

By What Authority

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Ranting AND Raking ON Eminent Domain

by Greg Coleridge

Last week my neighbor, Jay, saw me shaking my head while reading on my porch. He's used to hearing my rants about one injustice or another and keeps up with the news. Jay's a self-styled history buff, and believes the U.S. Constitution is among the major reasons why this country has the best democracy anywhere.

"What are you upset with now?" Jay asked as he raked leaves into neat piles.

"Just reading about eminent domain abuse," I said.

"Eminent domain abuse? Sounds familiar but just can't place it. Is that where the U.S. government believes it has the preeminent right to torture Iraqi prisoners?"

"Not quite. Eminent domain is the constitutional power of government to take a person's property without consent if it's put to public use and the owner is paid a fair amount for it. The Fifth Amendment to the Bill of Rights says no person shall 'be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.' Provisions in state constitutions affirm the same principle. For example, Ohio's Constitution

states, 'Private property ought and shall ever be held inviolate, but always subservient to the public welfare, provided a compensation in money be made to the owner.'"

"Oh yeah, now I remember," Jay said, leaning on his rake. "The government – federal, state or local – has the power to take someone's property so long as it's used for a clear public purpose and you're given a fair amount of money for it. It's happened throughout U.S. history thousands of times."

"At least," I respond, and put down my article.

"Hasn't it been used mainly to acquire land for roads, schools, parks, hospitals, fire stations, and other public buildings? These benefit the people. So where's the abuse?" asks Jay, happy to delay the leaf raking.

"The democratic intent of eminent domain was to expand public space, what some call 'the commons,' to permit people to define the use of land in their communities and make sure public needs are met. However, over the last half-century, governments, mainly local, have been using this constitutional tool to take property from one private entity and, rather than expand public space or public use, give it to

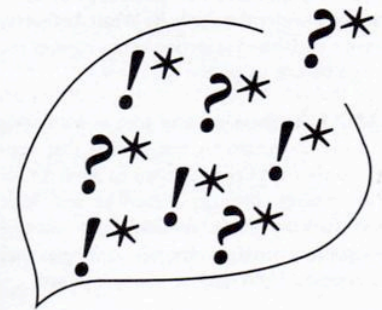
another private entity in the name of creating jobs, increasing local property taxes and, in general, promoting local economic development."

"What's wrong with that?"

"Plenty," I said. "Governments become tools of big developers – big corporations against small corporations or individual homeowners. It used to be that corporations were arms of kings. After the American Revolution, corporations became arms of We the People. Now it's governments that are arms of big corporations raking in (no pun intended, Jay) more and more rights and powers. Over the last century corporations have perverted many provisions of the Bill of Rights that were intended to protect the people from organized public power. Corporations have turned all this on its head through court challenges and grabbing rights to protect themselves against the public. Using eminent domain to concentrate power and usurp the rights of people and communities is just one example."

"Is that your POKE LID soapbox I see you standing on?"

"That's POCLAD and no, I'm not standing on a soapbox, just this old porch."



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By What Authority (ISSN: 524-1106) is published two times a year by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation, and plunder the earth. **By What Authority** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

POCLAD is a group of nine people instigating democratic conversations and actions that contest the authority of corporations to govern. Our analysis evolves through historical and legal research, writing, public speaking, and working with organizations to develop new strategies that assert people's rights over property interests.

BWA is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions, and suggestions.

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RAKING AND RANTING

(continued from page 1)

"Whatever you say, Greg. **When did all this start happening?**"

"It's been going on for a long time but the problem worsened after the U.S. Supreme Court in **Berman v. Parker** in 1954 expanded the meaning of 'public use' to include projects having a 'public purpose' or benefit. This permitted corporations to rationalize that their private developments would benefit the public because of the jobs and taxes they'd create. Many public officials were more than willing to go along with this scheme because they were bought off by politicians or desperate for funds, having lost revenues from shrinking corporate taxes or corporate capital flight in past years."

"But wasn't one of the biggest give-aways of public land to the railroad corporations a century earlier? And didn't these huge handouts help make the railroad tycoons the most powerful people of their time?"

"Indeed, now that you mention it," I said, caught somewhat off guard.

Jay continued, "If this has been happening for a long time, why all the hub-bub now?"

"The railroad land give-aways were gifts of public land to private companies," I said, in recovery mode. "This is different. This is taking property from one private entity and giving it to another, most often from a poorer, less powerful party to a richer, more powerful one. Why the current interest? Maybe because the U.S. Supreme Court last June ruled in **Kelo vs City of New London** that a small town in Connecticut had the power to seize the private land of several homeowners and small businesses by condemning it as 'blighted,' freeing it up for a mega shopping mall and other forms of redevelopment that would bring the community more tax dollars. This is but one of an estimated more than 10,000

examples over the last four years alone of government using its eminent domain power to transfer private land to for-profit entities, mostly corporations. Here in Ohio, residents in the communities of Norwood and Lakewood have waged high-profile battles against large corporate property owners on one side and small businesses and poor or middle class property owners on the other."

"Can't states or communities do anything about this?" asked Jay.

"They have. The Supreme Court in **Kelo** removed federal constitutional protections from homeowners and threw the issue back to the states to decide if state-level protection remains. Many states have taken up the challenge. Legislatures in at least 25 of them have either passed, like our own Ohio, or introduced or promised to introduce legislation postponing or halting state and local governments from taking property for private development."

"That should make you and your POCLAD friends happy, right? People making local governing decisions, exerting their authority over big corporations and questioning corporate rights!"

"How do you know so much about these themes and principles?"

"Your **By What Authority** gets delivered to my house sometimes by accident," Jay said sheepishly.

"Huh, I thought it didn't come because I hadn't recently donated. Anyway, I have mixed feelings about all of this."

"How so?"

"I and others with POCLAD feel that some of those organizing in response to Kelo are glossing over hidden assumptions, sort of like you raking leaves over that big bare spot in your yard to make it look better."

"I can't get grass to grow in that spot, but never mind that, tell me more."

"The major assumption concerns the constitutional sanctity of property. Your namesake, John Jay, president of the Constitutional Convention and first Chief Justice of the Supreme Court, said, 'The people who own the country ought to govern it.' James Madison, meanwhile, felt, 'Landholders ought to have a share in the government, to support these invaluable interests, and to balance and check the other. They ought to be so constituted as to protect the minority of opulent against the majority.' So they and their propertied friends set up a constitutional system that for the most part protected the rights of property as through the Commerce and Contracts clauses in Article I and the return servants clause in Article IV, affirming slaves as property. The Supreme Court, appointed and confirmed-for-life by the president and Senate, became the ultimate defender of private property, especially corporate property rights over any form of collective or community rights. Over the last two centuries, the court has consistently declared unconstitutional local and state laws passed on behalf of public rights, applying the constitutional bias for property protection to affirm that individual property rights supersede collective rights and to expand constitutional protections, such as the 14th Amendment and Bill of Rights, to one special category of property – namely corporations."

"All legislative and executive roads at every level of government now go through the Supreme Court?" Jay asked.

"Almost."

"Are you suggesting that Kelo is a continuation of this 'property rights over people' trend? That the public use provision of eminent domain has been turned on its head?"

"I like the word 'perverted.' Eminent domain has been perverted."

"If you can't kill it, then use it for your own gain," sparked Jay. "It sounds like that's what the corporate elites and wealthy few have done over and over."

"Exactly. On the one hand, they've embedded in our culture the 'sanctity of property' argument. On the other hand, they claim that their property rights count a lot more than those of the poor and working class, or even small businesses."

"Is it all as hopeless as it sounds? My namesake and his buddies seem to have created a pretty clever system that gives the appearance of openness and opportunity for change but, for the most part, locks in protections against any real threat to large-scale property."

"Change has happened. It comes down to decolonizing our minds, overcoming fear, and organizing. Social movements have eliminated some undemocratic and inhumane elements of the Constitution. Slaves are no longer property. Women can now vote. So can renters. Native Americans are even considered people under the law rather than savages. The place to begin is where we are today, on real issues that inspire people. Eminent domain is one of those issues."

"But what do we do?" Jay asked, restlessly.

"On this issue, concerned citizens need to organize and affirm their right to make decisions at a community level. Cities and communities can and should pass ordinances or change municipal charters, making it clear that their eminent domain policies will be used to promote public use, not private gain couched in some 'public benefit' language."

"Won't such ordinances or charter changes be challenged as 'unconstitu-

tional' if they depart from Kelo?" Jay inquired.

"Bring 'em on! At what point are we the people going to affirm our rights over those of property? We've raked over these issues long enough."

"If I hear you right," Jay said with a kind of bright understanding, "you're saying that eminent domain can be a democratic tool if it's applied in that spirit. It shouldn't be used to expand the property, power and rights of corporations in the hopes that some jobs or taxes might come our way. That's giving up too much public authority. Rather, eminent domain should hold to its original intent, to meet public needs and goals. Seems to me that ordinary folks need to organize to protect our right to make these kind of decisions."

"Hey Jay, I'm impressed. You've been reading those issues of *By What Authority* pretty closely!"

"Well," Jay shrugs, "it beats raking leaves." ☺

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The Rule of Property, Part II

by Karen Coulter



A harvest scene in the West--threshing grain in the field. From a sketch by O. D. Stein.

NEW WORLD REVOLTS AND COMMUNES

Colonists arriving in the "New World" included common people from England and Ireland who had been inspired by the numerous urban and rural revolts and popular theories of self-governance in the British Isles. As indentured servants, white slave laborers and exiled religious heretics, they often found common cause with dispossessed Natives and enslaved Africans.

The Virginia Company was synonymous with the slave labor plantation of Virginia, England's first New World colony. The Virginia Company represented a gathering of wealth in pursuit of world trade, which then as now, had such far-reaching global impacts as expropriation, repression, ecological and cultural destruction, and the imposition of class discipline – the taming of the aspirations of the people along with the taming of the wild. Modern capitalism largely emerged as a result of vast expansion in trade, the conversion of self-sufficiency to wage labor, growth in urban populations, and the establishment of colonial systems. These developments were made possible by the enclosure of land and removal of thousands of people from the commons. The

source of the original accumulation of capital was expropriation and force that transformed land and labor into commodities.

A broad spectrum of contrary popular traditions inspired the peasant emigrants to resist hierarchical discipline in the New World. **The struggle against repression and slavery and the formation of autonomous democratic communities was diverse and vibrant across the New World colonies and on the high seas.** Some colonists succeeded in establishing communes through democratic experiments. Resistance to the Virginia colony led to a multiracial refuge from slavery in a swamp with slaves, paupers, pirates and general rebels living under the protection of the Tuscarora Indians in the 1640s. They were antinomian (against law and judicaries) and abolitionist, calling as early as 1675 for an end to slavery. West Indian communities of fugitive slaves threatened the Virginia Colony as a possible base of attack on the plantation system and delayed the establishment of North Carolina as a colony for years.

Public officials used witchcraft statutes to prosecute religious radicals in England, resulting in an estimated 1000 women losing their lives between 1643

Grade school history texts and post 9/11 "patriotic" outpourings paint a picture of the founding of the United States as pure liberation from an oppressive monarchy. This illusion leaves out well-documented history that tells of colonial slave labor and repression, genocide of native peoples, revolts of common people and their formation of autonomous, vigorous democratic communities. Proposed alternatives of the time might have placed social and economic equality, majority political rights and participation, even pacifism as the ideal and practice of the nation.

Instead, we have a minority in charge that defines land, people and natural resources as property, enforced through violence and more subtle forms of coercion. What happened? The following is a taste of the hidden history leading to the American Revolution and the constitutional coup that inaugurated the inequality, civil and economic rights struggles, and institutionalized despotism that followed. This story reveals the transformation of property's meaning by the framers of the Constitution and illuminates what we need to do to write a new story.

and 1647. Radical religious movements led by women in the 1640s offered the hope of social equality, promoted skepticism about the authority of the Church and challenged patriarchal control over women as the property of men. The ruling class had an interest in increased fecundity to breed labor for the expanding capitalist system. Women at the time – such as Anne Hutchinson in the Massachusetts Bay Colony – affected childbearing practices through their work as midwives, herbalists and advisors for one other. This was a peak period for criminalizing women accused of infanticide, abortion and witchcraft in the colonies and in Europe.

In contrast to the repression, hierarchy and forced labor of the New World's property system, the native Algonquin Confederation of 14,000 people consisted of small-scale societies without ownership of land, class divides or a formal state. They

pursued little economic specialization or trade, but worked toward self-sufficiency.

With the American Revolution came an escalation of the Europeans' enclosure of native lands, as well as the enslavement of native people. As indigenous cultures held different conceptions of property (land was not bought and sold), it is doubtful that their treaty signers understood the ramifications of "signing away" property rights to settlers. Military defeats of native territory usually meant that lands were occupied and enclosed, imposing a property regime on a culture that had no conception of "property."

Six thousand armed men from Virginia, North Carolina, South Carolina, and Georgia made war on the Cherokee in 1776 with instructions from William Drayton, a leading patriot: "*And now a word to the wise.* It is expected you make smooth work as you go – that is, you cut up every Indian cornfield, and burn every Indian town – and that every Indian taken shall be the slave and property of the taker; that the nation be extirpated and the lands become the property of the public." Thus were people converted to property, cultures extinguished, and land, natural resources and the commons appropriated, a process continuing today through global corporatization.

The colonial definition of people as property met with resistance. Many African slaves ran away to join one side or the other of the revolutionary conflict in hopes of attaining freedom. A slave owner complained in the November 7, 1775, South Carolina Gazette about his runaway slave: "...for though he is my Property, he has the audacity to tell me he will be free, that he will serve no Man, and that he will be conquered or governed by no Man." As others have discussed at greater length, the Revolution was a quagmire of contesting theories about the nature of property and societal ideals. For those who wanted to hold onto their acquired wealth and govern the new nation, a solution was needed.

PROPERTY BIAS EN ROUTE TO THE CONVENTION

The sanctity of private property over public welfare was hotly contested in the

ideological debates and popular rebellions leading to the Constitutional Convention. As Jennifer Nedelsky observes: "In 1787 government regulation in the name of basic principles of equity was a standard practice. The regulation of the prices of bread and other basic commodities was an old and deeply entrenched practice. The prevailing concept of contract still included a notion of equity that could void 'unfair' agreements, contracts which were not based on the 'just price.'" By pitting the primacy of individual property rights against people's self-governing, democratic "incursions" on the rulers' power, the Federalist Constitution's authors attempted to redefine the concept of property.

Charles Beard's *An Economic Interpretation of the Constitution of the United States* documents the biases toward property that precluded widespread popular involvement in the framing of "We the People's" governing structure. The shift of the Constitutional Convention – away from the state-based, decentralized Articles of Confederation and toward more centralized control – was originated and implemented principally by four groups of property interests: capital (creditors), public securities (stock and bond holders), manufacturing and trade, and shipping. Interestingly, the same property interests hold the reins of power in the U.S. today. It is not surprising then, that the Constitution was designed as an economic document based upon the concept that the private rights of property are the primary concern of government and morally beyond the reach of the property-less majority.

THE SIGNIFICANCE OF PROPERTY IN THE FRAMING OF THE CONSTITUTION

Property was conceived by the Founding Federalists as the origin and benefit of civilization, and its protection seen as the primary purpose of government. Private property was generally recognized as the source of social inequality. Nonetheless, economic inequality was posited as both inevitable and necessary in order to protect the wealth of the ruling elite and perpetuate their political control.

Nedelsky summarizes it this way: "...**(T)he original focus on property placed inequality at the center of American constitutionalism. For the Framers, the protection of property meant the protection of unequal property and thus the insulation of both property and inequality from democratic transformation.** Effective insulation, in their view, required wealth-based inequality of access to political power. It also meant that the illegitimacy of redistribution defined the legitimate scope of the state."

Following their self-interested reasoning, the Constitution's authors designed the new government's institutions to encourage the conflation of economic with political power and discourage the political engagement of citizens. The legacy of this structure is clear: long-lasting obstacles to the attainment of the majority's political rights, economic and social equality, general public welfare, and real democracy.

THE STRUCTURE OF GOVERNMENT INSTITUTIONS DESIGNED TO PROTECT PROPERTY

The framers devised numerous ways to ensure unequal allocation of political and economic power, including:

- giving property direct weight in the scheme for political representation;
- not taxing accumulated wealth;
- controlling states through the national Congress and the Supreme Court;
- an elaborate system of "checks and balances" designed to divide and conquer the majority's governing power.

An example of a lasting check on the political ascendancy of the majority is the composition and tenure of the U.S. Senate. Designed to protect property interests, it was composed of a small number serving long terms to prevent easy displacement. In the tenth issue of "The Federalist," James Madison lays out his reasoning for a system of checks and balances to prevent

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PROPERTY *(continued from page 5)*

majority rule: "Since the contending classes cannot be eliminated and their interests are bound to be reflected in politics, the only way out lies in making it difficult for enough contending interests to fuse into a majority, and in balancing one against the other."

Nedelsky observes: "...Madison came to see that formal restrictions on political rights were neither necessary nor optimal to contain the political power of the people. The indirect mechanism could structure the whole relation of the people to the federal government, shape the patterns of participation, and limit the effectiveness of the poor. The necessary control of popular injustice would thus be embedded in the very foundations of the political system, in its daily practices, rather than being accomplished by explicit exclusions of the people from office or franchise..."

Thus the Madisonian Constitution launched a complex system of government in which the people do not govern themselves but are encouraged to believe they are governed with their consent.

Under the Articles of Confederation, individual state legislatures represented the will of a poor majority by issuing paper money and forgiving debt. Speculators and creditors resented this shrinking of their capital. With the new Constitution this threat was addressed by prohibiting the states from issuing currency, emitting bills of credit or creating laws impairing the obligation of contracts. For good measure, the states were also prohibited from interfering with international trade through import duties.

JUDICIAL REVIEW: THE FEDERALIST CONSOLIDATION OF POWER

Judicial review institutionalized the supremacy of individual property rights over democratic political rights by claiming that law and politics were separate realms and that property fell within law's domain. This removed fundamental property issues from popular engagement and

control. Nedelsky argues that judicial review and the law-politics distinction were justified and supported by a distorted conception of property: "...The courts could make a strong claim that property belonged in a distinctly legal realm, which had the sanction of the long and honorable tradition of common law. The need for the judiciary to protect this venerable realm from legislative encroachment could then be seen to rest on a neutral legal tradition rather than on the fear and suspicion of the people... this distinction has sustained a mythic quality of property as not merely social construct, but a basic right, linked in powerful ways to cherished values of freedom and autonomy. The myth of property and the image of the law-politics distinction... have together provided the foundation for the American conception of limited government."

It is important to note that the judiciary is appointed by the President and the Senate, both with longer terms than the House of Representatives. At the nation's founding, only membership in the House was directly elected. Control over the judiciary can be countered only through the power of appointment. To change that appointment process requires the near prohibitive task of amending the Constitution. To add insult to injury, Supreme Court justices – the ultimate arbiters – are in for life.

THE ANTIDEMOCRATIC LEGACY OF THE FRAMERS

This institutionalized concept of property was used as a foundation for the nebulous entity of "the market" and its eventual elevation above every other concern. Viewing property as private or public and seeing it in the context of ownership, buying and selling, exclusion and exploitation became the norm. In contrast, property seen as either personal or social, associations and distinctions that might have engendered a sense of participation and stewardship, received little consideration. The sacred cow status of private property and the limited involvement of the public in politics are now assumed to be natural rather than the product of institutional design. Thus

the gradual expansion of the right to vote failed to deliver real democracy.

Gouverneur Morris, a Constitutional framer, held that "Where political liberty is in Excess, Property must be insecure and where Property is not secured Society cannot advance." Part of the thinking was that investors would not risk their money in a country whose government would not uphold the rights of property, such as in contract and trade agreements. Modern ramifications of this still widely held distinction between economic and political rights include the paradox that while political equality is now widely supported, economic inequality is accepted as inevitable. The fact that matters of production, commerce and international trade overwhelm concerns such as community welfare, worker rights and environmental integrity is a legacy of the Constitution's framers.

The Federalist concept of property equated private property with the idea of freedom from government interference and thus, with liberty and justice generally. Therefore, government regulations have come to be regarded by many as a violation of individual liberty rather than a way to prioritize socially determined rights. Today we see this reasoning running through Libertarian ideology and the justification for "takings" claims in which rights of private property are presumed to take precedence over the jurisdiction of the federal government or broader community concerns. For example, Oregon passed a referendum requiring the state to compensate private property owners for losses of property value due to environmental or zoning restrictions on the use of their land. The possibility of redistributing capital or property remains outside the popular frame of reference, denounced as an unlawful intrusion of government, or heaven forbid, as socialism or communism. Should we not be asking why we persist in this relentless materialist, competitive, unsustainable, and violent system designed for us by those late eighteenth century framers?

DEMOCRATIC ALTERNATIVES

By contrast, Brazilian land law assumes that private land not being used should be

redistributed. On this basis, a vibrant social movement has arisen called “O Movimento dos Trabalhadores Sem-Terra” – the Landless Workers Movement or MST. Like the earlier Diggers movement in England, the propertyless MST families physically occupy vacant land claimed by the wealthy. However, this activist model goes further by incorporating democratic community structures allowing for full participation in political decisions and ongoing challenges to the entrenched political patronage system. Other social rights are addressed, including schools and health care, and ecologically sustainable farming practices are encouraged.

We see here mutual participation and shared power at work, rather than Madisonian factionalism. The arrangement reflects the writings of the Anti-Federalist, “Centinel,” who penned: **“A republican or free government can only exist... where property is pretty equally divided. In such a government the people are sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of government is changed and an aristocracy, monarchy, or despotism will rise on its ruins.”** The Bush administration has made this transformation into despotism and an aristocracy of wealth and privilege more blatant than ever.

The Constitution could have been written differently since other models existed at the time. In the spring of 1776, radical members of the Philadelphia militia initiated a provincial conference which unseated Pennsylvania’s elected representatives, expanded the vote from 50% to 90% of free adult males and called for a convention to write a new state constitution. The militia advised that “great and overgrown rich Men will be improper to be trusted” as delegates. The first draft of the constitution included this clause: “That an enormous Proportion of Property vested in a few individuals is dangerous to the Rights, and destructive to the Common Happiness of Mankind; and therefore every free State hath a right by its Laws to discourage the Possession of such Property.”

A blueprint for direct and democratic governance evolved in which all governmental power was vested in a unicameral legislative body directly responsible to the electorate and short, nonconsecutive rotations were prescribed for elected representatives. All bills had to be made available for the consideration of the people before voting. Today’s greater numbers and diversity of eligible voters are hobbled by structural limitations on their political participation that were unacceptable in 1776 Pennsylvania.

REPLACING THE RULE OF PROPERTY

Anthropologist Marshall Sahlins writes: “The market-industrial system institutes scarcity in a manner completely unparalleled and to a degree nowhere else approximated. Where production and distribution are arranged through the behavior of prices, and all livelihood depends on getting and spending, insufficiency of material means becomes the explicit, calculable starting point of all economic activity.”

While most modern commentators tend to focus on the insufficiency problem as exclusively economic, more in the past recognized the threat posed to democracy. In 1908 Theodore Roosevelt noted the consequences of concentrated political power through the corporate monopolization of property: **“The true friend of property, the true conservative, is he who insists that property shall be the servant and not the master of the commonwealth. The citizens of the United States must effectively control the mighty commercial forces which they themselves called into being.”**

Although it was not a majority of U.S. citizens who called these large corporate interests into being, the disempowered and wealth-deprived majority must now act to remedy rule by property so that people and ecosystems across the world might achieve their inalienable rights and vitality.

Our task is nothing less than revealing the hidden history of structured inequality and Commons enclosure in order to dislodge the deeply held assumptions about property that allow private property rights

to dominate all other social and ecological concerns. We need to reawaken dormant imaginations with real life examples of popular struggles and egalitarian social experiments in the past and present.

Organized resistance outside the boundaries of any “system” has always been necessary to achieve lasting systemic change. As a poster for a demonstration against the G8 governments and their proposed Multilateral Agreement on Investment invited, **“Join us in protesting against their world... where everything has a price and nothing has a value.”**

ENDNOTES

The background materials for this article, including quotations, were largely drawn from the following sources:

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