

# CORPORATIONS AND THE PUBLIC INTEREST

## THE DEVELOPMENT OF PROPERTY CONCEPTS IN THE U.S. "JUST US" SYSTEM

*by Karen Coulter*

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### LAW AS A MANUFACTURED ASSUMPTION

CONTEMPORARY EXPLANATIONS OF law seem to proceed on the assumption that the framers of the Constitution and the Bill of Rights were alone responsible for its content. Yet their authors represented a privileged class immersed in the public political tumult of a vigorous new State, with people prolifically espousing ideals, debating law and policy, and trying to obtain promised rights and freedoms.

Likewise, critical turning points in court doctrine are perceived as only due to particular cases and decisions, as if judges are merely arbitrators whose decisions are somehow kept pure and separate from their context of societal values and class biases.

This perception of judicial isolation is reinforced by a manufactured "assumption" that the U.S. public has been a static entity. People in the eighteenth and nineteenth centuries are presumed to have been passive and uninterested in personally engaging in the interpretation of law and political policy-making, as the majority are now disengaged in our current context of mind-numbing com-

mercial media, abandonment of relinquished civic responsibilities to a technical elite, and well-advanced corporate takeover of governance, public life and culture. The omission in academic texts of the historical reality of significant public engagement in shaping law, policy and culture sets people on the dangerous path of believing law to be fixed in stone except for occasional inexplicable aberrations at the discretion of judges alone.

Corporate rule, thus, has been made to appear inevitable and too immense and unfathomable to overthrow. The individual's freedoms and abilities have been narrowly circumscribed as the courts have increasingly given corporations more powers. The torrent of ongoing abuses of wealth and power are seen as the *status quo*, regarded as normal costs of doing business, and as nothing that can ever be subject to more than limited reforms.

These are some of the basic perceptions which have generated current public apathy (along with a great confusion of mass-produced goods and parasitic consumerism with the source of happiness). However, court doctrine is mutable, with tremendous reversals and new precedents that come about as a

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result of public agitation and consequent shifts in the political climate. And there are ways to shift the locus of power from arbitrary judicial fiat based on outdated elevation of private property rights as the highest good back to popular mandates protecting the overall welfare of real human beings and the Earth.

Our biggest stumbling block to lasting, systemic social change is our perceptions—ourselves—not physical impediments. So, let's think about some historical and legal history as a way of breaking through these perceptual barriers, to come out on the other side with a clearer vision of how to effectively challenge corporate rule.

### REVOLUTIONARY IDEAS

The bedrock of U.S. law lies in concepts of property rights and their defense, so let's start with a re-evaluation of property. The meaning of the word "property" has changed over the course of the twentieth century. In most cultures of the world, property typically meant only personal property such as clothing and household goods. Land was considered to be held in common, to be shared by all, or was thought to be part of God or Nature, inseparable. Under Native American Iroquois confederacy law, the buying, selling and monopolizing of land was illegal and immoral. In English history, it was not until the enclosure movement that land titles were transformed from leasehold, or use, to freehold property. Nobles seized the land of the commons for themselves, fencing it off in their names only, even when they had no use for it. Enclosures were a revolution of the rich against the poor which left a large class of people with no land base and no commons from which to procure food. This forced dependency on the nobles for payment in exchange for labor, much as whole classes of

people are now dependent on corporations to provide for their basic needs in exchange for labor.

English common law can be seen as a reaction to the extensive collapse of the corrupt Roman empire and feudal and money-based speculative economies. Much as with today's globalization of finance and neoliberal imperialism, the competing monopolists of the Roman Empire left Rome for lower tax, labor, resource and environmental costs. Money flowed out of the imperial realm. Common law and Native Confederacy law, by contrast, limited the effects of greed by placing the commonwealth beyond the reach of speculative individuals, kings and corporations.

However, in the mid-1500s, the English monarchy regressed to imperial Roman ways. Royalty used so-called "equity" courts to give urban commercial interests access to rural community lands and resources denied to them by common law courts. In return, merchant taxes financed military colonizing conquests and opened the way for merchant and military influence-dealing in government policy-making. Again, we have an equivalent situation in the U.S. today, where corporations seek "equity" through use of the Fifth Amendment "due process" clause and through general use of federal courts to change the law of the land and gain greater wealth and power, redefining themselves through court doctrine and using their growing political rights and economic influence to govern the nation.

Many of the early colonists in the U.S. were disillusioned by the wretched poverty of England caused by enclosures, displacements and growing industrialism. They were impressed by the wealth and beauty of many Native American societies, and recognized the similarity between Iroquois Confederacy laws and English common law. To protect them-

selves from the economic and political subjugation they had experienced in England, they placed strong constraints in many of the early states' constitutions (once the "states" became constitutionalized after the American Revolution, as they had originated as corporations serving the British monarch). For example, the Massachusetts Constitution of 1780, Part I, Article VI, states:

No man, nor corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public.

Likewise, due to the colonists' experience with British crown corporations, original corporate charters issued after the American Revolution strictly defined corporations as under the authority of the sovereign citizens. American revolutionists overthrew the British monarch and instead put newly enfranchised citizens (although they were all white men of property) in the King's place to rule. Corporations were only allowed to do what they were chartered to do: a paper-making corporation could only make paper, not lobby or pay off elected officials or improve its public image through charitable donations. Corporations were only given a limited time frame in which to exist, then were automatically dissolved. They were not allowed to own other corporations. Most importantly, a citizen could institute legal proceedings called *quo warranto*, literally "by what authority," for the revocation of corporate charters, the dissolution of the corporation, and disbursement of its assets, if the corporation either exceeded the authority given to it by citizens or failed to act on behalf of the public welfare.

## MEN OF PROPERTY WRITE THE LAW

Yet as the concept of property changed, the rights of corporations expanded. From the first application of the common land law of the English settlers, there has been a gradual extension of private control over land, first to simple use, then to benefit and ultimately to the idea of gain made by selling land. Land speculation radically transformed New England's quasi-democratic town pattern. (Actually most people, including Native people, women, children, indentured servants, slaves and poor vagrants were considered property or non-persons under New England's much touted "democracy," and insubordination to the ruling elite was met with severe bodily punishment, branding, increased length of servitude or slave-for-life status. There was active trading and selling of white servants (including at public auctions, and orphans or unclaimed children were sometimes forced into labor as "apprentices" or indentured servants.)

As land was transferred to the wealthy elite and usurped under title in "fee simple,"<sup>1</sup> it came to be regarded as a private financial asset. Earlier (especially in Native American tradition) land was considered part of Nature, like air, wind, water, and weather. Property concepts have been continuously extended so that today even much of our air, water, wind and sunlight have been privatized. Such privatization has led to the extension of private and corporate property rights to "intangible property" such as: so-called commercial free speech, the corporate ability to spend money to influence the outcome of public referenda, access to government contracts and subsidies and even the empty space in utility bill envelopes.<sup>2</sup>

Since land, resource wealth, and political

power are virtually inseparable in practice, the conversion of land into capital can be seen as one of the greatest paradigm shifts in the evolution of social philosophy. Traditionally, sovereignty is a concept of political or public law, and property is part of civil or private law. Montesquieu, the eighteenth century philosopher and jurist, said that:

. . . by political laws we acquire liberty and by civil law we acquire property, and that we must not apply the principles of one to the other.<sup>3</sup>

That distinction has surely been blurred considerably now that U.S. courts have defined individual rights and liberties under the Constitution as corporate property, so that property no longer means just physical things. By the acquisition of such intangible property, in addition to amassing great physical wealth far beyond the means of all but the wealthiest individuals in the world, corporations have acquired most of the rights of individuals with virtually none of the responsibilities or liabilities (such as disparate taxation, and no death penalty or incarceration for serious crimes, and limitations on liability for actions). This creates a very unequal playing field. Yet Montesquieu's now outdated view that political laws must in no way impinge on private property—because no public good is supposed to be greater than the maintenance of private property—still forms the basis of legal thought in the U.S.

Legal and moral philosopher Morris Cohen has much to say on this issue. He writes:

In making a private property right out of the freedom to contract, the Supreme Court has stretched the meaning of “property” to include what it has never

before signified in the law or jurisprudence of any civilized country. But whether this extension is justified or not, it certainly means the passing of a certain domain of sovereignty from the state to the private employer of labour, who now has the absolute right to discharge and threaten to discharge any employee who wants to join a trade-union, and the absolute right to pay a wage that is unjurious to a basic social interest.<sup>4</sup>

Meanwhile, the sovereignty of the state is limited by the manner in which the courts interpret the term “property” [as well as “personhood”] with regard to the Fifth and Fourteenth Amendments to the Federal Constitution.<sup>5</sup>

Any one who frees himself from the crudest materialism readily recognizes that as a legal term, “property” does not denote material things, but rather certain rights. In the world of nature . . . there are things but clearly no property rights.

Further reflection shows that a property right is not to be identified with the fact of physical possession. Whatever technical definition of property we may prefer, we must recognize that a property right is a relation not between an owner and a thing, but between the owner and individuals with reference to things.<sup>6</sup>

This becomes unmistakable if we consider intangible property, which constitutes an ever increasing part of the capitalized assets of corporations. “[T]he essence of private property is always the right to exclude others.”<sup>7</sup> Corporate private property rights exclude individuals and communities from access to commonwealth and power.

The money needed for purchasing things in the corporate commercial economy must be acquired by long labor and disagreeable service to those to whom the law has granted dominion over the things necessary for subsistence.<sup>8</sup>

Thus, not only medieval landlords, but the owners of all revenue-producing property are granted by the law certain powers to tax the future social product.<sup>9</sup>

The future social product constitutes natural resources once held in common and individual labor once used directly for family and community subsistence.

When to this power of taxation there is added the power to command the services of large numbers [of people] who are not economically independent, we have the essence of what historically has constituted political sovereignty.<sup>10</sup>

Thus the modern corporation has been given political sovereignty—the right to rule over individuals and communities.

In addition to indirect ways which the wealthy few use to determine the parameters of culture and freedoms for the many—such as commercial advertising to direct patterns of material consumption, and corporate control of media to limit the scope of political analysis—there is also the more direct mode of control that bankers and financial speculators exercise when they determine the flow of investment. This power becomes especially obvious when an economically poor country has to borrow foreign capital to develop its resources. The corporate-directed World Trade Organization and International Monetary Fund now exploit countries with the neocolonial practice of requiring “structural adjustments” in return for loans. These

“adjustments” mandate severe decreases in domestic spending for public welfare and environmental protection, effectively impoverishing the debtor country and opening the countries door to their greater vulnerability and to their further exploitation by transnational corporations.

Thus, as Cohen points out, “it is necessary to apply to the law of property all those considerations of social ethics and enlightened public policy which ought to be brought to the discussion of any just form of government.”<sup>11</sup> For that is what the largest corporations are doing—governing—just as the British crown corporations governed when they colonized other parts of the world with an explicit mission to destroy existing cultures and exploit the natural wealth of the land. The Crown corporations were granted authority by the British monarch to govern the conquered territories. The difference is that now the corporations are almost completely sovereign in themselves.

As transnational corporations have liquidated most of the natural resources and destroyed most of the cultural and biodiversity in colonial “new frontiers” abroad, they are now tightening their stranglehold over domestic policy, culture and labor in their countries of origin (witness the effects of NAFTA: the gutting of domestic regulatory laws, the blackmail of widespread downsizing of domestic workers with the threat of shipping jobs and factories overseas, pitting states against each other in a downward economic spiral). Transnational corporations’ use of violence via foreign military actions and donated corporate equipment such as helicopters (from which to gun down indigenous protesters) and bulldozers (with which to bury the bodies) has also become more blatant (witness Shell and Chevron corporate-spon-

sored massacres of indigenous people in Nigeria to make way for oil pipelines).

### CORPORATE RULE IS RULE BY PROPERTY

Many corporations are now larger in gross economic revenues than most of the nations of the world. Corporations now make decisions behind closed doors that extend their governance (dictatorship) to a global scale. It is necessary to move beyond generally accepted justifications of the preeminence of property rights in order to free ourselves of the growing reality of global enslavement by the wealthy few. Cohen's refutations of some of the standard justifications for elevating property rights over all other values are worth considering.

First, it is as "absurd to argue that the distribution of property must never be modified by law as it would be to argue that the distribution of political power should never be changed."<sup>12</sup>

Second, as "not all things produced are ultimately good, as even good things may be produced at an unjustified expense in human life and worth, it is obvious that other principles beside that of labour or productivity are needed for an adequate basis or justification of any system of property law . . . [A]ll things being equal, property should be distributed with due regard to the productive needs of the community."<sup>13</sup>

Third, "the primary effect of private property on a large scale is to limit freedom."<sup>14</sup> A private corporate regime is too likely to sacrifice social interests for its own short-term or immediate monetary profits to itself. There are also inherent sources of waste in a regime of private enterprise and so-called "free" competition (which is actually heavily subsidized by taxpayers who benefit little or not at all, as well as being subsi-

dized by depletion of the commons—existing and future social wealth.) There is a finite, limited common supply of many resources that form the basis of corporate profit, such as land, minerals and fossil fuels. Thus a government that limits the rights of property-owners such as corporate entities may be promoting real freedom for individuals and communities and preserving social wealth for common use and future generations. As Cohen points out:

[P]roperty, being only one among other human interests, cannot be pursued without detriment to human life. Hence we can no longer maintain Montesquieu's view that private property is sacrosanct and that the general government must in no way interfere with or retrench its domain.<sup>15</sup>

However, in the U.S. the last word on law comes from judges, who as lawyers are mostly trained in private rather than public law. This is why absolutist concepts of property prevail over obvious national interests such as the freedom of workers to organize, the necessity of preserving sufficient standards of living, and the need to prevent destruction of ecological necessities such as pure air, pure water and food, fertile soil, and a diversity of native plants and wildlife.

### CORPORATIONS AS PUBLIC, NOT PRIVATE

After all, it should be considered: what private corporate interest is not really a public interest? Most private property rights now claimed by corporations involve some part of the public domain, whether it be public lands, minerals and ocean fish, or what is to be public media and our right to have government free of corporate influence, to be a self-governing people.

When slavery is abolished by law, the owners have their property taken away but compensation is paid to the slaves, not the slave owners. Likewise, when a corporation's charter is revoked for exceeding its authority or acting against the public-welfare, corporate property must be taken away and its assets redistributed among the people and for the good of the land that suffered damages. Let's get the relationship straight—people must put themselves back in charge of the institutions society created to serve the public interest.

With these considerations in mind, it becomes clear that there is no unjustifiable taking when corporations are prohibited from firing their employees if they engage in union activity, and there is no property taken away without due process of law when a corporation is compelled to pay its workers a living

wage instead of subsistence wages, or being downsized so that the corporation can exploit workers overseas at starvation wages.

Throughout history, experience has shown societies the necessity for “communal control to prevent the abuses of private enterprise”<sup>16</sup> arising from the accumulation and concentration of wealth. The subordination of all our societal values to the single unrealistic aim of somehow maintaining endless economic growth and ever greater short-term profit for the wealthy few (no matter the cost) puts corporations in the position of an imperial, dictatorial power. Life is far too rich and complex to hand over sovereignty and governance to those who are systematically rewarded for placing money above everything else. ■

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## NOTES

<sup>1</sup> “Fee simple” is an estate of a free person, of virtually infinite duration, and without restriction as to whom that free person may transfer the estate. —*Ed.*

<sup>2</sup> *Pacific Gas & Electric Co. v. Public Utility Commission.*

<sup>3</sup> Cohen 1933, “Property and Sovereignty” p. 41.

<sup>4</sup> *Ibid.*, pp. 44-45.

<sup>5</sup> *Ibid.*, p. 45.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 46.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*, p. 47.

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*, p. 49.

<sup>12</sup> *Ibid.*, p. 51.

<sup>13</sup> *Ibid.*, p. 52.

<sup>14</sup> *Ibid.*, p. 54.

<sup>15</sup> *Ibid.*, pp. 56-57.

<sup>16</sup> *Ibid.*, p. 65.