendment and enjoy the protections of the Constitution just like living, breathing, human persons.

Using this argument for their base, the railroads repeatedly sued various states, counties, and towns claiming that they shouldn't have to pay local taxes because different railroad properties were taxed in different ways in different places and this constituted the creation of different "classes of persons" and was thus illegal discrimination. For almost 20 years, these arguments did not succeed.

In 1873, one of the first Supreme Court rulings on the Fourteenth Amendment, which had been passed only 5 years earlier, involved not slaves but the railroads. Writing in the lead opinion, Justice Samuel F. Miller minced no words in chastising corporations for trying to claim the rights of human beings.

The Fourteenth Amendment's "one pervading purpose," he wrote in the majority opinion, "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."

The railroads, however, had a lot of money to pay for lawyers, and railroad lawyer S. W. Sanderson had the reputation of a pit bull. Undeterred, the railroads again and again argued their corporations-are-persons position all the way to the Supreme Court. The peak year for their legal assault was 1877, with four different cases reaching the Supreme Court in which the railroads argued that governments could not regulate their fees or activities or tax them in differing ways because governments can't interfere to such an extent in the lives of "persons" and because different laws and taxes in different states and counties represented illegal discrimination against the persons of the railroads under the Fourteenth Amendment.
By then, the Supreme Court was under the supervision of Chief Justice Morris Remick Waite, himself a former railroad attorney. Associate Justice Stephen Field, who was so openly on the side of the railroads in case after case that he annoyed his colleagues, also heavily influenced the Court. In each of the previous four cases, the Court ruled that the Fourteenth Amendment was not intended to regulate interstate commerce and therefore not applicable. But in none of those cases did Waite or any other justice muster a majority opinion on the issue of whether or not railroad corporations were persons under the Constitution, and so Miller's "one pervading purpose" of the Fourteenth Amendment as being to free slaves prevailed.

Having lost four cases in one year took a bit of the wind out of the sails of the railroads, and there followed a few years of relative calm. The railroads continued to assert that they were persons, but states and localities continued to call them artificial persons and pass laws regulating their activities.

Throughout the 1870s and 1880s, the issue of corporate personhood was frequently debated in newspapers and political speeches, with a handful of the nation's largest corporations arguing "for" and most of the voters, newspaper editorialists, and politicians arguing "against." Across America, politicians were elected repeatedly on platforms that included the regulation of corporations, particularly the railroads. And yet the legal fight continued.

The Railroads Claim There Was a "Secret Journal"

In 1882, the railroad's attorneys floated the claim in an 1882 Supreme Court pleading that when the Fourteenth Amendment was drafted, "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.'"

It was a complete fabrication and they lost the 1882 case: Nobody took the "secret journal theory" seriously except Justice Field, who had ruled in the railroad's favor in the Ninth Circuit Court, where he was a judge at the same time he was on the Supreme Court, and which brought the case before the Supreme Court.

In future cases, the railroad attorneys were unable to produce or even prove legislative reference to the secret journal of the congressional committee.

Years later, Supreme Court Justice Hugo Black wrote, in a dissenting opinion in the Connecticut General Life Insurance Company v. Johnson case, "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, 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.'"

"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, [ruled] 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 1882 case, however, would not be the last time attorneys for the railroads would try to use this fabricated story in their attempts to change the meaning of the Constitution.

There's an important lesson here about the relative ability of different parties to use the legal system for their protection, or to gain advantage. A human individual might try to advance a ludicrous claim such as "There was a secret journal" without the slightest evidence. Indeed, from time to time we hear of defendants trying such things. But it's highly unlikely that an actual person would have the ability to carry claims to the Supreme Court year after year after year, even when they have so little to go on.

This is directly relevant to the issue of a level playing field: When one party has dramatically more power, property, and wealth than another, it makes no sense to assert that both require equal protection.

Indeed, one aspect of the concentration of wealth that worried Jefferson and most American legislatures in those decades was that with enough wealth, a corporation can keep trying in the courts for centuries (literally centuries, because they don't die), no matter how much it costs, until they get what they want.

And ultimately, that's what happened.
Chapter 6
The Deciding Moment

The first thing to understand is the difference between the natural person and the fictitious person called a corporation. They differ in the purpose for which they are created, in the strength which they possess, and in the restraints under which they act.

Man is the handiwork of God and was placed upon earth to carry out a Divine purpose; the corporation is the handiwork of man and created to carry out a money-making policy.

There is comparatively little difference in the strength of men; a corporation may be one hundred, one thousand, or even one million times stronger than the average man. Man acts under the restraints of conscience, and is influenced also by a belief in a future life. A corporation has no soul and cares nothing about the hereafter....

-WILLIAM JENNINGS BRYAN, IN HIS ADDRESS TO THE OHIO 1912 CONSTITUTIONAL CONVENTION

Part of the American Revolution was about to be lost a century after it had been fought. At the time, probably only a very few of the people involved realized that what they were about to witness could be a counterrevolution that would change life in the United States and ultimately, the world, over the course of the following century.

In 1886, the Supreme Court met in the U. S. Capitol building, in what is now called the Old Senate Chamber. It was May, and while the northeastern states were slowly recovering from the most devastating ice storm of the century just 3 months earlier, Washington, D. C., was warm and in bloom.

In the Supreme Court's chamber, a gilt eagle stretched its 6-foot wingspan over his head as United States Chief Justice Morrison Remick Waite glared down at the attorneys for the Southern Pacific Railroad and the county of Santa Clara, California. Waite was about to pronounce judgment in a case that had been argued over a year earlier, at the end of January 1885.

The Chief Justice had a square head with a wide slash of a mouth over a broomlike shock of bristly graying beard that shot out in every direction. A graduate of Yale University and formerly a lawyer out of Toledo, Ohio, Waite had specialized in defending railroads and large corporations. In 1846, Waite had run as a Whig for Congress from Ohio but lost before being elected as a Republican state representative in 1849. After serving a single term, he had gone back to litigation on behalf of the biggest and wealthiest clients he could find, this time joining the Geneva Arbitration case suing the British government for helping to outfit the Confederate Army with the warship Alabama. He and his delegation won an astounding $15.5 million for the United States in 1871, bringing him national attention in what was often referred to as the Alabama Claims case.

In 1874, when Supreme Court Chief Justice Salmon P. Chase died, President Ulysses S. Grant had real trouble selecting a replacement, in part because his administration was embroiled in a railroad bribery scandal. His first two choices withdrew; his third was so patently political it was certain to be rejected by the Senate; three others similarly failed to pass muster. On his seventh try, he nominated attorney Waite.

Waite had never before been a judge in any court, but he passed Senate confirmation, instantly becoming the most powerful judge in the most powerful court in the land. It was a position and power he relished and promoted, even turning down the 1876 Republican
nomination for President to stay on the Court and to serve as a member of the Yale [University] Corporation.

Standing before Waite and the other justices of the Supreme Court that spring day were three attorneys each for the railroad and the county.

The Chief Legal Advisor for the Southern Pacific Railroad was again S. W. Sanderson, a former judge—a huge, aristocratic bear of a man, over 6 feet tall, with neatly combed gray hair and an elegantly trimmed white goatee. For more than 2 decades, Sanderson had made himself a rich man litigating for the nation's largest railroads—artist Thomas Hill included a portentous and dignified Sanderson in his famous painting *The Last Spike* about the 1869 meeting of the rail lines of the Union Pacific and Central Pacific Railroads at Promontory Summit, Utah.

The lead lawyer for Santa Clara County, California, was Delphin M. Delmas, a Democrat who later went into politics and by 1904 was known as the Silver-Tongued Orator of the West when he was elected a delegate to the Democratic National Convention from California. While Waite and Sanderson had spent their lives serving the richest men in America, Delmas had always worked on behalf of local California governments and, later, as a criminal defense attorney. For example, he passionately and single-handedly argued before the California legislature for a law to protect the remaining redwood forests. (See chapter 2.)

Fiercely defensive about the "rights of natural persons," Delmas was a fastidious, unimposing man, known to wear "a frock coat, gray-striped trousers, a wing collar and an Ascot tie," whose "voice thrummed with emotion" and was nationally known as the master dramatist of America's courtrooms. He had a substantial nose and a broad forehead only slightly covered in its center with a wispy bit of thinning hair. In the courtroom he was a brilliant dramatist, as the nation would learn in 1908 when he successfully defended Harry K. Thaw for murder in what was the most sensational case of the first half of the century, later made into the 1955 movie *The Girl in the Red Velvet Swing*, starring Ray Milland and Joan Collins. (Delmas was played by Luther Adler.)

The case about to be decided in the Old Senate Chamber before Justice Waite's Supreme Court was about the way Santa Clara County had been taxing land and rights-of-way of the Southern Pacific Railroad. Claiming the taxation was improper, the railroad had refused for 6 years to pay taxes levied by Santa Clara County, and the case had ended up before the Supreme Court, with Delmas and Sanderson making the main arguments before the Court.

Although the case on its face was a simple tax case, having nothing to do with due process or human rights or corporate personhood, the attorneys for the railroad nonetheless used much of their argument time to press the issue that the railroad was a person and should be entitled to human rights under the Fourteenth Amendment.

**The Mystery of 1886 and Chief Justice Waite**

In the decade leading up to this May day in 1886, the railroads had lost every Supreme Court case that they had brought seeking Fourteenth Amendment rights. I've searched dozens of histories of the time, representing a wide variety of viewpoints and opinions, but only two have made a serious attempt to answer the question of what happened that fateful day—and their theories clash.

No laws were passed by Congress granting that corporations should be treated the same under the Constitution as living, breathing human beings, and none have been passed since then. It was not a concept drawn from older English law. No court decisions, state or federal, held that corporations were persons instead of artificial persons. The Supreme Court did not rule, in this case or any case, on the issue of corporate personhood.

In fact, to this day there has been *no* Supreme Court ruling that could explain why a corporation—with its ability to continue operating forever—a legal agreement that can't be put in jail and doesn't need fresh water to drink or clean air to breathe—should be granted the same
constitutional rights our Founders explicitly fought for, died for, and granted to the very mortal human beings who are citizens of the United States to protect them against the perils of imprisonment and suppression they had experienced under a despot king.

But something happened in 1886, even though nobody to this day knows exactly what or why.

That year, Sanderson decided to again defy a government agency that was trying to regulate his railroad's activity. This time he went after Santa Clara County, California. His claim, in part, was that because a railroad was a person under the Constitution, local governments couldn't discriminate against it by having different laws and taxes in different places. In 1885, the case came before the Supreme Court.

In arguments before the court in January 1885, Sanderson asserted that corporate persons should be treated the same as natural (or human) persons. He said, "I believe that the clause [of the Fourteenth Amendment] in relation to equal protection means the same thing as the plain and simple yet sublime words found in our Declaration of Independence, 'all men are created equal.' Not equal in physical or mental power, not equal in fortune or social position, but equal before the law."

Sanderson's fellow lawyer for the railroads, George F. Edmunds, added his opinion that the Fourteenth Amendment leveled the field between artificial persons (corporations) and natural persons (humans) by a "broad and catholic provision for universal security, resting upon citizenship as it regarded political rights, and resting upon humanity as it regarded private rights."

But that wasn't actually what the case was about—that was just a minor point. The railroad was being sued by the county for back taxes. The railroad claimed six different defenses. The specifics are not important because the central concern is whether the Court ruled on the Fourteenth Amendment issue. As will be shown below, the Supreme Court's decision clearly says it did not. But to put the railroad's complaint in perspective, consider this:

- On property with a $30 million mortgage, the railroad was refusing to pay taxes of about $30,000. (That's like having a $10,000 car and refusing to pay a $10 tax on it... and taking the case to the Supreme Court.)
- One of the railroad's defenses was that when the state assessed the value of the railroad's property, it accidentally included the value of the fences along the right-of-way. The county, not the state, should have assessed the fences. So the railroad withheld all its taxes.

Yes, this is an exceedingly picayune distinction. All the tax was still due to Santa Clara County; the railroad didn't dispute that. But they said that the wrong assessor assessed the fences—a tiny fraction of the whole amount—so they refused to pay any of the tax, and they fought it all the way to the U. S. Supreme Court.

And as it happens, the Supreme Court of the United States agreed: "... the entire assessment is a nullity, upon the ground that the state board of equalization included . . . property [the fences] which it was without jurisdiction to assess for taxation ..."

The Court rejected the county's appeal, and that was the end of it. Except for one thing. One of the railroad's six defenses involved the Fourteenth Amendment. As it happens, since the case was decided based on the fence issue, the railroad didn't need those extra defenses, and none of them were ever decided by the court. But one of them—related to the Fourteenth Amendment—still crept into the written record, even though the Court specifically did not rule on it.

Here's how the matter unfolded. First, the railroad's defense.
The Treatment That the Railroad Claimed Was Unfair

In the Fourteenth Amendment part of their defense, the railroad said:

"That the provisions of the constitution and laws of California . . . are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads [that are only] operated in one county, and of other corporations, and of natural persons, for the value of the mortgages . . ." (Italics added.)

The italic portions say, in essence, "The state is taxing us railroads on the whole value of our property, instead of deducting our mortgage the way people do. That's not fair. Nobody else gets taxed that way."

The implication, of course, is that the state has no right to decide that corporations get different tax rates than humans. And the railroad was using the former slaves’ equal protection clause (the Fourteenth Amendment) as its shield.

The Legal Difference Between Artificial and Natural Persons

In the Supreme Court, cases are typically decided a year after arguments are presented, allowing the justices time to research and prepare their written decisions. So it happened that on January 26, 1885 (a year before the 1886 decision was handed down), Delphin M. Delmas, the attorney for Santa Clara County, made his case before the Supreme Court in exquisitely persuasive language:

"The defendant claims [that the state’s taxation policy] ... violates that portion of the Fourteenth Amendment which provides that no state shall deny to any person within its jurisdiction the equal protection of the laws.... In defending the provisions of our Constitution, permit me, in the first place, to reply to this attack made upon it, which, if tenable, would place the organic law of California in a position ridiculous to the extreme. . . . If this be so, it is safe to say that there is hardly a State in this Union whose revenue system is not in danger of overthrow. . . .

"The shield behind which [the Southern Pacific Railroad] attacks the Constitution and laws of California is the Fourteenth Amendment. It argues that the amendment guarantees to every person within the jurisdiction of the State the equal protection of the laws; that a corporation is a person; that, therefore, it must receive the same protection as that accorded to all other persons in like circumstances. ...

"To my mind, the fallacy, if I may be permitted so to term it, of the argument lies in the assumption that corporations are entitled to be governed by the laws that are applicable to natural persons. That, it is said, results from the fact that corporations are [artificial] persons, and that the last clause of the Fourteenth Amendment refers to all persons without distinction.

"The defendant has been at pains to show that corporations are persons, and that being such they are entitled to the protection of the Fourteenth Amendment. . . . The question is, Does that amendment place corporations on a footing of equality with individuals?

"Blackstone says, 'Persons are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.'

"This definition suggests at once that it would seem unnecessary to dwell upon, that though a corporation is a person, it is not the same kind of person as a human being, and need not of necessity—nay, in the very nature of things, cannot—enjoy all the rights of such or be governed by the same laws. When the law says, 'Any person being of sound mind and of the age of discretion may make a will,' or 'any person having arrived at the age of majority may marry,' I
It would be inconceivable to carry out the provisions of the Fourteenth Amendment if those provisions did not include equality for corporations. The advocate of equality of protection would have hardly argued that corporations must enjoy the right of testamentary disposition or of contracting matrimony.

"The equality between persons spoken of in the Fourteenth Amendment obviously means equality between persons of the same nature or class, and not equality between persons whose very natures are absolutely dissimilar—equality between human beings, if the rights of natural persons are involved; equality between corporations of the same class, if the rights of artificial persons are involved. The whole history of the Fourteenth Amendment demonstrates beyond dispute that its whole scope and object was to establish equality between men—an attainable result—and not to establish equality between natural and artificial beings—an impossible result.

"The evolution of the Fourteenth Amendment began with the first Civil Rights Bill, which provided that—

"*All persons born in the United States. . . are hereby declared to be citizens of the United States and such citizens of every race and color. . . shall have the same right in every state and territory in the United States to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sue, hold, and enjoy real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by WHITE citizens.* [capitalized from Delmas' original text]

"That this law was intended to establish equality between men in their individual capacity, and had no reference to equality between men and corporations, is too plain for argument. The law took the rights of a white citizen as the standard of measurement, and simply commanded that the rights of all other citizens, whatever their race or color, should be equal to his. . . ."

At this point, Delmas cut right to the heart of the issue. Sanderson had before made his claim of the "secret committee" of Congress that helped write the Fourteenth Amendment and meant for it to equalize corporate persons and human persons. Delmas, if his performance before the Supreme Court was consistent with his later well-documented performances in criminal courtrooms, would have been trembling in righteous indignation as he said:

"Could Congress have by any possibility meant to confer upon artificial persons the same rights in the respects enumerated as were enjoyed by white citizens? Could it, for instance, have meant that a corporation should have the same right to 'give evidence' as a white citizen? And as to contracts, may not the state, which creates corporations, impose certain limitations upon their right or power to make contracts? . . . Under this leveling statute was it intended to abolish the right of a state to impose terms and limits upon its own creatures? . . .

"It is certain that this law has never been so understood or interpreted by any State. And if it is now so to be interpreted, what, I ask, is to become of the vast mass of legislation in all the States by which taxes, licenses, and exactions are demanded from corporations where none whatever is demanded from white citizens? . . .

"As of the broad meaning and generous scope of the Fourteenth Amendment, I yield my fullest assent. Standing in this presence, I would not attempt to dwarf the proportions of that historic provision by seeking to restrict its beneficent operation to a particular class or race. No. The law is as broad as humanity itself.

"Wherever man is found within the confines of this Union, whatever his race, religion, or color, be he Caucasian, African, or Mongolian, be he Christian, infidel, or idolater, be he white, black, or copper-colored, he may take shelter under this great law as under a shield against individual oppression in any form, individual injustice in any shape. It is a protection to all men because they are men, members of the same great family, children of the same omnipotent Creator.

"In its comprehensive words I find written by the hand of a nation of sixty millions in the firmament of imperishable law the sentiment uttered more than a hundred years ago by the philosopher of Geneva, and re-echoed in this country by the authors of the Declaration of the Thirteen Colonies: *Proclaim to the world the equality of man.*
"And realizing the dream of the poet, the philosopher, and the philanthropist, it may be that this great statute is destined to usher in the dawn of that era when national antipathies and animosities shall be appeased, national boundaries and barriers obliterated, and, under a system of universal justice, man shall be allowed to claim from man, in all climes and in all countries, equal protection, equal security, and equal rights.

"What, then, must a State of this Union do in order to bear its share in carrying out the behests of this great commandment, that all men shall be equal—shall receive the equal protection of the laws? The State must see to it that no man, no class, no order of men are granted privileges, immunities, distinctions that are denied upon the same terms to others; that no rank or superiority is accessible to one which is not upon equal conditions within the reach of all; that no badge of invidious discrimination or humiliating inferiority is affixed to any, the humblest member of the commonwealth.

"The State must see to it that the avenues leading to happiness are left equally open to all; that whatever pursuit is lawful for one is lawful equally for all; that whatever hopes aspirations, ambitions are licit for the most exalted shall be equally licit for the most humble; that into whatever paths leading to profit, place, or honor one man may venture to tread, all may upon an equal footing venture.

"To attain and accomplish all these ends in all the states is, I conceive, in some degree, the object of the Fourteenth Amendment. Its mission was to raise the humble, the down-trodden, and the oppressed to the level of the most exalted upon the broad plain of humanity—to make man the equal of man; but not to make the creature of the State—the bodiless, soulless, and mystic creature called a corporation—the equal of the creature of God. . . .

"Therefore, I venture to repeat that the Fourteenth Amendment does not command equality between human beings and corporations; that the state need not subject corporations to the same laws which govern natural persons; that it may, without infringing the rule of equality, confer upon corporations rights, privileges, and immunities which are not enjoyed by natural persons; that it may, for the same reasons, impose burdens upon a corporation, in the shape of taxation or otherwise, which are not imposed upon natural persons...

"I have now done. I am conscious of having occupied no inconsiderable portion of the time allotted by the court for the argument—not longer, I hope, however, than the importance of the questions at issue warrants. In saying this I am not unmindful of the propensity of counsel to magnify their causes. Self-complacency is ever ready to whisper exaggerated notions of the magnitude of our undertakings. Yet I cannot but think that the controversy now debated before your Honors is one of no ordinary importance. It is important to the people of California, not only on account of the very large amount [of tax money] at stake, but more, for that it involves the validity of their laws and Constitution. It is important to the many States. . . . menaced by the same attack. It is important to every State of this Union whose sovereign attribute of taxation is here challenged."

A year and 5 months passed while the Supreme Court debated the issues in private. And then came the afternoon of May 10, 1886, the fateful moment for the fateful words of the Supreme Court, upon which hung much of the future of the United States and, later, much of the world.

Chief Justice Waite Rewrites the Constitution (Or Does He?)

According to the record left to us, here's what seems to have happened. For reasons that were never recorded, moments before the Supreme Court was to render its decision in the now-infamous Santa Clara County v. Southern Pacific Railroad Company case, Chief Justice Waite turned his attention to Delmas and the other attorneys present.

As railroad attorney Sanderson and his two colleagues watched, Waite told Delmas and his two colleagues, "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 of the opinion that it does." He then turned to Justice Harlan, who delivered the Court's opinion in the case.

In the written record of the case, the court recorder noted, "The defendant corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."

This written statement, that corporations were persons rather than artificial persons, with an equal footing under the Bill of Rights as humans, was not a formal ruling of the court, but was reportedly a simple statement by its Chief Justice, recorded by the court recorder.

- There was no Supreme Court decision to die effect that corporations are equal to natural persons and not artificial persons.
- There were no opinions issued to that effect, and therefore 110 dissenting opinions on this immensely important constitutional issue.

The written record, as excerpted above, simply assumed corporate personhood without any explanation why. The only explanation provided was the court recorder's reference to something he says Waite said, which essentially says, "that's just our opinion" without providing legal argument.

In these two sentences (according to the conventional wisdom), Waite weakened the kind of democratic republic the original authors of the Constitution had envisioned, and set the stage for the future worldwide damage of our environmental, governmental, and cultural commons. The plutocracy that had arisen with the East India Company in 1600 and been fought back by America's Founders, had gained a tool that was to allow them, in the coming decades, to once again gain control of most of North America and then the world.

Ironically, of the 307 Fourteenth Amendment cases brought before the Supreme Court in the years between Waite's proclamation and 1910, only 19 dealt with African Americans: 288 were suits brought by corporations seeking the rights of natural persons.

Supreme Court Justice Hugo Black pointed out 50 years later, "I do not believe the word 'person' in the Fourteenth Amendment includes corporations. ... Neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protection."

Sixty years later, Supreme Court Justice William O. Douglas made the same point, writing that, "There was no history, logic or reason given to support that view [that corporations are legally 'persons']."

There was no change in legislation, and President Grover Cleveland had not issued a proclamation that corporations should be considered the same as natural persons. The U. S. Constitution does not even contain the word "corporation," and has never been amended to contain it because the Founders wanted corporations to be regulated as close to home as possible, by the states, so they could be kept on a short leash—presumably so nothing like the East India Company would ever again arise to threaten the entrepreneurs of America.

But as a result of this case, for the past 100-plus years corporate lawyers and politicians have claimed that Chief Justice Waite turned the law on its side and reinvented America's social hierarchy.

"But wait a minute," many legal scholars have said over the years. Why would Waite say, before arguments about corporations being persons, that the court had already decided the issue—and then allow Delmas and Sanderson to argue the point anyway? Alternately, why would he say such a thing after arguments were already made? By all accounts, he was a rational and capable justice, so it wouldn't make sense that he would do either of those things.
Several theories have been advanced about what really happened. But first, let's look at what the Supreme Court decision actually said in the 1886 *Santa Clara* case.

**What the Court Actually Said About Personhood**

The Supreme Court generally tries to stay out of a fight. If a case can be thrown out or decided on simpler grounds, there's no need to complicate things by issuing a new decision. And in this case, the Court's decision specifically mentioned this. "These questions [regarding the Constitutional amendment] belong to a class which *this court should not decide* [emphasis added] unless their determination is essential to the disposal of the case ..."

It continued, saying that the question of "unless it is essential to the case" depended on how strong the other defenses were. "Whether the present cases require a decision of them depends upon the soundness of another proposition, upon which the court... in view of its conclusions upon other issues, did not deem it necessary to pass." In other words, because of other issues (who should assess the fences), the Court wasn't even going to consider whether to rule on the Fourteenth Amendment corporate personhood issue.

The decision then identifies the fence issue, and concludes that there's nothing left to decide. "If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined ... as the judgment can be sustained upon this ground, it is not necessary to consider any other questions raised by the pleadings ..."

So what actually happened? Why have people said, for all these years, that in 1886 the Waite Court in the *Santa Clara* case decided that corporations were persons under the Fourteenth Amendment? It turns out that the court said no such thing, and it can't be found in the ruling.

**It Was In the Headnotes!**

This apparent contradiction—lawyers and corporations and authors and courts saying for over 100 years that the Supreme Court had decided corporations are person, when the opinion itself does not say that and in fact explicitly says it didn't rule on constitutional issues—sent me to the law library in the Vermont Supreme Court building. Librarian Paul Donovan found for me Volume 118 of *United States Reports: Cases Adjudged in The Supreme Court at October Term 1886 and October Term 1886*, published in New York in 1886 by Banks & Brothers Publishers, and written by J. C. Bancroft Davis, the Supreme Court's reporter.

What I found in the book, however, were two pages of text that are missing from the online and official version. They were not part of the decision. They weren't even written by the Supreme Court justices, but were a quick summary-of-the-case commentary by Davis. He wrote commentaries like these for each case, "adding value" to the published book, from which he earned a royalty.

And there it was, in the notes. The very first sentence of Davis's note reads, "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."

That sentence was followed by three paragraphs of small print that summarized the California tax issues of the case. In fact, the notes by Davis, further down, say, "The main—and almost only—questions discussed by counsel in the elaborate arguments related to the constitutionality of the taxes. This court, in its opinion *passed by these questions* [emphasis added], and decided the cases on the questions whether under the constitution and laws of California, the fences on the line of the railroads should have been valued and assessed, if at all, by the local officers, or by the State Board of Equalization ..." In other words, the first
sentence of "The defendant Corporations are persons ..." has no\textit{thing} to do with the case and wasn't the issue that the Supreme Court decided on.

Two paragraphs later, perhaps in an attempt to explain why he had started his notes with that emphatic statement, Davis remarks that, "One of the points made and discussed at length in the brief of counsel for defendants in error was that 'Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.' Before argument Mr. Chief Justice Waite said: '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.'"

A half-page later, the notes ended and the actual decision, delivered by Justice Harlan, begins—which, as noted earlier, explicitly says that the Supreme Court is \textit{not}, in this case, ruling on the constitutional question of corporate personhood under the Fourteenth Amendment or any other amendment.

I paid my 70 cents for copies of the pages from the fragile and cracking book and walked down the street to the office of attorney Jim Ritvo, a friend and wise counselor. I showed him what I had found and said, "What does this mean?"

He looked it over and said, "It's just headnotes." "Headnotes? What are headnotes?"

He smiled and leaned back in his chair. "Lawyers are trained to beware of headnotes because they're not written by judges or justices, but are usually put in by a commentator or by the book's publisher."

"Are they legal? I mean, are they the law or anything like that?"

"Headnotes don't have the value of the formal decision," Jim said. "They're not law. They're just a comment, by somebody who doesn't have the power to make or determine or decide law."

"In other words, these headnotes by court reporter J. C. Bancroft Davis, which say that Waite said corporations are persons, are meaningless?"

Jim nodded his head. "Legally, yes. They're meaningless. They're not the decision or a part of the decision."

"But they contradict what the decision itself says," I said, probably sounding a bit hysterical. "In that case," Jim said, "you've found one of those mistakes that so often creep into law books."

"But other cases have been based on the headnotes' commentary in this case."

"A mistake compounding a mistake," Jim said. "But ask a lawyer who knows this kind of law. It's not my area of specialty."

So I called Deborah L. Markowitz, Vermont's Secretary of State and one very bright attorney, and described what I had found. She pointed out that even if the decision had been wrongly cited down through the years, it's now "part of our law, even if there was a mistake."

I said that I understood that (it was dawning on me by then), and that I was hoping to have some remedies for that mistake in my book, but just out of curiosity, "What is the legal status of headnotes?"

She said, "Headnotes are not precedential," confirming what Jim Ritvo had told me. They are not the precedent. They are not the law. They're just a comment, with no legal status.

So how did it come that court reporter J. C. Bancroft Davis wrote that corporations are persons in his headnotes? And why have 100 years of American—and, now, worldwide—law been based on them? Here are the main theories that have been advanced regarding what happened.
The Republican Conspiracy Theory That Empowered FDR

In the early 1930s, the stock market had collapsed and the world was beginning a long and dark slide into the Great Depression and eventually to World War II. Millions were out of work in the United States, and the questions on many people's minds were, "Why did this happen? Who is responsible?"

The teetering towers of wealth created by American industrialists during the late 1800s and early 1900s were largely thought to have contributed to or caused the stock market crash and ensuing Depression. In less than 100 years, corporations had gone from being a legal fiction used to establish colleges and trading companies to standing as the single most powerful force in American politics.

Many working people felt that corporations had seized control of the country's political agenda, capturing senators, congressmen, the Supreme Court, and even recent presidents in the magnetic force of their great wealth. Proof of this takeover could be found in the Supreme Court decisions in the years between 1908 and 1914, when the Supreme Court, often citing corporate personhood, struck down minimum wage laws, workmen's compensation laws, utility regulation, and child labor laws—every kind of law that a people might institute to protect its citizenry from abuses.

Unions and union members were the victims of violence from private corporate armies and had been declared "criminal conspiracies" by both business leaders and politicians. It seemed that corporations had staged a coup, seizing the lives of American workers—the majority of voters—as well as the elected officials who were supposed to represent them. And this was in direct contradiction of the spirit expressed by the Founders of the country.

It was in this milieu that an American history book first published in 1927, but largely ignored, suddenly became a hot topic. In \textit{The Rise of American Civilization}, Columbia University history professor Charles Beard and women's suffragist Mary Beard suggested that the rise of corporations on the American landscape was the result of a grand conspiracy that reached from the boardrooms of the nation's railroads all the way to the Supreme Court. They fingered two Republicans: former senator (and railroad lawyer) Roscoe Conkling and former congressman (and railroad lawyer) John A. Bingham. The theory, in short form, was that Conkling, when he was part of the Senate committee that wrote the Fourteenth Amendment back in 1868, had intentionally inserted the word "person" instead of the correct legal phrase "natural person" to describe who would get the protections of the amendment. Bingham similarly worked in the House of Representatives to get the language passed.

Once that time bomb was put into place, Conkling and Bingham left elective office to join in litigating on behalf of the railroads, with the goal of exploding their carefully worded amendment in the face of the Supreme Court. Thus "Republican lawmakers," the Beards said, conspired in advance to give full human constitutional rights to corporate legal fictions. "By a few words skilfully chosen," they wrote, "every act of every state and local government which touched adversely the rights of [corporate] persons and property was made subject to review and liable to annulment by the Supreme Court at Washington."

This conspiracy theory was widely accepted because the supposed conspirators themselves had said, very publicly, "We did it!" Earlier, in an 1882 case pitting the railroads against San Mateo County, California, Conkling testified (as a paid witness for the railroads) that he had slipped the "person" language into the amendment to ensure that corporations would one day receive the same civil rights Congress was giving to freed slaves. Bingham made similar assertions when appropriate during his turns as a paid witness for the railroads. As a result of these assertions, through the late years of the 1800s both were the well-off darlings of the railroads, basking in the light of their successful appropriation of human rights for corporations.

When the Beards' book was widely read in the early 1930s, it gave names and faces to the villains who had turned control of America over to what were then called the Robber Barons of
industry. Conkling, Bingham, and Justice Waite were all dead by the time of the Great Depression, and all judged guilty by the American public of pulling off the biggest con in the history of the republic.

The firestorm of indignation that swept the country helped set the stage for Franklin D. Roosevelt's New Deal, using legislative means and packing the Supreme Court to turn back the corporate takeover—at least in part—and returning to average working citizens some of the rights and benefits they felt had been stolen from them in 1886.

It was widely accepted that Conkling and Bingham had pulled off this trick successfully, purposefully saying "person" instead of "natural person" or "citizen" when they helped write the Fourteenth Amendment, and corporate personhood was a fait accompli. It was done, and couldn't be undone. The Supreme Court, confronted with the reality of the language of the Fourteenth Amendment, had been forced to recognize that corporations were persons under the U. S. Constitution because of the precedent of the 1886 Santa Clara case.

Senator Henry Cabot Lodge apparently ratified die coup on January 8, 1915, when he unwittingly promulgated Conkling's myth in a speech to the Senate about the 1882 San Mateo case cited above.

"In the case of San Mateo County against Southern Pacific Railroad," Lodge said, "Mr. Conkling introduced in his arguments excerpts from the Journal [of the Senate committee writing the Fourteenth Amendment], then unprinted, to show that the Fourteenth Amendment did not apply solely to Negroes, but applied to persons, real and artificial of any kind. It was owing to this, undoubtedly, that the [Supreme] Court extended it to corporations." The journal Lodge referenced is the secret journal that never existed. Nonetheless, it was a done deal, conventional wisdom suggested, and the Supreme Court had been forced to acknowledge the reality of corporate personhood—or, some suggested, had gone along with it because Waite and the other justices were corrupt stooges of the railroads, but wielded the majority vote. In either case, it had been the intent of at least some of the legislators (Conkling and Bingham) who drafted the Fourteenth Amendment that corporations should have the constitutional rights of natural persons.

The Republican Conspiracy Theory Collapses

In the 1960s, author, attorney, and legal historian Howard Jay Graham came across a previously unexamined treasure in the personal papers of Chief Justice Waite, which had been gathering dust at the Library of Congress.

In Waite's private correspondences with Davis (his former Recorder of the Court's Decisions), Graham made a startling discovery: The entire thing had been a mistake.

What had vexed legal authorities for nearly 80 years was why Waite would say, "The Court does not wish to hear argument..." when the arguments were already finished. Further, why wasn't there any discussion of this explosive new doctrine of corporate personhood in the Court's ruling or in dissents? It was as if they said it, and then forgot they had said it. And complicating the situation further, if the Court had arrived at a huge constitutional decision with sweeping implications, why did the decision say it was based on a technicality about fences? It just didn't seem to add up.

Looking over Waite's personal papers, Graham found a note from Davis to Waite. At one point in the arguments, Waite had apparently told Sanderson to get beyond his arguments that corporations are persons and get to the point of the case. Court reporter Davis, apparently seeking to clarify that, wrote to Waite, "In opening, the Court stated that it did not wish to hear argument on the question whether the Fourteenth Amendment applies to such corporations as are parties in these suits. All the Judges were of opinion that it does. "Please let me know whether I correctly caught your words and oblige."
Waite wrote back, "I think your mem. in the California Railroad Tax cases expresses with sufficient accuracy what was said before the argument began. I leave it with you to determine whether anything need be said about it in the report inasmuch as we avoided meeting the constitutional question in the decision."

Graham notes in an article first published in the Vanderbilt Law Review that Waite explicitly pointed out to court reporter Davis that the constitutional question of corporate personhood was not included in their decision. According to Graham, Waite was instead saying, "something to the effect of, 'The Court does not wish to hear further argument on whether the Fourteenth Amendment applies to these corporations. That point was elaborately covered in 1882 [in the San Mateo case], and has been re-covered in your briefs. We all presently are clear enough there. Our doubts run rather to the substance [of the case ... the fence issue]. Assume accordingly, as we do, that your clients are persons under the Equal Protection Clause. Take the cases on from there, clarifying the California statutes, the application thereof, and the merits.'"

In my opinion, Waite was saying something to the effect of, "Every judge and lawyer knows that corporations are persons of the artificial sort—corporations have historically been referred to as 'artificial persons,' and so to the extent that the Fourteenth Amendment covers them, it does so on a corporation-to-corporation basis. But we didn't rule on the railroad's claim that corporations should have rights equal to human persons under the Fourteenth Amendment, so I leave it up to you if you're going to mention the debates or not."

Another legal scholar and author, C. Peter Magrath, was going through Waite's papers at the same time as Graham for the biography he published in 1963 titled Morrison R. Waite: Triumph of Character. In his book, he notes the above exchange and then says, "In other words, to the Reporter fell the decision which enshrined the declaration in the United States Reports. Had Davis left it out, Santa Clara County v. Southern Pac. R. Co. would have been lost to history among thousands of uninteresting tax cases."

It was all, at the very best, a mistake by a court reporter. There never was a decision on corporate personhood. "So here at last," writes Graham, "now for then,' is that long-delayed birth certificate, the reason this seemingly momentous step never was justified by formal opinion." He adds, in a wry note for a legal scholar, "Think, in this instance too, what the United States might have been spared had events taken a slightly different turn."

Graham's Conspiracy Theory

In Everyman's Constitution, Howard Jay Graham suggests that if there was an error made on the part of court reporter J. C. Bancroft Davis—as the record seems to show was clear—it was probably the result of efforts by Supreme Court Justice Stephen J. Field.

Field was very much an outsider on the Court, and despised by Waite. As Graham notes, "Field had repeatedly embarrassed Waite and the Court by close association with the Southern Pacific proprietors and by zeal and bias in their behalf. He had thought nothing of pressuring Waite for assignment of opinions in various railroad cases, of placing his friends as counsel for the railroad in upcoming cases, of hinting at times he and they should take, even of passing on to such counsel in the undecided San Mateo case 'certain memoranda which had been handed me by two of the Judges.'"

Field had presidential ambitions, and was relying on the railroads to back him. He had publicly announced on several occasions that if he were elected, he would enlarge the size of the Supreme Court to 22 so he could pack it with "able and conservative men."

Field also thought poorly of Waite, calling him upon his appointment "His Accidency" and "that experiment" of Ulysses Grant. Waite didn't have the social graces of Field, who was often described as a "popinjay," and even though he had been a lawyer for the railroads, the record
appears to show that Waite did his best to be a truly impartial Chief Justice during his tenure, eventually literally working himself to death.

But Field was a grandstander who served on the Ninth Circuit Court of Appeals of California at the same time he was a Justice of the Supreme Court of the United States. It was often his "corporations are a person" decisions in California cases that led them to reappear before the U.S. Supreme Court—no accident on Field's part—including the San Mateo case in 1882 and the Santa Clara, case in 1886.

And when the justices did not decide (contrary to what court reporter Davis published months after the decision) that constitutional issues were involved in the Santa Clara County v. Southern Pacific Railroad case, Justice Field was incensed. In his concurring opinion to the Santa Clara case, even though he agreed with the finding that fence posts should have a different tax rate than railroad land, he was clearly upset that the issue of corporate personhood was not addressed or answered in the case. He wrote, "[The court had failed in] its duty to decide the important constitution questions involved, and particularly the one which was so fully considered in the Circuit Court [where Field was also the judge], and elaborately argued here, that in the assessment, upon which the taxes claimed were levied, an unlawful and unjust discrimination was made . . . and to that extent depriving it [the railroad 'person'] of the equal protection of the laws. At the present day nearly all great enterprises are conducted by corporations . . . [a] vast portion of the wealth . . . is in their hands. It is, therefore, of the greatest interest to them whether their property is subject to the same rules of assessment and taxation as like property of natural persons . . . whether the State . . . may prescribe rules for the valuation of property for taxation which will vary according as it is held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue to come until it is authoritatively decided in harmony with the great constitutional amendment (Fourteenth) which insures to every person, whatever his position or association, the equal protection of the laws; and that necessarily implies freedom from the imposition of unequal burdens under the same conditions."

In Everyman's Constitution, Graham documents scores of additional attempts by Supreme Court Justice Field to influence or even suborn the legal process to the benefit of his open patrons, the railroad corporations. Field's personal letters, revealed nearly a century after his death, show that his motivations, in addition to wealth and fame, were presidential aspirations—he wrote about his hopes that in 1880 and 1884 the railroads would finance his rise to the presidency, which may explain his zeal to please his potential financiers in 1882 in the San Mateo case and the 1886 Santa Clara case.

So, this conspiracy theory goes, after the case was decided—without reference to corporations being persons and without anybody on the court except Field agreeing with Sanderson's railroad arguments that they were persons under the Fourteenth Amendment—Justice Field took it upon himself to make sure the court's record was slightly revised: it wouldn't be published until J. C. Bancroft Davis submitted his manuscript of the Court's proceedings (titled United States Reports) to his publisher, Banks & Brothers in New York in 1887, and not released until Waite's death in 1888 or later.

After all, Waite's comments to reporter Davis were a bit ambiguous—although he was explicit that no constitutional issue had been decided. Nonetheless, recorder Davis, with his instruction from Waite that Davis himself should "determine whether anything need be said . . . in the report," may well have even welcomed the input of Field. And since Field, acting as the judge of the Ninth Circuit in California, had already and repeatedly ruled that corporations were persons under the Fourteenth Amendment, it doesn't take much imagination to guess what Field would have suggested court recorder Davis include in the transcript, perhaps even offering the language, curiously matching his own language in previous lower court cases.

Graham and Magrath, two of the preeminent scholars of the 20th century (Graham on this issue, and Magrath as Waite's biographer), both agree that this is the most likely scenario. At
the suggestion of Justice Field, almost certainly unknown to Waite, "a few sentences" were inserted into Davis's final written record "to clarify" the decision. It wasn't until a year or more later, when Waite was fatally ill, that the lawyers for the railroads safely announced they had seized control of vital rights in the United States Constitution.

The Hartmann Theory

Court recorders had a very different role in the 19th century than court reporters do today. It wasn't until 1913 that the Stenograph machine was invented to automate the work of court reporters. Prior to that time, notes were kept in a variety of shorthand forms, both institutionalized and informal. Thus, the memory of the reporter and his (in the 19th century, nearly all were men) understanding of the case before him, were essential to a clear and informed record being made for posterity.

Being a recorder for the Supreme Court was also not simply a stenographic or recording position. It was a job of high status and high pay. Although the Chief Justice in 1886 earned $10,500 a year, and the Associate Justices earned $10,000 per year, the Recorder of the Court could expect an income of more than $12,000 per year, between his salary and his royalties from publishing the United States Reports. And the status of the job was substantial, as Magrath notes in Waite's biography. "In those days the reportership was a coveted position, attracting men of public stature who associated as equals with the justices ..."

Prior to his appointment to the Court, John Chandler Bancroft Davis was a politically active and ambitious man. A Harvard-educated attorney, Davis held a number of public service and political appointment jobs ranging from Assistant Secretary of State for two presidents to Minister to the German Empire to Court of Claims judge.

This was no ordinary court reporter, in the sense of today's professionals who do their jobs with clarity and precision but completely uninvolved in the cases or with the parties involved. He was a political animal, well-educated and traveled, and well-connected to the levers of power in his world, which in the 1880s, were principally the railroads.

In 1875, while Minister to Germany, Davis even took the time to visit Karl Marx, transcribing in their conversations one of what was considered one of the era's clearest commentaries about Marx. But Davis also left out part of what Marx said—Davis apparently viewed himself as both reporter and editor. In late 1878, a second reporter tracked down Marx and asked about Davis' omission. Here's an excerpt from that second article, as it appeared in the January 9, 1879 issue of the Chicago Tribune.

"During my visit to Dr. Marx, I alluded to the platform given by J. C. Bancroft Davis in his official report of 1877 as the clearest and most concise exposition of socialism that I had seen. He said it was taken from the report of the socialist reunion at Gotha, Germany, in May 1875. The translation was incorrect, he said, and he [Marx] volunteered correction, which I append as he dictated ..."

Marx then proceeds to give this second reporter an entire Twelfth Clause about state aid and credit for industrial societies, and suggests that Davis had cooperated with Marx in producing a skewed record in recognition of the times and place where the discussion was held.

I own 12 books written by Davis, which give an insight into the status and role he held as recorder for the Supreme Court. My frayed, disintegrating copy of Mr. Summer, the Alabama Claims and Their Settlement, published by Douglas Taylor in New York in 1878, is filled with Davis's personal thoughts and insights on a testimony before Congress. The book, first published as an article in the New York Herald by Davis, says such things as, "Like Mr. Sumner's speech in April 1869, this remarkable document would have shut the door to all settlement, had it been listened to. To a suggestion that we should negotiate for the settlement of our disputed boundary and of the fisheries, it proposed to answer that we would negotiate only on condition
that Great Britain would first abandon the whole subject of the proposed negotiation. I well remember Mr. Fish's astonishment when he received this document."

He summarizes with extensive commentary such as, "I add to the foregoing narrative that Mr. Motley's friends were (perhaps not unnaturally) indignant at his removal, and joined him in attributing it to Mr. Sumner's course toward the St. Domingo Treaty ..." He indirectly references his own time as Envoy to Germany when he writes, "They apparently forgot that the more brilliant, the more distinguished, and the more attractive in social life an envoy is, the more dangerous he may be to his country when he breaks loose from his instructions and communicates socially to the world and officially ..." As you can see, Davis was fond of flowery writing, and thought well of himself.

And then I realized what I was reading. It related to the famous 1871 Geneva Arbitration Case, led by attorney Morrison Remick Waite, which won over $15 million for the U. S. government from England for their help of the Confederate army during the Civil War. Going to another book by Davis that I had purchased while researching this book, published in 1903 and titled A Chapter in Diplomatic History, I discovered that Davis had been quite active in the Geneva Arbitration Case.

During the negotiations with England, he writes, "I answered that I was very sorry at the position of things, but that the difficulty was not of our making; that I would carry his message to Lord Tenterden, but could hold out little hope that he would adopt the suggestion; and that, in my opinion, the Arbitrators should take up the indirect claims and pass upon them while this motion was pending." That evening I saw Lord Tenterden," Davis continues, "and told him what had taken place between me and Mr. Adams and the Brazilian arbitrator. . . . About midnight he came to me to say that he had told Sir Roundell Palmer what had passed between him and me, and that Sir Roundell had made a minute of some points which would have to be borne in mind, should the Arbitrators do as suggested. He was not at liberty to communicate these points to me officially; but, if I chose to write them down from his dictation, he would state them. I wrote them down from his dictation, and, early the next morning, convened a meeting of the counsel and laid the whole matter before them."

"That Davis was playing more than just the role of a stenographer in this case was indisputable. And the case? It was, again, the Alabama Claims or Geneva Arbitration Case, which had made Morrison Remick Waite's career. Checking the University of Virginia's law school, I found the following notes on the Geneva Arbitration Case: "The United States' case was argued by former Assistant Secretary of State Bancroft Davis, along with lawyers Caleb Gushing, William M. Evarts, and Morrison R. Waite, under the direction of Secretary of State Hamilton Fish and Secretary of Treasury George Boutwell."

Waite and Davis had worked side-by-side on one of the most famous cases in American history (at the time), both in Geneva, Switzerland, and before the United States Congress. And all this a full 15 years before Davis was to put his pen to his understanding of the Santa Clara County v. Southern Pacific Railroad case when it came before the Supreme Court of which Waite was now Chief Justice and for which Davis was the head recorder.

Searching for traces of Davis on the Internet, I found an autograph for sale—it was a letter by President Ulysses Grant, signed by Grant, and also signed by Grant's Acting Secretary of State—J. C. Bancroft Davis.

And looking through the records of the City of Newburgh, New York, where Davis once lived, the Orange County New York Directory of 1878-1879 lists the following note about one of that city's distinguished citizens. "The Newburgh and New York Railroad Company was organized December 14th, 1864, the road was completed September 1st, 1869. J. C. Bancroft Davis was elected President of the Board of Directors . . . [on] August 1st, 1868."

Given his distinguished background, and his having worked with James Taylor and Jay Cooke of the railroads in late 1860s, it's hard to imagine that Davis would insert "corporations
are persons" into the record of a Supreme Court proceeding without understanding full well its importance and consequences, even if he was encouraged to do so by Justice Field.

So here is the fourth and final possibility: John Chandler Bancroft Davis undertook to rewrite that part of the United States Constitution himself, for reasons that to this day are still unknown, but probably not inconsistent with his own personal political worldview and affiliation with the railroads, and that he did it with the encouragement of Fields.

Waite was so ill that he missed the entire session of the 1885 court, was very weak and sick in 1886 and 1887, and died in March of 1888: In all probability, he never knew what Davis had written in his name.

Whether it was a simple error by Davis, or Davis was bending to pressure from Fields, or if Davis simply took it upon himself to use the voice of the Supreme Court to modify the United States Constitution—the fact is that an amendment to the Constitution which had been written by and passed in Congress, voted on and ratified by the states, and signed into law by the president, was radically altered in 1886 from the intent of its post-Civil War authors.

And the hand on the pen that did it was that of J. C. Bancroft Davis.

Chapter 7
The Corporate Conquest of America

The legal rights of the... defendant, Loan Company, although it be a corporation, soulless and speechless, rise as high in the scales of law and justice as those of the most obscure and poverty-stricken subject of the state.

-EXCERPT FROM JUDGE’S RULING IN BRANNAN V, SCHARTZER, 25 OHIO DEC. 491 (1915)

While corporations can live forever, exist in several different places at the same time, change their identities at will, and even chop off parts of themselves or sprout new parts, the Chief Justice of the U. S. Supreme Court, according to its reporter, had said that they are "persons" under the Constitution, with constitutional rights and protections as accorded to humans. Once given this key, corporations began to assert the powers that came from their newfound rights.

• Claiming the First Amendment right of all "persons" to free speech, corporate lawsuits against the government successfully struck down laws that prevented them from lobbying or giving money to politicians and political candidates.

• Earlier laws (such as the Wisconsin laws noted in chapter 5) had said that a corporation had to open all its records and facilities to our governments as a condition of being chartered. But now, claiming the Fourth Amendment right of privacy, corporate lawsuits successfully struck down such laws. In later years, they also sued to block OSHA laws allowing for surprise safety inspections of the workplace and stopped EPA inspections of chemical factories.

• Claiming the Fourteenth Amendment protection against discrimination (granting persons equal protection), the J. C. Penney chain store successfully sued the state of Florida, ending a law designed to help small, local business by charging chain stores a higher business license fee than locally owned stores.

On December 3, 1888, President Grover Cleveland delivered his annual address to Congress. Apparently, the President had taken notice of the Santa Clara County decision, its politics, and its consequences, for he said in his speech to the nation, delivered before a joint
session of Congress, "As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."

Women Ask, “Can I Be a ‘Person’ Too?”

Interestingly, during the era of the Santa Clara County decision granting the full protections of persons under the Constitution to corporations, two other groups also brought cases to the Supreme Court asking for similar protections. The first group was women. This was a movement with a fascinating history, its roots in the American Revolution itself.

In April of 1776, 32-year-old Abigail Adams sat at her writing table in her home in Braintree, Massachusetts, a small town a few hours' ride south of Boston. The war between the American colonists and their opponents, the governors and soldiers of the East India Company and its British protectors, had been going on for about a year. A small group of the colonists gathered in Philadelphia to edit Thomas Jefferson's Declaration of Independence for the new nation they were certain was about to be born, and Abigail's husband, John Adams, was among those men editing that document.

Abigail had a specific concern. With pen in hand, she carefully considered her words. Assuring her husband of her love and concern for his well-being, she then shifted to the topic of the documents being drafted, asking John to be sure to "remember the Ladies, and be more generous and favourable to them than [were their] ancestors."

Abigail knew that the men drafting the Declaration and other documents leading to a new republic would explicitly define and extol the rights of men, but not of women, and she and several other well-bred women were lobbying for the Constitution to refer instead to persons, people, humans, or "men and women." Her words are well-preserved and her husband later became President of the United States, so her story is better known than most of her peers.

By late April, Abigail had received a response from John, but it wasn't what she was hoping. "Depend on it," the future president wrote to his wife, "[that we] know better than to repeal our Masculine systems." Reflecting that attitude, Adams' friend and political ally Alexander Hamilton wrote in what became The Federalist Papers an explicit warning about the dangers to a new nation from the "intrigues of courtesans and mistresses."

Furious, Abigail wrote back to her husband, saying, "If particular [sic] care and attention is not paid to the Ladies, we are determined to foment a Rebellion . . ."

All of Abigail's efforts were ultimately for nothing. Richard Henry Lee of Virginia introduced on June 7, 1776 a resolution that the colonies be free and independent states governed solely by free men, based on a document written by Thomas Jefferson and edited by John Adams and Ben Franklin. Adams played a strong role in the heated debate over the following month, which concluded with a vote to adopt the gender-specific language of Lee's resolution on July 2, 1776; Congress formalized it 2 days later as the Declaration of Independence.

Adams, Jefferson, Hamilton, and the other men of the assembly explicitly demanded rights for male citizens—and not for female citizens—when they crafted the Declaration. "Men" was not a generic reference to humans: The authors meant humans of the male gender. They wrote: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed ..."

The men had won. Among the earliest laws of the Colonies were several legislating that men had power over women:
• A married woman was not allowed to make out a will because she was not allowed to own land or legally control anything else worthy of willing to another person.

• Any property she brought into the marriage became her husband’s at the moment of marriage, and would revert to her only if he died and she did not remarry. But even then, she would get only one-third of her husband's property, and what third that was and how she could use it were determined by a male, court-appointed executor, who would supervise for the rest of her life (or until she remarried) how she used the third of her husband's estate she "inherited."

• When a widow died, the executor would either take the property for himself or decide to whom it would pass; the woman had no say in the matter because she had no right to sign a will. Women could not sue in a court of law except under the same weak procedures allowed for the mentally ill and children, supervised by men.

• If the man of a family household died, the executor would decide who would raise the wife's children, and in what religion: She had no right to make those decisions and no say in such matters. If the woman was poor, it was a virtual certainty that her children would be taken from her.

• It was impossible in the new United States of America for a married woman to have legal responsibility for her children, control of her own property, own slaves, buy or sell land, or even obtain an ordinary license.

Women Work For, Then Against, The Fourteenth Amendment

After the American Revolution, educated women picked up Abigail Adams' chant and began to quietly foment her "rebellion." They wrote poems and seemingly innocuous letters to the editors of newspapers, speaking indirectly about their demands for equal rights. Word spread. By the early 1800s, women's voices were getting louder, and many were demanding an amendment to the Constitution to give equal rights to women or prohibiting discrimination against women.

But women didn't gain any legislative successes until 1868, and that turned out to be a nonvictory. It was the Fourteenth Amendment, passed after the Civil War, which guaranteed due process of law to all "persons." Oddly, when it was being drafted in 1866, suffragettes Susan B. Anthony and Elizabeth Cady Stanton had argued strongly against it because it was the first time the word "male" was used in the Constitution or any constitutional amendments. The Fourteenth Amendment has two provisions, one guaranteeing due process of law to all persons and the other defining how lines would be drawn to decide how representation was to be apportioned in the House of Representatives. Section 2 includes the phrase "the proportion which the number of such male citizens shall bear to the whole number of male citizens."

Stanton wrote in 1866 that, "if the word 'male' be inserted [in this Amendment] it will take a century to get it out again." Despite her objections to its sexually discriminatory language, the Fourteenth Amendment was passed and ratified by enough states to become law. And Stanton was off in her prediction by only 2 years: The Equal Pay Act of 1963 and the Civil Rights Act of 1964 required equal pay for women and men and prohibited discrimination against women by any company with more than 24 employees.

Women Test the Fourteenth Amendment

In an attempt to test the Fourteenth Amendment, Susan B. Anthony went to her local polling station and cast a vote on November 1, 1872. Justifying her vote on the grounds of the Fourteenth Amendment, on November 12, Anthony wrote, "All persons are citizens—and no state shall deny or abridge the citizen rights ..."

Six days later, however, she was arrested for illegally voting. The judge, noting that she was female, refused to allow her to testify, dismissed the jury, and found her guilty. Lacking the
resources available to huge corporations, she was unable to repeatedly carry her cause to the Supreme Court as the railroads customarily did, and that judge's decision stood.

One year later, in the 1873 Bradwell v. Illinois decision, the Supreme Court ruled that women were not entitled to the full protection of persons under the Fourteenth Amendment. Justice Bradley wrote the Court's concurring opinion, which minced no words: "... the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state ..."

Corporations had full legal existence and the constitutional rights of persons, but women could derive these rights only through their husbands. They didn't even exist separate from their husbands. And the Supreme Court said that the Fourteenth Amendment didn't apply to them, even though the Amendment explicitly said "persons."

Women didn't get the vote until 1920, and the Equal Rights Amendment that says, "Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex," still hasn't been ratified by enough states to amend the Constitution and was most recently reintroduced to the Senate by Ted Kennedy in 2000.

Freed Slaves Ask, “Can I Be a ‘Person’ Too?”

The second group to petition the Supreme Court to be recognized as persons under the Fourteenth Amendment were the people for whom it was passed: freed slaves and their descendants. But 10 years after giving corporations full rights of personhood, the Supreme Court ruled in Plessy v. Ferguson that any person more than "One-Eighth Negro" was not legally entitled to full interactions with white "persons."

Justice Brown delivered the near-unanimous (one dissenter) opinion of the court, which established nearly a century of Jim Crow laws, saying, "Gauged by this standard we cannot say that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of which does not seem to have been questioned, or the corresponding acts of state legislatures."

Court reporter J. C. Bancroft Davis, in the headnotes he wrote as commentary to the Plessy v. Ferguson case, said that the case had come about when Plessy, "being a passenger between two stations within the State of Louisiana, was assigned by the officers of the [railroad] company to the coach used for the race to which he belonged, but he insisted upon going into a coach used by the race to which he did not belong."

Davis then quotes the Fourteenth Amendment, and says afterward, "The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either."

This institutionalization of segregation by the 1896 Plessy case prompted U. S. Supreme Court Justice Hugo Black to note in 1938 that, "Of the cases in this court in which the Fourteenth Amendment was applied during its first fifty years after its adoption, less than one half of one percent invoked it in protection of the Negro race, and more than fifty percent asked that its benefits be extended to corporations."
From Women's Rights Lost to Worker's Rights Lost

Fast on the heels of the passage and then Supreme Court interpretations of the Fourteenth Amendment, a new type of feudalism emerged in America with the Industrial Revolution, and included women, people of color, and first-generation immigrants. The explosion of factories in the East and Midwest was so great and so rapid that millions of workers emigrated from Europe to the United States, many of them arriving deeply in debt and indentured to their new employers.

My wife and I once bought a truckload of slate from a local quarry to pave an area in front of our home in Vermont. The quarry owner who delivered the stone told us, "This is from a huge pile of seconds that were mined over 150 years ago by indentured Welshmen." Looking into the history of the quarry industry in New England, I discovered that the incredibly difficult and often deadly job of quarryman was filled for more than 100 years in New England almost exclusively by indentured men freshly arrived from Wales, Scotland, and Ireland.

It turns out, according to author Peter Kellman, "Roughly half the immigrants to the English colonies were indentured servants. At the time of the War of Independence, three out of four persons in Pennsylvania, Maryland, and Virginia were or had been indentured servants, people who had exchanged a certain number of years of bonded work (usually 4 to 25) for passage to America and/or to reduce family debts or avoid prison back in Europe." Increasing the labor pool with immigrants so that more people were forced to compete for the same jobs reduced the problem of strikes or workers demanding a living wage.

Eliminating Competition

Over 2,000 corporations had been chartered between 1790 and 1860. They helped protect themselves from economic disasters by keeping a tight control of the economy and markets within which they operated. In this, they echoed the Federalist ideas of Hamilton and Adams.

Many companies deal with competition by working hard to earn our business, just as Adam Smith envisioned. But others don't—they feel that the best way to deal with competition is to eliminate it. And, as the East India Company had shown, two ways to do so were by getting the government to grant a monopoly or special tax favors, or by crushing or buying out one's competition.

Railroads were the leaders in the movement of monopoly grants, convincing lawmakers to use the government's power of eminent domain to seize land from farmers and settlers and grant it, free, to the railroads, to provide convenient and financially low-risk rights-of-way. In just 7 years after 1850, over 25 million acres of land were given to railroads, and often it was alleged to be the consequence of bribes. For example, the LaCrosse and Milwaukee Railroad in Wisconsin passed out $900,000 worth of stocks and bonds to the governor, 13 senators, and 59 assemblymen ... and soon after received a million acres in free land and freedom from competition.

Another way of limiting the risk of competition was for large corporations to become larger. Some did this by buying their competitors, although many states had outlawed such practices in the 19th century. An easier method was to form consortiums, trade associations, and what were later called trusts, to muscle upstart entrepreneurs out of the marketplace.

By the time of Santa Clara, the generation that knew the East India Company was dead, and the corporate excesses that would eventually bring about the Great Depression hadn't yet happened. So most of these associations were quite open and free in declaring their intent to control prices, markets, and competition.

The American Brass Association, for example, came right out and said that their purpose in organizing was "to meet ruinous competition." Similar language was found in the charters,
articles, or publications of trade groups that organized to protect large companies, in business categories as diverse as selling cotton, manufacturing matches, and distributing steel.

**The Earliest Mergers and Acquisitions**

The railroads made possible the rapid growth of other industries that previously had been hampered by an inability to quickly and easily transport their raw materials or finished goods. After the Civil War, this growth took on explosive proportions. Entrepreneurs of every stripe were starting and building companies, and the competition was cutthroat.

To deal with this excessive competition, companies joined together within industries to fix prices and control markets. By 1889, there were at least 50 of these consortiums operating in the United States; most were called trusts. They were essentially the same as what are today called corporate mergers, with each participating company selling their company to the trust in exchange for stock in the larger entity. This method would allow 8, 10, or 20 companies to become a single company, with the attendant benefits of larger economies of scale, joint purchasing, and the ability to control a large market while crushing smaller competitors.

A committee of the New York State Senate noted on March 6, 1888, "That combination [anticompetitive collusion] is the natural result of excessive competition there can be no doubt. The history of the Copper Trust, the Sugar Trust, the Standard Oil Trust, the American Cotton Oil Trust, the combination of railroads to fix the rates of freight and passenger transportation, all prove beyond question or dispute that combination grows out of and is a natural development of competition ..."

When that New York Senate committee pursued their investigation in 1888, they called witnesses from trusts representing meat, milk, oil, sugar, cottonseed oil, oilcloth, and glass, among others. They learned that in just the 6 years since its creation in 1882, John D. Rockefeller's Standard Oil Trust increased the value of its holdings to the point where dividends paid out to trustees in 1888 were over $50 million. Simultaneously, the trust drove thousands of small oil and kerosene dealers out of business. The Sugar Trust had caused the price of sugar to soar nationally, and the Bagging Trust had doubled the price of bags in the previous decade. The Copper Trust had succeeded in raising the cost of copper from 12 to 17 cents a pound, making all of the copper companies profitable but hitting small businesses and consumers hard.

The revelations of the trusts' wild profits hit the newspapers as a big story, and the U. S. House of Representatives began their own investigation of trusts in April 1888, under the leadership of Representative Henry Bacon of New York.

Testimony before Congress showed that the trusts played hardball with entrepreneurs and small businesses who tried to compete with them. Unrelated trusts even cooperated with each other to wipe out small businesses in each other's markets.

A small businessman named Harlan Dow testified before Congress that when he tried to market kerosene in West Virginia in competition with Rockefeller's Standard Oil Trust, the railroads raised their prices to him for transporting his product. He tried to survive by shipping his kerosene in his own horse-drawn wagon, but in response to this, the Standard Oil Trust cut their price to consumers for kerosene in the areas where Dow was trying to sell it. "I stopped the wagon and it has been idle in the stable ever since," Dow told the investigating committee.

One of Standard's distributors, a man named F. D. Carley, even corroborated Dow's testimony, bragging about how he had been able to destroy every small competitor who tried to enter the marketplace or stay in business. "For instance," Carley said, "a man named Pettit got on some [oil] tanks at New Orleans ... I dropped the price on him pretty lively." In the absence of competition and free choice, giant corporations have the power to do this, and consumers have nowhere else to go.

As newspapers nationwide screamed headlines about how the fat cats of industry were raking in millions while wiping out small businesses and fixing prices, the states got into the act.
While most states already had laws or constitutional prohibitions against restraint of trade, the years from 1887 to 1896 saw dozens of new laws enacted. The first were in 1887 in Texas, then 1889 in Idaho, Kansas, Tennessee, and Michigan; by 1892 virtually every state had passed some sort of legislation, with one of the most powerful being passed in New York that year. The corporate charters of the Standard Oil Trust in California and the Sugar Trust in New York were both revoked in this early wave of reaction.

**Senator Sherman Tries to Protect Small Businesses and Entrepreneurs**

Both of the major political parties denounced trusts in the 1888 Cleveland-Harrison presidential campaigns, and on December 4, 1889, Senator John Sherman of Ohio submitted Senate Bill No. 1, "A bill to declare unlawful, trusts and combinations in restraint of trade and production." In promoting his bill, Sherman said that the people "are feeling the power and grasp of these combinations, and are demanding from every legislature and of Congress a remedy for this evil. . . . Society is now disturbed by forces never felt before."

The bill was championed by Senators George of Mississippi, Edmunds of Vermont, and Hoar of Massachusetts, passed by an almost unanimous vote, and then signed into law by President Harrison in 1890. The Sherman Anti-Trust Act of 1890, in its entirety, says:

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred and fifty thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

"Section 2: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding ten million dollars if a corporation, or, if any other person, three hundred and fifty thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

The Standard Oil Trust was clearly in violation of the new law, and of state laws that mirrored it. Six days after the state of Ohio ruled his trust an anticompetitive monopoly that violated the law, John D. Rockefeller announced on March 10, 1892 that his Standard Oil Trust would be dissolved into separate companies. By then, federal and state prosecutions of trusts were underway nationwide.

**But They’re Still Persons**

In 1906, President Theodore Roosevelt proposed campaign finance reform legislation that was ultimately struck down by the Supreme Court because it violated the First Amendment free speech rights of corporate persons. He reacted to that ruling, in his annual address to Congress on December 3, saying, "I again recommend a law prohibiting all corporations from contributing to the campaign expenses of any party. . . . Let individuals contribute as they desire; but let us prohibit in effective fashion all corporations from making contributions for any political purpose, directly or indirectly." Teddy Roosevelt made another run at trying to rein in the corporate persons a year later, when in December 1907 he addressed Congress and said, "The fortunes amassed through corporate organization are now so large, and vest such power in those that wield them, as to make it a matter of necessity to give to the sovereign — that is, to the Government, which represents the people as a whole — some effective power of supervision over their corporate use. In order to ensure a healthy social and industrial life, every big
Corporation should be held responsible by, and be accountable to, some sovereign strong enough to control its conduct."

Corporations, however, now had the power to give money to politicians as a First Amendment right granted to all persons by the Constitution via the *Santa Clara* case, and so Roosevelt's efforts failed. Nonetheless, he became wildly popular as the "trustbuster" through his aggressive enforcement of the Sherman Anti-Trust act, using it to break up more than 40 large corporations during his presidency.

From 1909 to 1913, President Taft continued Teddy Roosevelt's tradition by further breaking up John D. Rockefeller's Standard Oil Trust into 33 separate companies, and breaking up American Tobacco. Working people loved him for it, as did entrepreneurs who again had opportunities in the newly freed marketplace.

But in the first year of the Wilson administration, the corporations reacted by trying to use the same law—the Sherman Anti-Trust Act—to get unions outlawed. They essentially argued that if it was illegal for corporate persons to conspire or form monopolies for their own benefit, then it should be equally illegal for human persons to do the same in the form of unions.

When corporations started using the Sherman Act against unions, going against the spirit of an act that was passed to protect the average person from excessive corporate power, the U. S. Congress passed the Clayton Anti-Trust Act of 1914 at the urging of President Woodrow Wilson. It specifically outlawed tying together multiple products, price discrimination, corporate mergers, and interlocking boards of directors. The Clayton Act also mandated the creation of the Federal Trade Commission (FTC). The FTC's original job was to control corporate wrongdoing, and it still carries that mission.

Through the Roaring Twenties, little was done to enforce these various acts by the corporate-friendly administrations of Calvin Coolidge ("the business of America is business") and Herbert Hoover. Seven years after the onset of the Great Depression, however, Franklin D. Roosevelt again began to enforce the Sherman Act, and it was pretty much the law of the land from that time until Ronald Reagan was elected President.

**Other Attempts to Put Humans First Fail**

On the one hand, legislation was being pushed through state legislatures right and left granting corporations human and superhuman powers. In the state of Ohio, for example, Senate Bill No. 8 "became effective on March 8, 1927, amending over 70 statutes and enacting more than 50 others." It repealed the "single purpose" requirement of incorporation, streamlined the processes, insulated corporate owners and managers from personal liability for corporate wrongdoing, and, in an sweepingly phrased provision, enabled Ohio corporations to "perform all acts," both within and outside the state, that could be performed by a natural person.

In 1936, the Robinson-Patman Act was passed, which made price discrimination illegal in an attempt to revive the Sherman Anti-Trust Act: it is still law, yet it is largely ignored today. And in 1950, the Celler-Kefauver Antimerger Act (another attempt to update and re-empower the Sherman Anti-Trust Act) was passed: it, too, is still law, yet it is now largely ignored.

Since 1950, no legislation of any consequence has passed that would put corporate power or personhood under the control of the people and their democratically elected governments, and most of the earlier laws have been watered down substantially.

For example, the Hart-Scott-Rodino Anti-Trust Improvements Act of 1976, itself a watering down of the Sherman Anti-Trust Act, was amended during the 2000 term of Congress, through passage of the Commerce-State-Justice appropriations bill, to reduce by about half the number of corporate mergers that would come under Federal Trade Commission review. Other mergers could proceed without such regulation.
The Working Class Tests the Fourteenth Amendment

Between the Civil War and the Great Depression, workers tried many times to gain equal rights with corporations and thus bargain on a level playing field for fair wages and decent working conditions. Carl Sandburg, in his biography of Lincoln, points out that the word "strike" was so new during the Civil War era that newspapers put it in quotes in their headlines. And, Sandburg notes, Lincoln was the first U. S. president to explicitly defend the rights of strikers, intervening in several situations where local governments were planning to use police or militia to break strikes and preventing the local governments from cooperating with the local corporate powers.

Nonetheless, from the time of Lincoln's death to the era of the Great Depression and Franklin D. Roosevelt, strikes were most often brutally put down, and corporations sometimes used intimidation, violence, and even murder to keep their workers in line. Probably the biggest turning point in the union movement, however, happened on February 11, 1937, when striking workers at General Motors won recognition for their union in the Great Sit-Down Strike in Flint, Michigan.

After the Great Depression, in the 3 years between 1937 and 1940, union membership more than tripled in the United States and the American working class became, for the first time since the Jefferson-Madison-Monroe era, a class with some powers of self-determination. Along with it, however, came the exploitation of workers by their own union bosses. All forms of organized business activity where there is money or power at stake, it seems, are equally susceptible to these corrupting forces, although unions never achieved as much power as corporations because more laws were passed to limit union behaviors…and they never achieved personhood status under the Fourteenth Amendment.

Chartermongering and the Race to the Bottom, Circa 1900

As we've seen, throughout most of the 18th and 19th centuries, states were moving to restrict corporate activities by placing limits on the term, activities, and powers a corporation could take in their charter of incorporation. When Ohio broke up the Standard Oil Trust in 1892, Rockefeller and other corporate giants with similar problems began looking for states where they could recharter their corporations without all of the restrictions that Ohio and most other states had placed on them.

New Jersey was the first state to engage in what was then called chartermongering—changing its corporate charter rules to satisfy the desires of the nation's largest businesses. In 1875, its legislature abolished maximum capitalization limits, and in 1888, the New Jersey legislature took a huge and dramatic step by authorizing—for the first time in the history of the United States—companies to hold stock in other companies.

In 1912, New Jersey Governor Woodrow Wilson was alarmed by the behavior of corporations in his state, and "pressed through changes [that took effect in 1913] intended to make New Jersey's corporations less favorable to concentrated financial power."

As New Jersey began to pull back from chartermongering, Delaware stepped into the fray, by passing in 1915 laws similar to but even more liberal for corporations than New Jersey's. Delaware continued that liberal stance to corporations, and thus, as the state of Delaware says today, "More than 308,000 companies are incorporated in Delaware including 60 percent of the Fortune 500 and 50 percent of the companies listed on the New York Stock Exchange. The Delaware Corporation Law, the Court of Chancery, and the customer service-oriented staff at the Division of Corporations are all sound reasons why Delaware leads the nation as a major corporate domicile."

As New Jersey and then Delaware threw out old restrictions on corporate behavior, allowing corporations to have interlocking boards, to live forever, to define themselves for "any legal
purpose," to own stock in other corporations, and so on, corporations began to move both their
corporate charters and, in some cases, their headquarters to the chartermongering states. By
1900, trusts for everything from ribbons to bread to cement to alcohol had moved to Delaware
or New Jersey, leaving 26 corporate trusts controlling, from those states, more than 80 percent
of production in their markets.

Chartermongering Goes National, Then International

Between 1900 and 1970, in order to remain competitive, nearly all U. S. states rolled back
their state constitutions or laws to make it easier for large corporations to do business in their
states without having to answer to the citizens of the state for what they do or how they do it. At
the same time, America's largest corporations—including the burgeoning defense industry—
began to look overseas and see a whole new frontier of minerals and wood and raw materials
owned by poor or powerless people, and great new places to build factories because the people
would work for extremely low wages compared to workers in the United States who were trying
to maintain a middle-class lifestyle. Not to mention all those potential customers for their
products.

The race to the bottom of costs, regulation, taxes, and prices was underway, and would
bring with it a race to the top in wealth for a few hundred multinational corporations and the
politicians and media commentators they supported.

And soon that race would turn worldwide.
Part 3
Unequal Consequences

_In our every deliberation, we must consider the impact of our decisions on the next seven generations_

_-FROM THE GREAT LAW (OR CONSTITUTION) OF THE IROquoIS CONFEDERACY_

Chapter 10
Unequal Regulation

_There can be no effective control of corporations while their political activity remains._

_-THEODORE ROOSEVELT, SPEECH, AUGUST 31, 1910_

There’s a side to regulation that most people don't think about, and it has far-reaching effects if representatives of corporations are writing the rules. Once a regulation is passed saying "you can emit no more than 10 ppm of mercury," then _you can legally emit up to 10 ppm_. Before that rule was passed, any amount you emitted might subject you to potential lawsuits from nearby humans made ill by your emissions, by other states, or even the federal government. The regulatory rule essentially legalizes what a corporation is doing. In the best of worlds, this wouldn't be a problem. But in practice, it means business interests are often directly involved in writing the regulations that they themselves will have to obey.

**Regulations Can Legalize Activity That Causes Public Harm**

During the Reagan administration, Robert Monks and Nell Minow worked with the Presidential Task Force on Regulatory Relief. Monks says, "We found that business representatives continually sought more rather than less regulation, particularly when [the new regulations] would limit their liability or protect them from competition."

Monks and Minow became disenchanted with the process. In their 1991 book _Power and Accountability_, they say, "The ultimate commercial accomplishment is to achieve regulation under law that is purported to be comprehensive and preempting and is administered by an agency that is in fact captive to the industry." In this way, corporations find an actual government shield for their actions. For example:

- Tobacco companies point to the government-mandated warnings on their labels, saying that the labels relieve them of responsibility for tobacco-related deaths because they're obeying government rules.
- Producers of toxic wastes can't be sued or attacked if they are releasing their toxins within guidelines defined by a government agency.
- Telemarketing companies push for laws and regulations that define their practice, thus legalizing it.
- Manufacturers of genetically modified products can bring them to market without labeling, as long as their products are made within the guidelines of the regulations.

**The Fox Guarding the Chicken Coop**

Before there was a single genetically modified food product on the market, Monsanto, a leading provider of agricultural products to farmers, including Roundup, die world's best-selling
herbicide, and a pioneer in genetically altered crops, sent lobbyists to the White House in late 1986 to meet with Vice President George Bush. "There were no products at the time," Leonard Guarraia, one of the Monsanto executives at the meeting, told the New York Times in 2001. "But we bugged him for regulation. We told him that we have to be regulated."

And so, the Times reports, "the White House complied" and Monsanto got the regulations they wanted from the EPA, USDA, and FDA.

Those regulations evolved throughout the Reagan and Bush administrations into a regulatory policy, announced by Vice President Dan Quayle on May 26, 1992, when he said, "We will ensure that biotech products will receive the same oversight as other products, instead of being hampered by unnecessary regulation." Certainly there would be no unnecessary regulation, but the regulations that were now in place were necessary for the industry. Said the New York Times, "the new policy strictly limited the regulatory reach of the FDA."

Under the regulations shepherded through government agencies by the White House, the dangers of genetically modified foods would be determined by the manufacturers, not the government, and testing would occur only when the companies wanted it to. And consumers were not to be notified if their food contained genetically modified organisms (as does now a substantial percentage of the American food supply). "Labeling was ruled out as potentially misleading to the consumer, since it might suggest that there was reason for concern," notes Times reporter Kurt Eichenwald. In the meantime, gene-altered corn accounted for about 32 percent of the 1998 U.S. crop, 38 percent for soybeans, and 58 percent for Canadian canola oil.

In the summer of 2000, the Clinton administration had to select a representative to the WTO talks on genetically modified foods. Ignoring the nomination of a scientist from the Consumers Union, they instead chose a former lobbyist for one of the largest companies in the business of genetically modified foods.

And in one of the most notorious cases, a multinational chemical and agricultural-products company's attorney quit his job with the company's law firm, went to work for the FDA where he wrote a regulation that allowed that company's product into the food supply, then quit the FDA and went to work for the USDA where he participated in writing regulations eliminating labeling of the product for consumers, and then quit his job at USDA and went back to work for the law firm representing the multinational. Unfortunately, because of "Veggie Libel Laws" passed in numerous states after much lobbying by pesticide manufacturers and others in the agricultural products industry (under which Oprah Winfrey was sued for her hamburger remarks), it would be a crime in at least 14 states (where, hopefully, this book will be for sale) for me (or any reporter) to give you the details of this episode.

The GMO regulations followed a pattern set out years before by the chemical industry. As Paul Hawken pointed out in 1994 in The Ecology of Commerce, the industry launched such a huge lobbying effort to fight regulations on toxic chemicals after the passage of the 1970 Clean Air Act that by 1990, "the agency has been able to muster regulations for exactly 7 of the 191 toxins that fell under the original legislation."

A decade later, things are still problematic, with profit driving the equation at every turn. 1999 is the last year for which EPA statistics are available on the release of toxic chemicals into the environment by industry, and in that year, 7.7 billion pounds of toxins were released directly into our air and water, most with unknown short- or long-term effects. And as huge as that statistic may sound, it's actually only the tip of the iceberg:

- Lobbyists defined EPA regulations so that now only 650 of the more than 80,000 chemicals being used in industry have to be reported— which means that the 7.7 billion pound total represents only 1 percent of the possible chemicals in use.
- Only America's largest chemical manufacturers are required to report their figures.
Those figures include only accidents and spills. As the Worldwatch Institute’s Anne Platt McGinn noted in a commentary titled "Detoxifying Terrorism" on November 16, 2001, "releases during routine use are not included" in that 7.7 billion pound figure. Platt added that we don't yet even know how dangerous or carcinogenic are "over 71 percent of the most widely used chemicals in the United States today" because the data simply doesn’t exist or hasn't been released by the industry.

**The Impact on Small Business**

Small businesses rarely lobby Congress, the White House, or regulatory agencies for more regulations. But because large businesses have an infrastructure to deal with regulations, the burden of regulations on small businesses sometimes wipes them out. Many regulations come along with benefits. Farm subsidies represent a huge transfer of tax money to corporations, but only a very small portion goes to family farmers.

In the agriculture industry, four multinational corporations control 82 percent of the beef cattle market; five companies control 55 percent of the hog-packing marketplace. Although large agricultural corporations numerically own only 6 percent of U.S. farms, that 6 percent accounts for almost two-thirds of all farm income.

In a growing trend known as contract farming, farmers are forced (because they can't compete against large-scale multinational purchasing) to sell their farms to agribiz companies and then work on the land they once owned. The United States lost 300,000 family-owned farms between 1979 and 1998. As agriculture writer Julie Brussell notes, "This agrarian 'genocide' mirrors the descent of much of America's rural country into economic serfdom." The result, as documented by the Community Environmental Legal Defense Fund's (CELDF) Thomas Linzey, is that, "Suicides have replaced equipment-related deaths as the number one cause of farmer deaths."

**Chapter 12 Unequal Taxes**

*You must pay the price if you wish to secure the blessings.*

-U.S. PRESIDENT ANDREW JACKSON

It costs money to run a government, and the more you want the government to do, the more it usually costs. One point to consider is *how much do we want our government to do*? Another is, *who should pay for it*? Tax policy is how government funds its services and also one way it fulfills the will of the people who elect it by providing tax incentives or disincentives for particular types of behaviors. Consider how home mortgage interest deductibility has fueled home-buying, for example.

As we have seen, starting well before *Santa Clara*, some companies have worked hard to get out of paying for anything, including taxes. Some even spent years resisting paying taxes on land the government had given them for free, and then worked the issue to a ludicrous extent. The *Santa Clara* case involved going to the Supreme Court to fight a tax of one-tenth of a percent.

You and I could never afford to do such a thing, but economies of scale mean that for huge property owners, such efforts can have very big paybacks. Motivated to pursue the subject, with the means to do so, and in the absence of regulations preventing it, they do the obvious tiling, as Adam Smith predicted anyone would: They act in their own self-interest.
The result has been an additional inequity that could not possibly have been intended by the framers of the Fourteenth Amendment. After Santa Clara (and subsequent cases continuing well into the 20th century), increased corporate access to lawmakers has resulted in a shift in the tax burden that rivals the shift in risk from corporate to individual shoulders. In this chapter, we will cover four aspects of this issue:

- A shift in income tax burden from corporations to workers
- A shift in property tax burden from corporations to residents
- The use of federal tax breaks and subsidies to help large corporations
- The use of tax breaks at state and regional levels to lure businesses

There is an appropriate concern about not overtaxing corporations; to do so could endanger the survival of business. But as you will see, this particular pendulum has swung very far away from that risk. To the contrary, the additional shift in tax burden being proposed today is financially crushing individuals who can least afford it.

**The Start of Income Taxes**

The main purpose of a business corporation is as an instrument for the accumulation of wealth, and it has worked well in that respect. In the Robber Baron era of the late 1800s and early 1900s, wealth was being concentrated at an amazing rate among the owners of the trusts. If you've ever had a chance to visit Newport, Rhode Island, to see the mansions of the rich from those days, you know how much wealth there was. For example, The Breakers is the 70-room Italian Renaissance-style villa of Cornelius Vanderbilt II, President and Chairman of the New York Central Railroad. The Elms is the French-style chateau of Edward Berwind, who made his millions providing coal to the railroads.

And these were their summer homes—cottages, as they called them. In New York City, Vanderbilt's "real" home filled the length of a city block along Fifth Avenue from 57th to 58th Street. Illustrating that the Newport house was truly just a cottage, the Victorian mansion in New York City had 137 rooms. "I have been insane on the subject of moneymaking all my life," he told the New York Daily Tribune.

The poor, however, who at that time constituted the vast majority of people in America and Europe, were truly poor: A middle class was largely unknown, outside of self-sufficient farming communities. At the turn of the century, more than half a worker's wage went to cover rent—often in slum tenements—and the remainder barely covered food and clothing. Children worked to supplement the family income because, as Annie S. Daniel documented in 1905, 4-year-old boys "can sew on buttons and pull basting threads" and a girl "from 8 to 12 can finish trousers as well as her mother." The Supreme Court declared a minimum wage unconstitutional and illegal, and it wasn't unusual for people to work 14-hour days, with two half-hour meal breaks, 6 days a week for $1.00 a day. As is always the case in situations of poverty, infant mortality in these communities was high.

Nobody filed income tax returns because nobody paid income taxes. Both the wealth and the poor, however, were paying taxes—essentially a form of sales tax—but it affected the poor far more than the rich. Here's how it worked.

To support itself, the government first taxed the things that people wanted but didn't need, and also taxed things that people were willing to pay to import from abroad. In 1912, for example, 42 percent of the money that ran the federal government came from taxes on alcohol and tobacco, which were heavily marketed to and used by the working poor. Another 45 percent of revenues came from taxes or duties on imported goods, which ran from necessities to luxuries. These taxes were paid to the government by the importers, wholesalers, or retailers, and were passed on to the consumers.
The net effect was that the working poor were paying large percentages of their incomes in taxes on the products they bought. The wealthy, who saved or invested much of the money they brought in so it could earn more money, paid only the pass-through duties when they purchased things. It was a dramatically smaller portion of their income, particularly if they chose to live frugally.

In 1913, during the Progressive movement, a constitutional amendment initiated the federal income tax, which allowed spreading the cost of government over a much wider base—not just what was spent but what was earned. Thus, the wealthy could no longer pocket almost all of their income. They shared the burden, which laid the foundation for the middle class.

By 1922, tariffs on tobacco and alcohol represented only 8 and 9 percent of federal government tax revenue respectively, whereas income taxes on wealthy individuals produced 13 percent of government revenue and taxes on corporations paid 19 percent of the cost of running the governments that authorized their existence. This sharing has been increasingly reversed in recent years, however.

• Corporate taxes as a share of the nation's tax revenues plunged from 28 percent in 1956 to only 11.8 percent in 1996.

• Family income taxes rose from 17.3 percent of median income in 1955 to 37.6 percent in 1998.

• In the past 2 decades, after-tax income of the middle class, which had been rising, has collapsed to inflation-adjusted 1969 levels, and, according to statistics compiled by the AFL-CIO, "average hourly wage of production and nonsupervisory workers in the U. S. economy was $12.77 last year [2001]—down 9 percent compared with 1973."

• The share of all property taxes paid by corporations has dropped from 45 percent in 1957 to 16 percent in 1995.

• During the first year of the Reagan administration's "tax reforms," General Electric actually received a tax refund—an omen of things to come.

• *Austin Chronicle* columnist Jim Hightower pointed out, "Forty-one of America's largest corporations earned $25.8 billion in profits between 1996 and 1999, yet not only did they avoid paying their fair share of taxes—they got $3.2 billion in rebate checks from taxpayers. Among these tax dodgers are such brand-names as Chevron, PepsiCo, Pfizer, J. P. Morgan, Saks, Goodyear, Ryder, Enron, Colgate-Palmolive, MCI, Weyerhaeuser, GM, and Northrop Grumman."

• By setting up almost 900 subsidiaries in tax havens such as the Cayman Islands and through exploiting the tax-deductibility of stock options given to senior executives, Enron Corporation was able to pay no federal taxes in 4 of the 5 years prior to its implosion in 2002. As the *Washington Post* pointed out, in 2000 the corporation was successful in converting a $112 million potential tax bill into a $278 million tax refund.

• According to the U. S. General Accounting Office, almost a third of all "large" corporations (assets of at least a quarter-billion dollars) in the United States paid no income tax whatsoever between 1989 and 1995 (the last year such a study was done), and more than 60 percent of such companies paid less than $1 million in taxes.

• Looking at all U. S. corporations, the GAO concluded, "in each year between 1989 and 1995, a majority of corporations, both foreign- and U. S.-controlled, paid no U. S. income tax."

A similar shift has occurred within the human domain, with the wealthy carrying less of the burden than the middle class. The decline in corporate income taxes has been paralleled by a decline in the income taxes paid by the CEOs and senior executives of those corporations.
• The wealthiest 1 percent of Americans paid $46,726 less in taxes in 1996 than they would have paid if there had been no changes in the tax laws since 1977. But among those earning less than $80,000, those "tax reductions" were worth an average of only $115.

• In 1981, the Reagan administration pushed through the Economic Recovery Tax Act, which, added to a Kennedy-era tax cut, slashed the income tax for America's top 1 percent of families by over 50 percent.

• The George W. Bush administration has recently driven the top income bracket's taxes even lower— from a high averaging around 80 percent between 1935 and 1963, to a 2002 low of 33 percent.

This may not be financially healthy, even for the wealthy. The figures for the period leading up to the crash of 1929 are startlingly similar to those above:

• The 1926 tax cut reduced income taxes for millionaires from 60 percent to 20 percent just 3 years after the minimum wage was repealed in 1923.

• America's top 1 percent of families reaped a 75 percent increase in after-tax income during the 1920s.

• From 1920 to 1929, corporate profits rose 62 percent and dividends rose 65 percent.

**What Happens When Corporate Insiders Run the Government**

In May of 2001, the idea of taxation without representation came full circle when a government leader proposed that we shift all tax burden back onto the people, lowering corporate income tax to zero. Paul O'Neill is a multimillionaire who has been a top executive at Alcoa and International Paper, two of the world's largest multinational corporations. At the time of this writing, O'Neill is Secretary of the United States Treasury, appointed by the Bush administration and approved by the Senate.

In May 2001, O'Neill suggested that corporations should be totally exempt from all income tax. He said that the roughly 10 percent of federal funds they currently pay in corporate income taxes to provide for and administer our commons is too much; corporations should be just as tax-exempt as churches and synagogues.

O'Neill also called for the abolition of Social Security, Medicaid, and Medicare for working people because, he told a reporter for London's *Financial Times*, "able-bodied adults should save enough on a regular basis so that they can provide for their own retirement, and, for that matter, health and medical needs." In O'Neill's opinion, corporations should pay no taxes and individuals should pay all costs of the federal government while also saving to pay for their retirement and all of their own medical costs.

Social Security is half-paid by the employer. If companies don't have to pay for it, the difference does not pass through to the employee—the worker's total tax burden goes up by another 7.75 percent of her income, and the employer's labor cost goes down correspondingly.

**Yes, He Really Said It**

While O'Neill's proposal was widely reported in England's business press, the media of the United States chose to ignore it, with the single exception of the suburban New York tabloid *Newsday*. When *Newsday* columnist Paul Vitello called the Treasury Department, he reported the following conversation:

**VITELLO:** "The secretary didn't really mean to say that no matter how old, no person who has paid into the Social Security system all his or her life would be entitled to benefits until he or
she is physically no longer able to work? He didn't really mean to say that ExxonMobil and Time Warner should be treated as we treat the church—as tax exempt?"

TREASURY DEPARTMENT SPOKESMAN: "Yes, that is our position. The quotes were all accurate."

Checking Vitello's work (and somewhat incredulous myself), I called O'Neill's Washington, D. C., office on June 20, 2001. I was eventually connected to a friendly and helpful woman at the Public Liaison Office. She confirmed that yes, that's what the secretary said. She added, "We were surprised we didn't hear anything back about this [from the American media]. We were waiting for it, but nothing came."

**Unequal Tax Breaks**

In the early 1990s, Paul Hawken, author of *Ecology of Commerce*, found data indicating that the nation's corporations were net consumers, rather than producers of tax monies. Several recent books on corporate welfare point to similar trends and conclusions, although hard data are difficult to come by because the statistics necessary to compile are spread across literally thousands of separate local, state, and federal government agencies and their reports. "It was almost certainly the case, when I did my initial research in 1992," Hawken told me, "that the nation's corporations took more out of the economy in tax dollars than they pay in."

Around the same time as Secretary O'Neill's modest proposal, a major aerospace corporation illustrated how much power it has in the economy. It announced that it would relocate its corporate headquarters and then played the offers of three cities against each other. By the time the decision was announced on May 10, 2001, the *New York Times* announced that the winning destination had "promised tax breaks and incentives that could total $60 million over 20 years ..." to seal the deal.

This is far from rare. According to a 1996 report from the Cato Institute, businesses in America receive direct tax subsidies of over $75 billion annually. That equates to every household in America paying a $750 annual subsidy to corporations, according to author and former faculty member of the Harvard Graduate School of Business Dr. David C. Korten.

The way that this happens clearly illustrates the consequences of unrestrained "freedom of expression" in the halls of a government that was designed to serve the public good. In a situation that is reminiscent of the chartermongering era, companies can once again be aggressive in getting local governments to offer tax breaks that are never offered for humans. All of the following have the effect of cash taken out of human pockets and put into company pockets:

- In Louisiana, a multinational chemical company was given a $15 million tax break.
- In Ohio, $2.1 billion worth of business property was taken off the tax rolls, leaving public schools struggling to find resources since they depend most on the now-eviscerated property tax revenues.
- New York State companies had, from just 1991 to 1992, "earned" $242 million in tax credits and held $938 million in "unused" tax credits they could "use" in future years.
- Arkansas helped a snack-food processor with $10 million.
- Alabama offered $153 million to a German automobile company to build a factory there, an amount equal to about $200,000 per job created.
- Illinois gave a national retail chain $240 million in land and tax breaks to keep them from moving out of state.
- New York City gave tax breaks of $235 million, $98 million, and $97 million to three corporations to keep them from moving to New Jersey, and $25 million to a media corporation to keep it in town. (Few of these breaks created any new jobs anywhere.) Says the *New York
"Since Mr. Giuliani took office in 1994, he has provided 34 companies with tax breaks and other incentives totaling $666.7 million."

- The state of Indiana borrowed millions from its citizens by a bond issue and gave that money as an "upfront cash subsidy," along with other grants and tax breaks that totaled $451 million, to an airline to build a maintenance facility.
- Pennsylvania gave a Norwegian transnational corporation $235 million in economic incentives to build a shipyard, an amount that cost the state, according to Time magazine, $323,000 per job.
- Kentucky gave nearly $140 million to two steel manufacturers—more than $350,000 per job created.
- In Louisiana over a 10-year period, just the top 10 corporations getting breaks (there were others) received $836 million to "create jobs." Time magazine did the math and found that the cost to the state's taxpayers per job created among those 10 ranged from $900,000 to $29 million.
- The State of Michigan created the Michigan Economic Growth Authority (MEGA), which as of 1999 had awarded over $900 million in tax breaks and grants to corporations, costing Michigan taxpayers, according to the Mackinac Center for Public Policy, $40,000 per job created or moved from other states into Michigan.

In almost every case, benefits to one community were subtracted from another. "No new jobs are created in the process," of most of these sorts of tax breaks, according to former United States Secretary of Labor Robert B. Reich, quoted in the New York Times. "They're merely moved around. Meanwhile, the public spends a fortune subsidizing these companies. But there's no way that mayors or governors can withstand the heat once a major company announces it is thinking about leaving."

The list could easily go on for pages, and extends from the local to the national. Indeed, entire books and Web sites are devoted to "corporate welfare." On November 6, 2001, the Barre-Montpelier Times Argus ran a syndicated article from the Knight Ridder News Service by Micah L. Sifry about proposals put before Congress within days and weeks of the September 11 terrorist attacks. The title speaks for itself: "At a Time of Sacrifice, Corporations Are Picking Our Pockets." After the attacks, corporations began lobbying hard for a Bush administration proposal to repeal retroactively the Alternative Minimum Tax passed in 1986. The result, if passed:

- $250 million for Enron
- $572 million for Chevron Texaco Inc.
- $671 million for General Electric
- $184 million for American Airlines
- $833 million for General Motors
- $608 million for TXU Corporation
- $241 million for Phillips Petroleum Company
- $600 million for DaimlerChrysler Corporation
- $1.424 billion for IBM

The consumer advocacy group Common Cause estimated that there may be a relationship between the $4.6 million given by 10 of America's largest corporations to the Democrats, the $10-plus million they gave the Republicans, and the $6.305 billion dollars in tax rebates just those 10 corporations would receive as result of the "economic stimulus package" lobbyists were promoting after the September 11 tragedy.

With or without that legislation, 7 of America's 82 largest corporations paid "less than zero" in federal income taxes in 1998 (they got rebates instead), and 44 of the 82 didn't pay the standard federal corporate income tax rate of 35 percent.
The Trend Goes International

Trends of business influencing government are becoming more uniform worldwide. In a famous recent case, a coalition of Deutsche Bank, Dresdner Bank, Allianz, Daimler-Benz, BMW, and the Germany energy group RWE all threatened to leave Germany if they didn't get tax breaks and subsidies from the government. (In the past 20 years, corporate profits in Germany had gone up over 90 percent and corporate tax revenues had actually fallen by half, but this wasn't enough.) Finance Minister Oskar Lafontaine tried to fight them, but in the end he himself was crushed. When he quit his job over the issue in 1999, Lafontaine said, "The heart isn't traded on the stock market yet."

As the Washington Post pointed out on March 15, 1999, Lafontaine's experience "shows the limits of any single politician, or any single country, to stem the tide of global capitalism."

The next voice from the German government, Chancellor Gerhard Schroder's top aide, Bobo Hombach, apparently got the message, and said, "Things will be different now. We have to move in a different direction." The companies got their money and stayed in Germany: Human taxpayers and family-owned businesses will make up the difference.

Often, however, corporations don't have to make threats to get their cash from the government; They make "investments."

- In the late 1980s and early 1990s, the tobacco companies donated over $30 million to various Republican and Democratic politicians and their parties. In 1997, Trent Lott and Newt Gingrich inserted a single and mostly unnoticed 46-word sentence into that year's massive tax law. The sentence granted the tobacco industry a $50 billion tax break.
- As Charles Lewis documented in his book The Buying of the President, a large national bank gave the Democratic National Committee a $3.5 million line of credit at an attractive interest rate 2 weeks after Democrats helped push through the 1994 Fair Trade in Financial Services Act, which netted that same bank $50 million a year in savings.

The final irony is that while all of this fiscal benefit has accrued to companies through their personhood privileges and they shift the tax burden to humans, they continue to claim exemptions from liability. Additionally, because the structure and culture of corporations is driven to maximize quarterly profits, otherwise well-intentioned people working in company boardrooms find themselves pushed to make decisions that may not be in the best interest of the long-term, of the commons, or even of the company's employees.

Chapter 13
Unequal Responsibility For Crime

A wicked big interest is necessarily more dangerous to the community than a wicked little interest.

-TEDDY ROOSEVELT, OHIO CONSTITUTIONAL CONVENTION, 1912

Consider this August 3, 2001 White House press briefing, in which the editor of Corporate Crime Reporter, Russell Mokhiber, asked a question of White House Press Secretary Ari Fleischer.

MOKHIBER: Ari, the Federal Communication Commission requires that if you're going to have a broadcast license you have to be of sound moral character. So when you make the
application, you have to answer whether you've ever been convicted of a felony. They are now going after a gentleman in Missouri who's been convicted of a felony—

FLEISCHER: Be careful, there are many broadcasters in this room.

MOKHIBER: I understand, that's why I'm raising the question. This gentleman was convicted of a felony, child molestation, and they're trying to strip him of five radio licenses. On the other hand, General Electric, which owns NBC, has been convicted of felonies, and they're not being stripped of their license. Why the double standard?

FLEISCHER: I think you need to talk to the FCC about their standards. That's their jurisdiction to deal with licensing. [Looks around the room at another reporter] Ron?

MOKHIBER: I understand, but generally, does the President have a position on—?

At that point, Fleischer cut off Mokhiber and moved on.

The case Mokhiber cited is not unique. In 1982, a study of America's 500 largest corporations reported that "23 percent of them had been convicted of a major crime or had paid more than $50,000 in penalties for serious misbehavior during the previous decade."

If Corporations Are Persons, Why Aren't Their Crimes in the Statistics?

In December 2001, the FBI issued a press release on their Uniform Crime Reporting Program, which determines the "Nation's Crime Index." It reports crimes by persons—but it excludes corporate persons, even when the corporations have been convicted of felonies. In its entire history, the FBI has never issued an annual report on crimes by corporate persons, although its reports on crimes by human persons are well-researched and well-publicized. The upshot of this is that when you ask people how most money and property are stolen, or how most people are killed, they think of burglars and muggers and bank robbers and crimes of passion. They think of human persons.

The reality, though, is that more money and property are stolen by or lost to corporate criminals than human criminals. Mokhiber's Corporate Crime Reporter notes that in 1998, when the FBI estimated robberies and burglaries at almost $4 billion, the cost of corporate crimes was in the hundreds of billions ... as it is every year. These include:

• Securities scams that ran around $15 billion that year
• Car-repair fraud that hit around $40 billion
• Insurance swindles and corporate fraud found on your health insurance/HMO/hospital billings that runs between $100 billion and $400 billion a year ... a hundred times greater than all the burglaries in the country combined.

Then there are the occasional "really big crimes" like the savings and loan scandal that then-Attorney General Dick Thornburgh called the biggest white-collar swindle in history.

Deaths From Corporate Actions Are Not Included

More people die as a result of corporate activity than because of the actions of deranged killers or overwrought spouses. According to Corporate Crime Reporter, the FBI reported that 1998 saw about 19,000 Americans murdered at the hands of other people. But that same year 56,000 people died from work-related diseases like black lung and asbestosis—that were unreported by the FBI—and many times that number died from "the silent violence of pollution, contaminated food, hazardous consumer products, and hospital malpractice."

Much of the human death caused by corporate activity has arguable benefits—for example, the many cancers caused by compounds associated with plastics or pesticides. But the cost of these deaths isn't factored into the unit cost of the products, so there's no financial incentive for
industry to develop toxin-free or toxin-reduced alternatives, or to use the more expensive but less toxic alternatives that already exist.

And then there are the Big Mistakes.

In 1998, one of America’s largest meatpacking companies replaced a refrigeration unit on one of their processing lines. Shortly thereafter, the detectors they have in place on the line to look for deadly cold-loving bacteria like *Listeria monocytogenes* started to react, indicating high levels of bacterial contamination.

The company's response was immediate. Caroline Smith DeWaal of the Center for Science in the Public Interest told reporters Russell Mokhiber and Robert Weissman, "Then their tests started coming up positive, so they stopped testing." This company's Fourth Amendment right to privacy blocked surprise inspections by the government.

The detectors were apparently turned off for a full month before the Centers for Disease Control used DNA fingerprinting to track the bacteria that was causing a national outbreak of *Listeria* back to the plant, provoking a nationwide recall of a million pounds of product.

But during that month, hundreds of people consuming this company's products were sickened by *Listeria*, and 21 humans died from it.

The U. S. Attorney's office, according to Mokhiber and Weissman, "said there was insufficient evidence to bring a felony charge" against the company. Instead, the company paid a $200,000 fine and issued an unprecedented joint press release with the Bush administration's USDA... that managed to say that the company had paid the fine without ever mentioning the brand name of the product that had been contaminated and caused the deaths.

Mokhiber and Weissman raised the case at the White House with Press Secretary Ari Fleischer. Here's the transcript of the interaction.

**QUESTION:** Ari, has the President expressed a view on the death penalty for corporate criminals—that is, revoking the charter of a corporation that has been convicted of a crime that resulted in death?

**FLEISCHER:** The President does not weigh in on those matters of justice. They should not be dictated by decisions made at the White House.

**QUESTION:** No, Ari, wait a second. Ari, Ari, wait a second. He's in favor of the death penalty for individuals generally. Is he in favor of the death penalty for corporations convicted of crimes that result in death?

**FLEISCHER:** These are questions that are handled by officials of the Justice Department—not by people at the White House.

The White House hasn't commented further. And because the FBI doesn't report on such deaths, or on workplace deaths, it's hard to know how many deaths every year could have been prevented.

**In A Democracy...**

The risk to a person who kills another is high: prison, and, in some states, execution. But the risk of killing people is relatively low to a corporation, and industry lobbies to keep it that way. For instance, when Congress considered putting criminal penalties into the National Traffic and Motor Vehicle Safety Act, the auto industry lobbied hard against it and won.

As a result, today if you or I were to knowingly and willfully repair or build a car for somebody that killed them, we could go to prison for manslaughter or even murder. But if a corporation knowing and willfully were to repair or build a car that killed a human, they now have a legal exemption. They would face only civil penalties and fines under the act.
Many human deaths are a result of corporate activities that are permitted by the government—but even deaths that result from corporate felony convictions are not included in FBI crime statistics. In a democracy, we can do better.

Chapter 16
Unequal Wealth

_I care not how affluent some may be, provided that none be miserable in consequence of it._

-THOMAS PAINE, 1796

In the absence of the controls recommended by the Founders and early state regulation, corporations have continued to grow in size and power without limit. But they haven't done it just by creating new wealth in the economy. Much of it, instead, has been accomplished by increasingly consolidating existing wealth. Of course, some new wealth has been generated, but nowhere near enough to explain the observable facts.

Consolidation: Mergers, Acquisitions, Interlocking Boards

I noted in chapter 2 that if you were to define and rank nations according to their gross domestic product (GDP), 52 of the world's 100 largest "nations" are actually corporations. Tracking the growth of the largest companies can be problematic because they're constantly merging with or buying other companies. This trend has accelerated in the decreased regulatory environment of the 1980s and 1990s—just a few generations after Americans busted the trusts during the Populist movement of Teddy Roosevelt and William Jennings Bryan.

One-third of 1980's Fortune 500 companies no longer existed in 1990— not because they failed, but because they had been merged or acquired. This accelerated in the 1990s: Two-fifths of the Fortune 500 vanished in the 5 years from 1990 to 1995. They're still there and still powerful; it's just that now they're even more powerful and wealthy, and they have less competition.

The combined GDP of the world's 200 largest corporations is greater than all but nine nations, and just as the European royal families are interrelated, so too are the boards of directors of most of the world's largest corporations.

Corporate observer Robert A. G. Monks reports that today 86 percent of billion-dollar company boards contain at least one CEO of another company, while 65 percent of outside directors serve on two or more boards. He documents how 89 percent of inside directors are outside directors on other companies' boards, and 20 percent of all directors serve on four or more company boards. Ralph Nader has testified about this extensively before Congress, suggesting these interlocking boards violate antitrust statutes, and there are entire Web sites devoted to it, such as www.theyrule.net.

For example, the following companies are interconnected in that each has at least one board member who's also a board member on another, creating a continuous daisy-chain (all information was current as of early 2002; stats cited from www.theyrule.net):

- IBM shares a board member with Coca Cola
- Which shares a board member with AT&T
- Which shares a board member with Citigroup
- Which shares a board member with Lucent Technologies
• Which shares a board member with Chevron
• Which shares a board member with Hewlett Packard
• Which shares a board member with Boeing
• Which shares a board member with Sara Lee
• Which shares a board member with Bank One Corporation
• Which shares a board member with Cardinal Health
• Which shares a board member with Freddie Mac
• Which shares a board member with Lehman Brother Holdings
• Which shares a board member with PepsiCo
• Which shares a board member with Bank of America
• Which shares a board member with Motorola
• Which shares a board member with J. P. Morgan Chase
• Which shares a board member with ExxonMobil
• Which shares a board member with SBC Communications (owns Ameritech, PacBell, Southwestern Bell, among others)
• Which shares a board member with PG&E Corporation
• Which shares a board member with Home Depot
• Which shares a board member with General Electric
• Which shares a board member with Delphi Automotive Systems
• Which shares a board member with Goldman Sachs Group
• Which shares a board member with Ford Motor Company
• Which shares a board member with Sprint
• Which shares a board member with Allstate
• Which shares a board member with AMR (owns American Airlines)
• Which shares a board member with Aetna
• Which shares a board member with Dell Computer
• Which shares a board member with Prudential Insurance
• Which shares a board member with Dow Chemical
• Which shares a board member with Met Life
• Which shares a board member with Verizon
• Which shares a board member with USX (formerly U. S. Steel)
• Which shares a board member with Lockheed Martin
• Which shares a board member with Enron
• Which at this writing shares board member Ken Lay with Compaq
• Which shares a board member with Dynergy
• Which shares a board member with CVS/Pharmacy
• Which shares a board member with Fannie Mae
• Which shares a board member with Conoco
• Which shares a board member with E. I. du Pont de Nemours » Which shares a board member with IBM
• Which shares a board member with Coca Cola (which is where we started)

There is strong evidence that this much concentration of wealth and power is not healthy, and prior to the last century it was considered criminal behavior in many states, as interlocking boards were often banned and most states had specific caps on the size a corporation could not exceed.

But that was then and this is now. Today, the world's largest 200 corporations, which employ fewer than 0.8 percent of the world's workforce, account for over 27 percent of the world's total economic activity, more than all nations in the world combined except the top 10.

The corporations of Samuel Adams' day, like the East India Company, were the bald economic instruments of monarchy and imperial power, but during and after the American
Revolution they were put firmly under the control of state legislatures and local municipalities. Today, empowered with human rights, they roam free, with few checks on their power or growth.

- The United Nations reports that "about two-thirds of all world trade" is in the hands of transnational corporations, who "increasingly shape trade patterns" of the planet.
- Corporations reaching out from their home countries and into other countries have become "the main force in international economic integration," according to the U. N.'s Trade and Development Conference.
- Sales of the 200 largest corporations in the world equal 27.5 percent of world's GDP.
- If you added together the sales of every nation in the world except the top 10, the total would be less than the combined sales of the world's 200 largest corporations.
- The 1999 sales of General Motors were greater than the GDP of 182 nations. The same is true of Wal-Mart, Exxon-Mobil, Ford Motor, and DaimlerChrysler.
- The 82 largest American corporations contributed $33,045,832 to political action committees in the year-2000 election cycle (and that doesn't include "soft money," for which statistics are unavailable), out-spending labor unions by 15 to 1. This was apparently useful to candidates: In 94 percent of U. S. House of Representatives races, the candidate who spent the most money won.

As this shift in income has happened, along with it came a shift in who owns pretty much everything.

- In 1976, the richest 10 percent of America's population owned 50 percent of American wealth. By 1997, they owned 73 percent. (In other words, 23 percent of America's total wealth shifted from the poor and middle-class to the very wealthy in 21 years.)
- This was not just because the economic pie got bigger—44 percent more people work multiple jobs than did in 1970, and American workers are putting in, on average, a full month more at work than they did 20 years ago. And hourly earnings of America's nonsupervisory workers, in 1998 dollars, have fallen by 9 percent since 1973, from $14.09 to $12.77.
- Looking at the same numbers from "the other end of the telescope," in 1976 the lower 90 percent of the population owned half the wealth. By 1997, their share was down to 27 percent.
- In 2000, the top 1 percent of American households have financial wealth greater than that of the bottom 95 percent combined.
- In 1998, the net worth of just one American, Bill Gates, at $46 billion, was greater than the bottom 45 percent of all American households combined.
- It's not just an American phenomenon any more. Worldwide, according to the United Nations Development Program, the difference between the richest and poorest nations in the world was 1 to 3 in 1820, 1 to 35 in 1950, and 1 to 72 in 1992. The gap has continued to grow since then.

How can this be? What's happening?

**Spengler's The Decline of the West**

In his book *The Decline of the West*, first published in German in 1918 and then in English in 1926, Oswald Spengler suggested that what we call Western Civilization was then beginning to enter a "hardening" or "classical" phase, in which all the nurturing and supportive structures of culture would become, instead, instruments of the exploitation of a growing peasant class to feed the wealth of a new and growing aristocracy.
Culture would become a parody of itself, peoples' expectations would decline while their wants would grow, and a new peasantry would emerge which would cause the culture to stabilize in a "classic form" that, while Spengler doesn't use the term, seems very much like feudalism—the medieval system in which the lord owned the land and everyone else was a vassal (a tenant who owed loyalty to the landlord).

Spengler, considering himself an aristocrat, didn't see this as a bad thing. In 1926, he prophesied that once the boom of the Roaring Twenties was over, a great bust would wash over the Western world. While this bust had the potential to create chaos, its most likely outcome would be a return to the classic, stable form of social organization, what Spengler calls High Culture and I call neofeudalism.

He wrote, "In all high Cultures, therefore, there is a peasantry, which is breed stock, in the broad sense (and thus to a certain extent nature herself), and a society which is assertively and emphatically 'in form.' It is a set of classes or Estates, and no doubt artificial and transitory. But the history of these classes and estates is world history at highest potential. It is only in relation to it that the peasant is seen as historyless." (All italics are Spengler's from the original text.)

More recent cultural observers, ranging from billionaire George Soros in his book The Crisis of Global Capitalism, to professor Noreena Hertz in The Silent Takeover: Global Capitalism and the Death of Democracy have pointed to deep cracks in the foundational structure of Western Civilization, traceable to the current legal status of corporations versus humans. The extent of the problems within our structures is laid bare with startling and sometimes frightening clarity by a wide variety of books.

The origin of many of modern global society's problems are clearly laid out in The Trap by now-deceased billionaire speculator Sir James Goldsmith, and it appears that perhaps that "crazy old coot" (as the media would have us believe) Ross Perot, with his charts and graphs and warnings about corporate money in the political process, GATT, and NAFTA was right in many regards, at least from a nationalistic American point of view.

The summary version of these and dozens of other books documenting Spengler's decline of the West is this: We're entering a new and unknown but hauntingly familiar era. It's new because it represents a virtual abandonment of the egalitarian archetypes the Founders of the United States put into place in our Constitution and Bill of Rights. And it's hauntingly familiar because it resembles in many ways one of the most stable and long-term of all social structures to have ever established itself in the modern history of Europe—feudalism.

Boston Tea Party participant George R.T. Hewes mentioned the idea that the situation then was beginning to resemble feudalism, and there are those today who have made the same comparison.

The New Feudalism

Feudalism doesn't refer to a point in time or history when streets were filled with mud and people lived as peasants (although that was sometimes the case). Instead, it refers to an economic and political system, just like democracy or communism or socialism or theocracy. The biggest difference is that instead of power being held by the people, the government, or the church, power is held by those who own property and the other necessities of life. At its essential core, feudalism could be defined as "government of, by, and for the rich."

Marc Bloch is one of the great 20th-century scholars of the feudal history of Europe. In his book Feudal Society, he points out that feudalism is a fracturing of one authoritarian hierarchical structure into another: The state disintegrates as local power brokers take over.
In almost every case, both with European feudalism and feudalism in China, South America, and Japan, "feudalism coincided with a profound weakening of the State, particularly in its protective capacity." Given most accepted definitions of feudalism, feudal societies don't emerge in civilizations with a strong social safety net and a proactive government.

There is a slight debate, in that some scholars like Benjamin Guerard say feudalism must be land-based, whereas Jacques Flach and others suggest that the structure of power and obligation is the key. But the consensus is that when the wealthiest in a society take over government and then weaken it so that it no longer can represent the interests of the people, the transition has begun into a new era of feudalism. "European feudalism should therefore be seen as the outcome of the violent dissolution of older societies," Bloch says.

Whether the power and wealth agent that takes the place of government is a local baron, lord, king, or corporation, if it has greater power in the lives of individuals than does a representative government, the culture has dissolved into feudalism. Bluntly, Bloch states, "The feudal system meant the rigorous economic subjection of a host of humble folk to a few powerful men."

This doesn't mean the end of government, but instead, the subordination of government to the interests of the feudal lords. Interestingly, even in feudal Europe, Bloch points out, "The concept of the State never absolutely disappeared, and where it retained the most vitality men continued to call themselves 'free'..."

The transition from a governmental society to a feudal one is marked by the rapid accumulation of power and wealth in a few hands, with a corresponding reduction in the power and responsibilities of government. Once the rich and powerful gain control of the government, they turn it upon itself, usually first eliminating its taxation process as it applies to themselves. Says Bloch, "Nobles need not pay taille [taxes]."

Bringing this to today, consider that in 1982, just before the Reagan-Bush "supply side" tax cut, the average wealth of the Forbes 400 was $200 million. Just 4 years later, their average wealth was $500 million each, aided by massive tax cuts. Today, those 400 people own wealth equivalent to one-eighth of the entire GDP of the United States.

**Extreme Concentrations Are Destabilizing**

Too much concentration of anything makes it vulnerable to toppling. Most historians and economists recognize that a root cause of the Great Depression was a severe economic imbalance. The sharp increase in concentration of wealth described in this chapter also has much in common with the statistics of the 1920s.

This is also the history of civilizations. As wealth and power accumulate into fewer and fewer hands, the rest of the populace loses its sense that there's any point in trying to keep up. Whether on a national or a worldwide stage, revolutions and terrorism result when enough people perceive too great a gap between the most rich and the average poor.

In the 1980s, the Reagan and Bush administrations effectively ceased enforcement of the Sherman Anti-Trust Act, just as the Coolidge administration had done in the 1920s. This led to a mania for mergers, acquisitions, and neo-trusts, just as happened in the Roaring Twenties, and with a similar re-consolidation of power and wealth and rise in the stock market. Hopefully, the same cycle will not play itself out: If we act promptly, we can set in motion forces that will change the direction of the current trend.

**The End of the American Dream?**

Martin Luther King, Jr., in his "I have a dream" speech, referred to how the people who wrote the Declaration of Independence and the U. S. Constitution "were signing a
promissory note to which every American was to fall heir." The contents of that note King referred to were identified by Jefferson when he wrote, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."

The American dream is something every schoolchild understands. It's the heart and soul of democracy. It means opportunity and freedom, the ability to raise a family or pursue one's own dreams. It means the strong participate in the protection of the weak, lest they lose their own rights if they become oppressors.

In *The Federalist Papers* No. 51, Alexander Hamilton wrote, "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign ..." and under such circumstances, eventually, even "the more powerful factions or parties will be gradually induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful."

Are we approaching that time Hamilton mentioned?

- At the same time that the concentration of wealth has taken place over the past 3 decades, the entry-level wage of an American male high school graduate has declined 28 percent (in real dollars).
- Twenty percent of American workers now earn income below the official poverty rate defined by the U. S. government—and that doesn't include the unemployed.
- The top 1 percent of Americans in 1998 in terms of income equaled the lowest wage earning 100 million Americans. (And there are only a total of about 140 million working Americans, according to the Bureau of Labor Statistics.)
- The top 20 percent of American families have seen their income go up by 97 percent in the past 2 decades. Meanwhile, the bottom 20 percent fell 44 percent in their real income, although most were working harder, working longer hours, and many carried multiple jobs.

Oswald Spengler noted that cycles of growth and collapse are built into the culture, and at a certain point it "hardens" and then becomes feudal or "classical." The warning signs, he says, are easily seen: replacement of human and spiritual values with slogans and self-indulgence, concentration of wealth into the hands of a few as poverty increases exponentially, citizens who are politically disengaged and ignorant, and a culture that becomes a parody of itself as it obsesses on its slogans and symbols but ceases to live out its ideals. The fall of the Roman Empire is a classic example, and we may be another.

- In a 1998 survey of American teens, 2.2 percent could name the Chief Justice of the Supreme Court (William Rehnquist), but 59.2 percent could name Curly, Larry, and Moe as the fictional Three Stooges.
- An impressive 74.3 percent of teens knew that Bart Simpson lives in Springfield, Massachusetts, but only 12.2 percent recognized that Abraham Lincoln lived most of his life in Springfield, Illinois.
- 21.1 percent knew there are 100 U. S. Senators, 1.8 percent could identify James Madison as a father of the Constitution, and a thin 25 percent knew what human right the Fifth Amendment protects. But 98.7 percent knew that Leonardo DiCaprio starred in the hit movie *Titanic*, and 75.2 percent knew the zip code associated with the popular television show *Beverly Hills 90210*.

Ironically, and probably unknown to the National Constitution Center at the time they designed their poll, the Three Stooges, Bart Simpson, the movie *Titanic*, and the television show *Beverly Hills 90210* are all owned by the same multinational corporation. Such single-
corporation influence over popular culture would not have been the case 200 years ago, or even 50 years ago.

To blame all or even most of this on the Santa Clara decision would be overreaching: Wealth was concentrating and moving around the world well before the modern corporation came along. Rome had concentrations of wealth, as did Sumeria and Greece. Medieval Europe and Japan were cultures of extreme wealth and poverty, as was India with its multi-millenia caste system. Even Victorian England, not so very long ago, was a hellhole for all but the well-born and the industrialists, as Charles Dickens reminds us in graphic, tragic prose. "This is nothing new," some would say.

But it is. The difference between then and now is twofold:

1. The wealth in those days had a face and a name. Without corporations to blur who does what, the warlords and nobles and the high-caste were identifiable. We know who the kings and queens of old were, from Gilgamesh 6,000 years ago in Sumeria to the King of France before the revolutionaries executed him and his family. Because that wealth had a face, saying sayings like "Let them eat cake" could be dangerous for one's survival.

2. More important, those governments never claimed to be democratic. In the past 6,000 years of modern worldwide agriculture-driven civilization, there were only two governments—Athens for about 2 centuries, and the United States for a century or so—which rose out of a dominator culture and claimed that they were truly democratic, truly government by the people, even the poorest of the people. Since the American experiment, dozens of countries have joined the club in various forms, but it's still very much a new experiment worldwide, one that was only once tried before in all these millennia—Athens, 300 BCE—and they were conquered and thrown back into oppression by the concentrated wealth and power of Alexander the Great.

In A Democracy…

The "great experiment" of a democratic republic is at a critical crossroads. Can it recover the "government of, by, and for the people" ideal that it held so recently, and implement it again in the halls of governments in America and across the world?

Or has de Tocqueville's worried vision come to pass? Have we become anesthetized and helpless as humans in the face of a mighty machine that puts on a good face but, when push comes to shove, takes no prisoners and destroys its competitors without a second's thought?

The answer will depend, in some part, on whether the fateful Santa Clara decision is allowed to stand. Will the people take back their government and assert democratic controls over the misdeeds of the fabulously powerful corporations among them?

To some extent, that will depend on whether We The People demand that our elected officials return to the time-tested principles of national trade policy and fair trade, instead of the "free for multinationals trade" that has been so aggressively peddled to the world in the past 2 decades.
Chapter 19
Unequal Influence

The resources in the treasury of a business corporation,, are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas.

-U.S. SUPREME COURT JUSTICE WILLIAM S. BRENNAN, JR.

"The people have got to know if their President is a crook," U. S. President Richard Nixon told a national television audience on November 11, 1973, when asked at a press conference if donations from the dairy industry had caused him to reverse his position on dairy price supports. He added, "Well, I am not a crook."

A bit over 2 years earlier, however, Nixon had a meeting at the White House with representatives of the dairy industry, who had apparently just given him a $2 million campaign pledge. With the tape running on March 23, 1971, Nixon said, "Uh, I know . . . that, uh, you are a group that are politically very conscious . . . And you're willing to do something about it. And, I must say a lot of businessmen and others . . . don't do anything about it. And you do, and I appreciate that. And I don't have to spell it out."

When the men from the trade association left, John Connally, one of Nixon's advisors who didn't realize that Nixon had bugged his own office, said to Nixon, "They are tough political operatives. This is a cold political deal."

Two days later, as Dairy Education Board executive director Robert Cohen documents, Nixon announced to his Cabinet a stunning change in administration position that would bring the dairy industry over $300 million in additional revenue for the following year.

Similarly, as somebody involved in education issues (I'm on the board of directors of a private school in New Hampshire, and have written six education-related books) I had wondered why the Bush administration would propose doubling the testing burden on public schoolchildren when both good science and common sense say that decreasing classroom size, increasing teacher training and resources, and other less expensive and more local methods are far more effective at helping children learn.

Then the office of Senator Jim Jeffords gave me a study from the Congressional Research Service from July 9, 2001, titled "Educational Testing: Bush Administration Proposals and Congressional Response." The report, produced for members of Congress and not generally available to the public, noted, "Estimated aggregate state-level expenditures for assessment programs in FY2001 are $422.8 million."

Suddenly, it all made sense: Most standardized tests are sold to schools by a small number of very large corporations, and those corporations are now scheduled to make hundreds of millions more dollars under the Bush proposals.

In fact, the report notes that the Senate version of the Bush plan would "authorize a total of $400 million for state assessment development grants for FY2002;" "authorize $110 million for expansion of NAEP state assessments;" and "authorize $50 million for state performance awards"—all in addition to the current $422 million that the states were already spending on testing. The testing industry would more than double in size in a single year, helping a handful of large corporations get very much richer from this redistribution of tax dollars, whether it helps kids learn or not.

The daily payoffs in Washington, the hundreds of millions that are funneled from corporate bank accounts to politicians' campaigns, often producing results that are of
questionable benefit to anybody but the donor corporations, evoke a response of cynicism among most Americans.

**A Political Backlash**

Political optimists see a different possibility than today's rampant cynicism. And although most registered voters no longer bother to vote, some do believe that politicians who are truly dedicated to the public good can return power to the people. Those who believe that it is the role of government and not corporations to ensure our rights to "Life, Liberty, and the Pursuit of Happiness" view the increasingly populist talk of some national politicians as good news.

For example, Vermont Congressman Bernie Sanders published an article on his Web site on August 17, 2001, titled "The U. S. Needs a Political Revolution." He wrote, "At a time when more and more Americans are giving up on the political process, and when the wealthy and multinational corporations have unprecedented wealth and power, it is imperative that we launch a grass-roots revolution to enable ordinary Americans to regain control of their country. . . .

"It is no accident," Sanders continued, "that while pharmaceutical and insurance companies donate huge sums of money into the political process, American citizens must pay, by far, the highest prices in the world for prescription drugs. Those same companies and their political donations ensure that the United States remains the only industrialized nation that does not have a national health care program providing health care to all.

"The rich hold $25,000-a-plate fundraisers for their candidates. Why would they pay so much for a chicken dinner? The answer is, they want access and special favors. It is no accident that after raising more money from the wealthy for his campaign than any candidate in history, President Bush and the Republican leadership passed a $1.3 trillion dollar tax bill which provides $500 billion in tax breaks for the wealthiest 1 percent of Americans. It is no accident that, rather than raising the minimum wage, the President and congressional leadership are providing billions in tax breaks and subsidies to the major oil, gas, and coal companies. It is also, sadly, no accident that almost 20 percent of our children live in poverty, schools throughout the country are physically deteriorating, college graduates begin their careers deeply in debt, and millions of working class people are unable to find affordable housing."

My read of it is that Sanders is suggesting that we again try real "republican democracy": a government truly of, by, and for humans. That we begin to put people first and the rights and powers of corporations (and governments, churches, and any other human-made institutions) second.

This brings us back to those two meta-political parties: the politicians who work on behalf of corporations, and the politicians who work on behalf of humans. Increasingly, citizens of democratic nations are setting aside labels like Republican, Democrat, Tory, or Labor when considering their politicians. Instead, the labels in people's minds are: "working in the interests of corporations" and "working in the interests of individual citizens."

**How Public Opinion Is Influenced By Concentrated Money**

Poll after poll has shown that Americans overwhelmingly support reform of our health-care system. People are concerned about costs and quality of care. Yet in 1993, when President Bill Clinton proposed that the government should offer some form of health-care protection to the nation's 40-plus million uninsured, the insurance industry spent an estimated $100 million on lobbying, $60 million on advertising, and provided members of Congress with around 350 free trips.
What actually happened as a result of all this spending is extraordinarily ironic. Industry polls showed that people cared more about being able to choose their own doctor than most other medical issues. Taking advantage of this, an infamous series of ads featuring "Harry and Louise" warned Americans that under a government-run health insurance program, they would lose their ability to select the doctor of their choice.

The advertising worked. Panicked, American public opinion swung from strong support for Clinton's proposals to overwhelming fear of them. The Internet became flooded with insulting e-mails about the evils of "Hillary's" insurance proposal.

Even more ironically, those fears have been realized today—without the Clinton proposal. Back in 1993, you could pretty much go to any doctor you wanted (assuming you were insured), and your insurance would almost always pay for it. Overtly restricting that ability was never part of the Clinton proposal, but because of the power of the Harry and Louise ads, people came to believe it was.

And within a few years, insurance companies and HMOs began to crack down on consumers who wanted to select their own doctors. Today, fewer Americans have that privilege than in 1993, even though it's fully available to citizens of virtually every country that has a national health-care program . . . which is every developed country in the world except the United States.

It turns out there is a strong reason why the insurance industry was eager to invest so much cash in advertising and lobbying to keep the government from competing with them in the realm of health care: profits. For every $100 that passes through the hands of the government-administered Medicare programs, between $2 and $3 is spent by Medicare on administration, leaving $97 to $98 to pay for medical services and drags. But of every $100 that flows through corporate insurance programs and HMOs, $10 to $24 sticks to corporate fingers along the way. As Yale University Professor of Public Policy Theodore Marmor, author of *The Politics of Medicare*, said, "The costs of administering private insurance are somewhere between 5 and 10 times the costs of administering Medicare."

After all, Medicare doesn't have lavish corporate headquarters, corporate jets, or pay expensive lobbying firms in Washington to work on its behalf. It doesn't pay out profits in the form of dividends to its shareholders. And it doesn't compensate its top executive with over a million dollars a year, as do each of the largest of the American insurance companies. The result, as Professor Marmor points out, is that Canadians—who receive health care at one-sixth the cost of the United States because no insurance companies are in the middle—"are somewhat healthier than citizens of the United States, use more hospital days per thousand, and visit their physicians more often," because services are freely available.

Yet most citizens of the United States have no idea what it's like to live in a country with national health care. When our family lived in Germany for a year a bit over a decade ago, we were amazed at how smoothly their health-care system works: We could make any appointment with any physician, and they were excellent at what they did. But even describing the reality of that experience draws uncomprehending stares from Americans, who have been fed a steady corporate diet of very one-sided information.

**Polluters Pass “Go”**

In 1995, the new governor of Texas responded to the needs of the "polluting industries" who had contributed more than $4 million (about 20 percent of the total) to his election campaign the year before. George W. Bush signed into law the Texas Environmental Health and Safety Audit Privilege Act, also known as the polluter immunity law. This new law, which has since been emulated in 25 other states and is now being considered at a federal level, allows polluting industries to avoid prosecution for pollution violations if they themselves
report their own crimes to themselves in an internal audit. It also gives them the ability to prevent the public from knowing about their violations.

As Arizona's Assistant Attorney General David Ronald said, "Only the business with something to hide would benefit from a law that turns data gathered from environmental audits into secret information." Some of these laws even provide for a year in jail and a $10,000 fine for any human who reveals to the public or government agencies any corporate pollution discovered in an audit, thus discouraging investigative reporting or whistle-blowing employees.

Like with health-care policy, these laws that increase the power and profitability of the nation's largest corporations at the expense of smaller companies who play by the rules from the beginning are influenced by enormous amounts of "corporate free speech" in the form of cash for politicians and political parties.

**In A Democracy...**

There are those who argue that health care should be included in understanding the meaning of the phrase "Life, Liberty, and the Pursuit of Happiness." Others point out that the Founders wrote the Constitution and didn't put into place a national health-care system then, so clearly they didn't mean for there to be one. Both arguments have their backers and make good points.

My goal here in this chapter was not to argue for national health care, but rather to point out how one of the more important of our national dialogues is skewed by the presence of corporate money, both in lobbying and advertising. And that money is spent under the "right of free speech" that corporations claim, hearkening back to the *Santa Clara* decision. Corporate personhood and its claim to First Amendment rights is one of the most powerful weapons wielded by insurance and HMO corporations to access politicians and use the airwaves to mold public opinion.

The point for a democracy, though, is what is the will of the people? That will may change over time, but it is undemocratic when it is shaped by the single voice that shouts the loudest because there are profits to be made. Democracy is more important than any single debate, and this is a classic example of how democratic republican processes have been twisted because of the concept of corporate personhood.
Part 4
Restoring Democracy as the Founders Imagined It

The Fourteenth Amendment followed the freedom of a race from slavery….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

-U.S. SUPREME COURT JUSTICE HUGO BLACK

Chapter 21
End Corporate Personhood

We are made wise not by the recollection of the past, but by the responsibility for our future.

-GEORGE BERNARD SHAW

Arizona changed their law after 1886 so that the word "person" would include nonliving as well as living legal entities: "'Person' includes a corporation, company, partnership, firm, association or society, as well as a natural person."

Many states have varying definitions of "person" depending on the part of law at issue. For example, there was a 1998 U.S. Supreme Court case in which a large part of the argument had to do with whether or not the Federal Trade Commission had the authority, under California law, to act as a person in enforcing a judgment against a telemarketer.

Limit-Setting Legislation Isn't Enough

As we've seen through the history of the Sherman Anti-Trust Act and other legislative attempts to control corporate behavior, the problem faced by citizens as well as directors and stockholders of corporations is systemic and rooted in how corporations are defined under law.

Virtually every legislative session since the 1800s has seen new attempts to regulate or control corporate behavior, starting with Thomas Jefferson's unsuccessful insistence that the Bill of Rights protect humans from "commercial monopolies." Ultimately, most have either failed or been co-opted because they didn't address the underlying structural problem of corporate personhood.

To solve this problem, then, new laws controlling corporations aren't the ultimate answer. Instead, what is needed is a foundational change in the definition of the relationship between living human beings and the nonliving legal fictions we call corporations. Only when corporations are again legally subordinate to those who authorized them—humans, and the governments representing them—will true change be possible.

To bring this about will require a grassroots movement in communities all across America and the world to undo corporate personhood, leading to changes in the definitions of the word "person."

Persistence

I'm not so naive as to think this is something that will happen quickly, easily, or start at a national level. It will begin with you and me, at a local level, and percolate up from there, just as every substantial reformation movement has, from the American Revolution to the
populist trust-busting movement of Teddy Roosevelt's era to the civil rights movement. Change happens when citizens stand up and say "I won't have it anymore."

If history is any indicator, it won't be a short or direct path. It may be in my children's or their children's lifetime that humans finally take back their governments and their planet from corporations, and it may even be generations beyond that. On the other hand, sometimes the Constitution is amended quickly in response to an overall public uprising, as happened with the amendment to end Prohibition and the amendment to lower the voting age to 18 that was passed in response to the rage of teenagers being forced to serve in the Vietnam War over which they had no voting power.

**Townships Fight Back**

In 2001, several townships in Pennsylvania passed ordinances forbidding corporations from owning or controlling farms in their communities. "They chose to go that route instead of the regulatory route," said attorney Thomas Linzey of the Community Environmental Legal Defense Fund (CELF). "If we just got a regulation passed about, for example, odor from factory farms, then the entire debate from then on would be about odor. But what we want to challenge is the right for these huge corporate farming operations to exist in our communities in the first place."

In December 2001, Gene Mellott, the Secretary for Thompson Township, Pennsylvania, said his township had adopted several such ordinances, including, "An ordinance forbidding confined animal feeding operations from being owned and operated by a corporation," and "one that deals with corporations who have a previous history of violations, denying them access to starting up an animal feeding operation."

Mellott noted that at the time of our interview, one farmer was actually going through the processes specified by the ordinance, cooperating with the township, prior to opening a new animal feeding operation.

Other townships weren't so lucky, though, Mellott said. "In one township, the agribiz corporations threatened to sue the directors of the Township, both as directors and personally. They didn't have the personal funds to fight that, so they decided not to pass the ordinance."

I asked Linzey how a corporation could sue a township official for proposing legislation, and he said, "They allege that the township officials are planning to infringe on their civil rights." "Civil rights?" I said.

"Yes, civil rights. Because they claim they're persons, just like the township officials, so they can sue them, person to person, so to speak. That also immediately throws it into federal court, where the local officials will have to pay more for defense and won't have the easy support of their local community."

If corporations weren't persons, they couldn't use such forms of harassment to prevent local officials from trying to protect their citizens from what may be unpleasant corporate neighbors. And that's really the bottom line for township officials like Mellott, who said, "These ordinances were passed to protect our citizens [emphasis added] from pollution or side-effects of factory farms, water usage problems where they may draw down our reserves and making wells go dry, that sort of thing. We felt that a business that large should be regulated. I've heard the farm bureau is opposed to this, but the majority of the citizens of the township are in favor of them if they're passed, and they're the ones who elected us to represent their interests."
Changing Local Laws First

So how to make these changes? As with the family farmers in Pennsylvania with their and CELDF’s battle against corporate factory-farming operations that risk fouling their air, polluting their wells and river waters, and degrading their land, it will start at the local level.

I’ve helped fund an effort by attorneys Daniel Brannen and Thomas Linzey to check the laws of every single state in the Union and Washington, D. C., to figure out how to best phrase local ordinances denying corporate personhood. You’ll find the proposed Model Ordinances to Rescind Corporate Personhood on page 294.

In many communities, you’ll have to get a city councilperson or other elected official to propose the law; in others, individuals can place initiatives on ballots or before town meetings themselves. Call your town hall to find out; ask, “How do I go about submitting a new law? What's the process?” In so doing, you will be joining all those down through the centuries who have initiated change in democracies across the world.

And, just as those who worked for civil rights for specific groups of humans came up against resistance, there may be opposition to your proposal.

When Linzey helped local farmers and elected officials pass ordinances keeping corporate factory farms out of their communities, he said, "A ranking Republican state senator demanded that CELDF be banned from [speaking out in public] panels. The Farm Bureau actively interfered in one local government's effort to pass the ordinance. And factory farm operatives began attending local government meetings."

But that was just the beginning, Linzey notes. Next, "The Pennsylvania Chamber of Commerce became more active, doing what the Chamber is designed to do—painting people like me and public officials who believe in democracy as rabble-driven advocates of no growth and no jobs. The Chamber also labeled as ‘anti-agriculture’ residents who supported our ordinance."

And then the corporate P. R. machine turned itself on. Linzey says, "Our work made the cover of the Chamber's monthly Advocate for Pennsylvania Business, with an article titled 'There's No Business Like No-Bizness in Wayne Township' and a graphic of the township surrounded by barbed wire."

Nonetheless, remembering former Speaker of the House of Representatives Tip O'Neills comment that, "All politics is local," there's little doubt that the best strategy is to start where we humans live, town by town, city by city, county by county. Corporations may have corrupted many of our political processes, but you and I still retain the right to vote. The ballot box has the potential to be the great leveler, the remedy of past errors and current inequalities.

Changing State Laws

When enough local communities have passed laws denying corporate personhood, eventually a corporation will challenge one of these laws and it'll end up before the Supreme Court. This could be a golden opportunity for the court to rectify the error made by reporter J. C. Bancroft Davis in his headnotes for the 1886 Santa Clara case. If the Court were to rule that the Founders didn't intend to give corporations human protections under the Bill of Rights and the Fourteenth Amendment, step one would be finished.

But if the Court rules that the new anti-corporate personhood laws are unconstitutional, then it will be necessary to move up the ladder and amend the state and federal constitutions. To support that effort, you'll also find ready-to-use draft amendments on page 315.

I’ve spoken with a number of attorneys, constitutional scholars, and a few politicians about all of this, and most agree that starting on a local level is probably best. But most also
suggest that people should concurrently begin the process of amending state constitutions since corporate charters are issued and controlled by—in virtually all cases—the states themselves.

Making Change Happen

Taking on the conventional wisdom and a hierarchical power structure is no small or easy task. The civil rights and Native American rights movements tell us how true social change happens: from the bottom up. The Supreme Court, for example, doesn't just go out and right social or legal wrongs. Instead, legislatures pass laws, and people challenge those laws. When the challenges have worked their way up through the courts, they end up before the Supreme Court, which then has an opportunity to rule on the laws in the context of their relationship to the Constitution.

For humans to take back control of our governments by undoing corporate personhood, we'll have to begin with the governments that are the closest and most accessible to us. It's almost impossible for you or me to go to Washington, D.C., and have a meeting with our Senator or Representative—most of us usually can't even get them on the phone unless we're a big contributor. But most of us can meet with our city council members or show up at their meetings. Lobbying within the local community is both easy and effective. Local politicians are the closest to the people they represent, and generally the most responsive to the people they represent.

When enough local communities have passed ordinances that directly challenge corporate personhood, state legislatures will begin to notice. As with the issues of slavery, women's suffrage, and Prohibition (among others), when local communities take actions that are followed by states, eventually the federal government will get on board.

An Opportunity for the Supreme Court to Now Right a Wrong

These new laws will surely meet with lawsuits, which will bring the question back to the courts. Just as the railroads themselves sought change in the courts, ordinary citizens across the land are standing up and saying, "This is not what we want." It may take decades, as it did to create the wrong in the first place, but eventually, the movement will lead to explicit legislation, or an amendment to the United States Constitution, or to the Supreme Court reversing the Santa Clara precedent as it has reversed so many other error-filled cases over the years.

The ultimate change would be to clarify that the Fourteenth Amendment's reference to "persons" meant "natural persons." But whatever change you might choose to seek, at the end of this book you'll find a start: proposed ordinances, state constitutional amendments, and a federal constitutional amendment, all returning to "natural persons" what Locke and Jefferson called our natural rights as human persons.

The result could be a new flowering of freedom, democracy, and economic opportunity in America and around the world.
Endnotes

Introduction


Chapter 1: The Values We Choose To Live By


P. 14: Address before the California Legislature by Delphin M. Delmas, Sacramento, 18 February 1901. D. M. Delmas, Speeches and Addresses (San Francisco: A. M. Robertson, 1901).

P. 15: Ibid.

P. 16: Thanks to Jeff Gates, author of Democracy at Risk, for pointing this out to me.

P. 17: 22 July 1966 Internal Chrysler memo file number 118-H-00.

P. 18: Human rights groups such as Amnesty International (www.amnesty.org) and Project Underground (www.moles.org) do an excellent job of documenting it.


P. 21: Ken Saro-Wiwa's brother, Owens Saro-Wiwa, M. D., testified before the U. S. Congress about this issue. His testimony is at www.sierraclub.ca.


Chapter 2: Banding together for the Common Good: Corporations, Government, and “The Commons”


P. 32: Worldwatch Institute's 2000 report "Overfed and Underfed: The Global Epidemic of Malnutrition" cites U. N. figures that at least 1.1 billion humans suffer from an outright "deficiency of calories and protein" (starvation or hunger) and another 2 to 3.5 billion suffer from a "deficiency of vitamins and minerals" (malnutrition).


P. 38: www.epa.gov.

P. 40: www.federalreserve.gov

P. 41: Thanks to Jock Gill for this data.

P. 41: An excellent resource of information on this topic of water privatization is: www.transnationale.org

Chapter 4: Jefferson’s Dream: The Bill of Rights

P. 67: A statement by Albert Gallatin, who later became Secretary of the Treasury after the Federalists lost power.

P. 69: The First Amendment protected citizens from the predations of churches by guaranteeing freedom of religion in a new nation that still had states and cities that demanded obedience to and weekly participation in state-recognized churches or religious doctrine. The Ninth Amendment was a direct and clear acknowledgement of Jefferson's
concept of the natural right of humans to hold all personal powers that they haven't specifically and intentionally given to their government of their own free will. It reads, in its entirety, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Chapter 5: The Early Role of Corporations in America

P. 74: Jane Anne Morris is also a brilliant researcher, and I gratefully owe much of the Wisconsin-related content of this chapter to her work, and thank her for her generous permission to share it with you.
P. 75: See the "reserved power" clause.
P. 75: Wis. G. L 1864, Ch. 166, Sec. 9.
P. 75: Wis. G. L 1864, Ch. 166, Secs. 4, 33.
P. 75: Wis. R. S. 1878, Sec. 1775.
P. 75: Wis. R. S. 1849, Ch. 54 Sec. 7; Wis. G. L 1864, Ch. 166, Secs. 6, 15.
P. 75: And it was a felony to do so. Wis. State 1953, Ch. 346.12-346.15.
P. 75: For example, Wis. G. L 1864, Ch. 166, Sec. 7.
P. 76: Wis. R. S. 1849, Ch. 54, Sec. 22.
P. 78: Ibid.
P. 80: Ibid.
P. 81: Most of the information in this and die preceding paragraph are derived from the pamphlet Taking Care of Business: Citizenship and the Charter of Incorporation by Richard L. Grossman and Frank T. Adams, published by Charter, Ink, 1999, and available from POCLAD. P. 82: Thomas Hobbes, Leviathan (chapter 29). Here's the quote in context: "Another infirmity of a Commonwealth is the immoderate greatness of a town, when it is able to furnish out of its own circuit the number and expense of a great army; as also the great number of corporations, which are as it were many lesser Commonwealths in the bowels of a greater, like worms in the entrails of a natural man. To may be added, liberty of disputing against absolute power by pretenders to political prudence; which though bred for the most part in the lees of the people, yet animated by false doctrines are perpetually meddling with the fundamental laws, to the molestation of the Commonwealth, like the little worms which physicians call ascarides." P. 85: 17111. 291-7.
P. 86: Charles L. Capen to John G. Dremian, 6 April 1906, MSS. Files Legal Dept. I.C.R.R.Co.
P. 86: Adlai E. Stevenson's statement, 6 April 1906, MSS. Files Legal Dept. I.C.R.R.Co.
P. 86: Central mimic Gazette, 14 April 1858.
P. 87: Albert Beveridge, Abraham Lincoln (Riverside Press, 1928). Notes Whitney to Herndon, August 27, 1887.
Chapter 6: The Deciding Moment


P. 100: www.tourolaw.edu.

P. 101: Blackstone, Book I, 123 (reference from Delmas). *Blackstone’s Commentaries to the Constitution and Laws of the Federal Government of the United States* (Philadelphia: Birch and Small, 1803). At the time of this pleading, it was considered the preeminent commentary on American law.


P. 114: Field’s letter to Pomeroy, 28 July 1884, cited in *Everyman’s Constitution*. 
P. 114: See note to page 106.
P. 115: Excerpted from the Santa Clara County v. Union Pacific Railroad decision. Even more interesting reading is found in Field's original opinion in the Ninth Circuit Court, when he ruled that corporations were persons and thus sent the case to the Supreme Court.

Chapter 7: The Corporate Conquest of America
P. 121: Liggett v. Lee [288 U. S. 517 (1933)].
P. 126: By What Authority, Summer 2001, Program on Corporations, Law, and Democracy.
P. 127: See second note to page 91.
P. 128: Ibid.
P. 129: House Trust Investigation, 1888, 316, 317.