Nace, Ted (2003). *Gangs of America: The Rise of Corporate Power and the Disabling of Democracy*. San Francisco: Berrett-Koehler.
Condensed by James Allison, June-July 2004.

According to recent Harris polls, the great majority of Americans think that big companies have too much power in Washington. How did they get that power? The answers lurk in the history of the American corporation and its British progenitor.

Crafts guilds began to proliferate in 13th-century Britain. They were not businesses, but umbrella groups of those who plied different crafts: clothworkers, fishmongers, haberdashers and the like. With the growth of international trade some guilds became the first business corporations. Among them were the Merchant Adventurers, independent traders who pooled their capital to finance a shared infrastructure that comprised such facilities as wharfs, convoys and overseas embassies. At first each member maintained his own capital. However, as maritime innovations extended the reach of trade, the attendant increase in potential risk and reward made it advantageous for merchants' financial backers to spread their capital across several trade ventures. This method of pooling capital was essentially a joint-stock company, the form used by the modern corporation. They also found it advantageous to seek grants of exclusive access to particular regions. Within such regions they repelled rivals and imposed order by means of private armies and police.

This kind of entity was no longer a federation of independent businessmen, but a separate entity, chartered by the state, that allowed the law to deal with it instead of the individual investors. The consummate corporation, still the most powerful one in history, was the British East India Company, formed in 1600 in the reign of Elizabeth I. It pioneered the use of joint-stock capital and limited liability, under which stock-holders evade responsibility for corporate misdeeds and debts. It had its own army, jails and justice system, and it squeezed India dry for over 200 years.

A major cause of the Boston Tea Party was an attempt by the British East India Company to expand its tea business at the expense of independent American tea merchants. History texts typically portray the American Revolution as a revolt against unfair taxes, but it was truly more of an anti-corporate revolt. An important ingredient in the revolution was a long-standing grudge against corporations on the part of indentured servants, conscripted sailors and others at the bottom of the socioeconomic ladder. Many of them had experienced the exploitative practices–starvation, overwork and brutal treatment– commonly employed in the great archipelago of corporate colonies scattered along the Atlantic rim in Ireland, West Africa, the Caribbean and the eastern coast of North America. The upper reaches of American society were also hostile to the corporation, because most American businesses were owned by family or partnerships: they neither had nor needed corporate charters or joint-stock ownership. It was an economic depression in Europe that knocked the bottom out of the tea market and inspired the East India Company to request permission to dump its tea on the American market through specially commissioned local consignees. The proposal involved both an export tax abatement for the company on the British side, and a continued import tax on the American side, but that alone would not have moved wealthy American businessmen to rebellion. What moved them was their certainty that if the East India Company could control tea distribution from top to bottom, it would eventually control in the same way every other imported commodity. When John Hancock learned that he was not to be one of the favored merchants, he patched up a quarrel with Sam Adams and joined the rebellion. It was the excessive British reaction to the tea rebellion that brought about the American Revolution, with its odd coalition of adherents across the entire spectrum of colonial society.

After the revolution, the founding fathers worried about corporations. When the Constitutional Convention convened in 1787 there were only six corporations besides banks. Nevertheless, the framers thought it advisable to place the corporation under democratic oversight and use it to meet the need for public projects that required an unusually large amount of capital, such as the building of canals, roads and bridges. James Madison proposed that the federal government take charge of corporations in cases where the authority of a state might be "incompetent." Other delegates, anxious to avoid an American version of the East India Company, stood fast for local control.

For the most part the states had their way. Two rare exceptions were federal charters for the Bank of the United States, chartered twice and revoked twice between 1791 and 1832, and our 20th century Amtrak. Otherwise, it was state legislatures that granted the charters and laid down restrictions and standards of accountability. There was a legislative focus on restrictions, rather than privileges, that reflected a widespread notion that great corporate power would endanger democracy. In consonance with that notion, in 1809 the Virginia Supreme Court stated that a charter should not be granted if the applicant's "object is merely private or selfish; if it is detrimental to, or not promotive of, the public good." In 1816, Thomas Jefferson wrote "I hope we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength, and bid defiance to the laws of our country." Note that the prevailing sentiment was anti-corporate, not anti-business. As a representative of the National Trade Union wrote in 1835, "We entirely disapprove of the incorporation of Companies, for carrying on manual mechanical business, inasmuch as we believe their tendency is to eventuate in and produce monopolies, thereby crippling the energies of individual enterprise, and invading the rights of smaller capitalists."

In those early days corporations were kept on a tight leash. They had to renew their charters as often as every three years. State legislatures denied them limited liability. Corporations were prohibited from any activities not specified in their charters. They could not own stock in other corporations. Most states limited the amount of capital a corporation could raise. Most corporations could not operate outside the home state; some were restricted to the home county. They could not own property not needed for their authorized activities. Errant or scofflaw corporations had their charters revoked in Massachusetts, New York and Pennsylvania. In those days the proper role of corporations was thought to be the building of public infrastructure or the provision of public services, such as banking and insurance. Their absence from manufacturing, which was carried on mainly by partnerships, did not inhibit the growth of American manufacturing, which reached by 1860 a per capita output second only to that of Great Britain.

Despite its success, this system had been swept aside by 1900. A major figure in the change was Tom Scott, of the Pennsylvania Railroad, who began to wield his influence in the 1850s, when railroad lobbyists began to wring concessions from the state legislatures. His monumental coup came when he persuaded the Pennsylvania legislature to permit one corporation to own stock in another.

His first mission as a lobbyist was the repeal of the tonnage tax levied by the state on the railroads. He organized supporters at the county level, bought ads in nearly every Pennsylvania newspaper and, when he still lacked a legislative majority, began to make deals with legislators–mainly promises to build rail lines to particular communities. The kicker was a legislative proposal that would let the railroad divert its state taxes to the construction of local spur lines. The measure squeaked through, but the public was outraged. In the next election almost all of the legislators who had supported the bill were defeated. But when the next session tried to undo the bill, legislators found that it had been written as a contract between the state and the railroad, and could therefore not be repealed without the consent of both parties. Scott had made the bill almost irrevocable, and his allies in the legislature frustrated an attempt to investigate allegations of bribery.

During the Civil War Scott gave extraordinary service in the Lincoln government as a railroad expert. As a result, he returned from the war not as a despicable manipulator, but as Colonel Scott the war hero, with more legislative clout than ever. His postwar dream was to replace the jumble of small fragmented lines with a nationwide railroad system that ran from New York to Washington, deep into the old Confederacy, and west along the southern tier to California. To achieve this goal he had to outmaneuver numerous interests that benefited from the fragmented system, and conceal the hand of the Pennsylvania Railroad and its sinister taint of imperial Yankee capital.

Scott's solution was the holding company, an entity formed specifically to own stock in other companies. Corporate charters normally prohibited ownership of stock in another company, but Colonel Scott was able to persuade the Pennsylvania legislature to ease the restriction, first for the Pennsylvania Railroad and then for another company that would buy up southern railroads. This tactic allowed Scott to buy up lines in southern states without getting charters from hostile southern legislatures. When word got out, Scott's southern rivals tried to use the press to inflame the public against the northern invader, but Scott silenced the opposition by buying up scads of southern newspapers and ordering their editors to toe the company line. By the time he was done, Scott had co-opted the Ku Klux Klan and used as free construction labor the entire penitentiary population of North Carolina. He had also forged back room deals that put Rutherford Hayes in the White House, installed Jim Crow in the South and secured for his railroad millions of acres of public land and huge federal subsidies. He conducted bloody strike-breaking battles with the aid of federal troops furnished by President Hayes. As the first oligarch whose power rivaled that of the government, Scott embodied the worst fears of those who framed the Constitution.

By 1889, through the efforts of a New York attorney named William Nelson Cromwell, Scott's interesting invention for the Pennsylvania Railroad had become available to all corporations. That was the year in which the New Jersey legislature relaxed the state's incorporation statutes so as to permit any corporation chartered there to hold stock in any other corporation in America. When Governor Woodrow Wilson tightened up the New Jersey law in 1913, Delaware rushed in to fill the vacuum. Having won the race to the bottom, Delaware remains to this day the corporate venue of choice. But the flood had begun years before: In the period 1897-1903 about 2,650 firms were absorbed by a handful of immense corporations, such as International Paper, U.S. Steel and International Harvester. By 1903 some 250 corporations dominated the American economy, and the legal system, once democracy's shield against corporate power, had turned into a corporate shield against legislative power.

By 1903 anyone could get a corporate charter by filing some papers with the state, and corporations had begun to acquire an unlimited life span. A discredited corporation could disappear and re-emerge by means of reorganizations, sell-offs or absorptions into other companies. Because the corporation could go venue-shopping, its accountability to any particular state had greatly diminished. Because states had begun to charter corporations for "any lawful purpose" rather than some specific purpose, corporations were now free to form conglomerates; they could also form vertically integrated companies that controlled the entire life of a product from production to distribution and retail. Limited liability had arrived in full, which meant the end of any external incentive for shareholders to concern themselves with the behavior of businesses in which they owned an interest. Several court decisions had made shareholders subordinate to corporate managers in such matters as acquisitions, mergers and bankruptcy proceedings. Many of these changes had the effect of removing restrictions on size. Anti-trust laws have tended to restrict size, but the enforcement and judicial interpretation of such laws have often reflected political ideology.

The biggest impediments to democratic control are the constitutional rights the corporations wrested from the courts, starting in the 19th century. Encouraged by Thomas Jefferson, New Hampshire had enacted legislation that would have converted Dartmouth, a private college, into a public one. Dartmouth trustees argued that the 1769 charter from King George was a contract protected under Article 1 of the Constitution, which prohibits states from impairing contractual obligations. The court ruled for the state, declaring the trustees to be servants of the public. The trustees appealed to the Supreme Court, which reversed the lower court and held that the charter from King George was a contract protected by the Constitution. However, Chief Justice John Marshall made it clear that corporations were subordinate to state power, and state legislatures added a clause to charters which asserted the state's right of revocation. Nevertheless, the Dartmouth case marked the beginning of a long phase in which the courts steadily eroded state sovereignty over corporations.

Enacted in 1868, the Fourteenth Amendment sought to protect the rights of freed slaves by means of due process and equal protection of the law, but its most profound effect was the empowerment of the corporation. One cause of this unintended consequence was Supreme Court Justice Stephen J. Field, son of a New England Congregational minister. Field graduated from law school, clerked for his brother, a lawyer for railroad robber barons Fisk and Gould, traveled in Europe and followed the California gold rush in 1849. He became Mayor of Marysville his third day in town, and a state legislator the following year. He was elected to the California Supreme Court in 1857 and became its chief justice in 1859. When Congress created a new federal court of appeals for the Pacific region in 1863, Field became the head of the new circuit court. By the custom of the day, he became at the same time a justice of the U.S. Supreme Court. Field had been recommended by Governor Leland Stanford, who later became a Southern Pacific railroad magnate. When he organized his university, Leland Stanford made Field a trustee. Field had also been recommended by his brother, a Lincoln partisan.

President Lincoln duly nominated Field, who soon became notorious for his pro-railroad sympathies.

Their lobbyists' bribes had the Congress well in hand, but at the state level the railroad barons needed help from a Supreme Court willing to invalidate state legislation on Constitutional grounds. There was no problem in Pennsylvania, where Tom Scott ruled. The trouble came from the west and the midwest, where militant farm and labor movements often had enough muscle to enact regulations and taxes harmful to railroads. For example, in Illinois Grangers and small-town merchants, in their opposition to rate-gouging by railroads and grain elevators, pushed for the creation of a state regulatory commission. Corporate interests challenged Illinois law, claiming that the state regulation of rates violated the due process clause of the Fourteenth Amendment. In 1877, in *Munn v. Illinois*, the U.S. Supreme court ruled, seven to two, that such regulation was acceptable. The guiding principle: When private property is "affected with a public interest, it ceases to be *juris privati* only." Field dissented on the principle that such an interpretation would leave all property and all business in the state to the mercy of a majority of its legislature.

But Field soon had another chance. Under the 1879 California constitution it was a democratically elected State Board of Equalization, staffed with excellent legal and accounting talent, that controlled the assessment of railroad taxes. At issue was how to value land for tax purposes. Individuals were taxed on the value of the land minus any outstanding mortgage. If railroads were taxed the same way they would pay no state property tax, because railroads could point to bonds worth more than the land itself. State law recognized that different rules were required for railroads and individuals, but the railroads took the issue to court. One of their arguments was that the difference in methods of assessment was a violation of the equal protection clause of the Fourteenth Amendment.

Two such cases reached Field at the ninth circuit court: *San Mateo County v. Southern Pacific Railroad* in 1882, and *Santa Clara County v. Southern Pacific Railroad* in 1883. In *San Mateo* both Field and Justice Sawyer ruled in favor of the corporation on the basis of the Fourteenth Amendment guarantee of equal protection to all persons, but they differed in their interpretation of "person." Sawyer simply ruled that a corporation was a legal person, but Field knew that the personhood of corporations had always applied only to the corporate ability to make contracts and own property. The courts had already rejected the notion that this restricted kind of personhood entitled corporations to broader rights. Accordingly, Field sought another justification for the extension of equal protection to corporations. He argued that it was the personhood rights of stockholders that were violated when counties levied discriminatory taxes on corporations. He used the same rationale in his circuit court opinion in the second case, *Santa Clara County.*

Field's rationale may look plausible on paper, but it had no grip on reality. Courts had long distinguished between corporate property and individual property. The most important distinction was that the shareholder, in accepting the privilege of limited liability, also renounced control of the property. It was patently absurd to state that a tax on the corporation was a tax on the shareholders, especially when the buying and selling of stocks meant that the group called "shareholders" was in a constant state of flux. Additional proof that they were not one and the same was that shareholders could sue the corporation. Nevertheless, on the train from California to Washington he hoped the Supreme Court would ratify his new theory of the Fourteenth Amendment as a protector of corporations. The Court was to disappoint him, but an obscure Court Reporter would grant far more than Field could have hoped for, corporate personhood under the Fourteenth Amendment.

Both cases reached the Supreme Court, but *San Mateo* was quickly withdrawn and faded out of sight. *Santa Clara* was decided in favor of the railroads and, by one of the great flukes of American history, gained mythic fame as the case that gave the corporations their Fourteenth Amendment personhood. The taint on the case has only recently become apparent to scholars who discovered that the court ruling said nothing at all about corporate personhood. As published in the *Supreme Court Reporter, Vol. 6* (1886) the *Santa Clara* decision, written by Justice Harlan, discourses on fences and mortages, and concludes that these narrow technical matters fall on the side of the railroads. It is another compilation of Supreme Court decisions that alludes to corporate personhood. In *United States Reports, Vol. 118*, J. C. Bancroft Davis, Reporter (1886), the following paragraph, prefatory to Harlan's decision, appears in a section called "Statement of Facts":

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.

Another such reference appears in the "Headnotes," annotations prepared by the Court Reporter to summarize the opinion. The first sentence says that "The defendant Corporations are persons within the intent of . . . the Fourteenth Amendment . . . "

The consensus among students of this bizarre episode of Supreme Court history is that Chief Justice Waite made a personhood comment from the bench that was not supposed to be part of the Court's *Santa Clara* decision. Nevertheless, Court Reporter Davis chose to highlight that comment as the main point of the case. In *Santa Clara* Waite probably stopped oral argument about corporate personhood because the Court had recently covered that ground in *San Mateo.* He wanted to settle *Santa Clara* on narrower technical grounds; he was not ready to break new constitutional ground. Even Justice Field thought that the court had avoided the issue of corporate personhood in its *Santa Clara* decision. Davis' motivation remains unclear, but those who have studied the matter have pointed out his ties to railroad interests and his status as a political player.

Fallacious though it was, the Supreme Court soon began to treat the *Santa Clara* decision as a personhood precedent. In another case five months later, Justice Harlan wrote a dissenting opinion that quoted Waite's oral comment as if it were a part of the *Santa Clara* decision. Unfortunately, the legal status of headnotes was not decided until 1905, when the Court ruled in *United States v. Detroit Lumber Co.* that headnotes and statements of facts are not part of the Court's decision. On the question of the validity of the Santa Clara precedent, it seems that time validates Supreme Court decisions, even those based on imaginary precedent.

Why did Chief Justice Waite comment as he did? Why did the Court embrace its decision as a personhood precedent? In each case the answer seems to be "Roscoe Conkling."

Conkling, a former Senator, had been hired by the Southern Pacific Railroad and charged with one task: to persuade the Supreme Court that Congress had intended that corporations be considered persons under the Fourteenth Amendment. Conkling's ace in the hole was that he had been a member of the committee that wrote the amendment. The committee's intent had never been revealed, but Conkling had documentary evidence, a secret journal of the committee's deliberations, that he brought with him in 1882 when he argued a case very like *Santa Clara* before the Supreme Court. Over 50 years later a Stanford law librarian, Howard Graham, found as he examined the journal that Conkling had deceived the Court by switching key words so as to prove his point about the intent of the committee. His trick was to claim that the committee had gone back and forth between two alternative words–first "person," then "citizen," and finally "person"–because the broader legal meaning of that word could include corporations. Graham discovered that the switch had not occurred. All drafts of the amendment had used "person" consistently. In his argument to the Court, Conkling had made a great show of emphasizing the switch, all the while claiming that the committee had feared that if the word "citizen" were used corporations would not have the protections the committee meant them to have.

Imagine Chief Justice Waite a few years later, confronted with *Santa Clara*. He is not quite ready to break new constitutional ground, but he has already bought Conkling's claims. He acknowledges them orally, but not as a written precedent-setting decision. Court Reporter Davis, a railroad sympathizer with a mind of his own, plays up Waite's comments in the notes he writes to accompany the written record of the case. As Justice Harlan writes the Court's opinion on *Santa Clara* he relies on technicalities, not personhood, but five months later he cites *Santa Clara* as a personhood precedent. The reason for his change is unknown, but the deed is done: Corporations have become persons by judicial fiat, carelessness, gall and chicanery. And the *Santa Clara* decision contains no judicial rationale for the deed.

In the period from 1886 to 1937 many among the American elite seemed guided by the principles of social Darwinism. According to its English prophet, Herbert Spencer, measures intended to help the weak or vulnerable actually ran counter to nature's fundamental order, and therefore only weakened the average fitness of any "race." Under Spencer's moral guidance, a judge could crush a piece of social legislation and defend the act as a humanitarian blow for the ultimate improvement of society.

This rugged laissez-faire view had to ignore some hard realities of American life in the 19th century. Foremost was that employer-employee relations were still governed by a common law structure that continued to enforce feudal principles of privilege and hierarchy. The original land-holding masters had simply been replaced by business owners and managers. Employers' power over workers was a private relationship in which normal constitutional rights might not apply. It was only in 1848 that courts prohibited employers from beating employees. Not to work or not to be seeking work was a "crime of status" punishable by fine or imprisonment. Labor was "entire," which meant that the worker was not entitled to wages until the term of employment was complete; a worker fired before then would have great difficulty collecting for the work already done. Even today many of the rights Americans enjoy in public are surrendered the moment they enter the workplace. In 2002 Barbara Ehrenreich, in her book *Nickel and Dimed*, described her life as a domestic worker: "You have rules such as no talking to your fellow employees . . . you're subject to surveillance; you have no privacy whatsoever . . . The workplace, especially the low-wage workplace (but it extends to a lot of mid-level people, too) is more like a dictatorship. You really check your civil rights at the door."

By 1868 labor organizing, begun in the Civil War, had resulted in eight-hour day statutes in Illinois, Wisconsin, Missouri, Connecticut, New York and Pennsylvania. The new unions included the National Labor Union, which proposed to destroy the power of large corporations and give workers more of the national wealth. However, most of the eight-hour laws lacked penalties or enforcement provisions, or provided a "free-contract" exception that permitted a different contract if workers agreed. As the eight-hour day began to vanish, some labor leaders gave up on laws and turned to collective bargaining–which itself faced a growing wave of repression by corporate security forces, police forces and state militias. The American elite had been badly frightened by the Paris Commune of 1871, where workers and soldiers took control of the city for two months, after which the French army killed 30,000 citizens as it reoccupied the city. It might happen here unless we kept the troublemakers in line.

In 1873 a financial panic led to a five-year depression: Unemployed workers roamed the country, lived in makeshift camps and demanded relief in demonstrations that evoked attack by police. In the Pennsylvania mine fields a Pinkerton agent inflltrated a secret society and fingered 19 Molly Maguires, all eventually hanged as ringleaders. In the 1880s labor went through another cycle of hopeful expansion, repression and collapse, this time under the banner of the Knights of Labor. The cycle included a railroad strike put down by force, with seven workers killed by company deputies in East St. Louis; a strike for the eight-hour day, where Chicago police fired into a mob and killed four people; and the consequent Haymarket bombing, after which eight anarchist leaders were tried and convicted simply as movement leaders. Four were hanged, one committed suicide and three received reduced sentences. That finished the Knights of Labor.

The cycle recurred in the 1890s, when Eugene V. Debs headed the American Railway Union. Repressive forces had a new weapon, the court injunction. Debs organized a strike in sympathy with workers locked out after they had struck Pullman Palace Car Company. In response, U.S. Attorney General Richard Olney met with a railroad attorney who recommended that Olney seek an injunction against the strike under Sherman Antitrust, which had been intended for use against corporate monopolies. The federal district court in Chicago set a precedent by injoining Debs to stop the strike, citing conspiracy to disrupt postal service and damage to the general welfare caused by disruption of interstate commerce. In 1895 the U.S. Supreme Court upheld the injunction in its decision *In Re Debs*. Corporations liked injunctions because they avoided the trouble and risk of trial by jury, and judges could imprison union leaders for contempt if the strike went forward. The Court strengthened the power of injunction in 1897 with the decision *In Re Lennon*, which allowed blanket injunctions–injunctions that applied to anyone on notice, whether named specifically or not. At an ever increasing annual rate, between 1880 and 1930 courts issued over 4,000 injunctions against strikes.

The high water mark of social Darwinist theory came in 1905, when the Supreme Court overturned a New York statute that mandated a 60-hour week in bakeries. Before that law, bakers worked as long as 126 hours in a week. But the Court ruled that the statute violated the due process of the Fourteenth Amendment and the freedom of contract provisions of the Constitution (*Lochner v. New York*). This decision exemplified the Court's "substantive" due process doctrine, under which the Court overturned many state laws intended to regulate working conditions, wages and other aspects of business. Justice Oliver Wendell Holmes wrote a famous dissent, but his opinion was ignored until 1937, when, under the intense social pressures of the Great Depression, the Court finally abandoned the doctrine of substantive due process. Until then, the Court practically worshipped the sanctity of contracts, while ignoring the obvious reality that in terms of negotiating power, the huge corporation will always overwhelm the individual worker. Until then, Holmes watched as the Court used the substantive due process doctrine to invalidate child labor laws, laws that limited the length of the work week, laws that prescribed safety standards and injury compensation for workers, and a host of similar laws enacted by state legislatures. Social Darwinism may have been the textual rationale, but the subtext was the bottom line, a cheap, docile work force.

In the same period, the Court of Chief Justice William Howard Taft, who thought that organized labor needed to be hammered every so often, outlawed the use of boycotts and secondary boycotts (boycotts in support of a strike). The Taft Court permitted injunctions against unions that tried to organize workers who had signed "yellow dog" contracts. Thus, unions could be enjoined against attempts to organize workers who had signed company contracts in which they promised not to join a union. In other anti-labor decisions the Taft Court limited picketing to one picket per plant gate, overturned an Arizona law that would have limited anti-labor injunctions, and prohibited unions from using the strike as a means of organizing the unorganized part of an industry.

The Supreme Court's abandonment of substantive due process in 1937 attests to the effect of political pressure on a body supposedly indifferent to it. By 1933 the Great Depression had cut industrial production by 50 percent, brought unemployment to 25 percent and sent two million of the jobless to wander the land in search of work. Twentyfive thousand veterans and their families camped in Washington to demand early payment on bonus certificates. President Hoover, alarmed by FBI warnings about communist leaders in the Bonus Army, put Douglas MacArthur in command. Tanks rolled through the capital; soldiers cleared the encampments with tear gas, then razed the shanties.

Wildcat strikes were rampant. As Congress preferred unions to anarchy, it passed the Norris-LaGuardia Act, which outlawed the labor injunction. In a speech in September 1932, presidential candidate Franklin Roosevelt took aim at corporate power: Six hundred companies controlled two-thirds of American industry; if we weren't careful, all American industry would soon be controlled by a dozen corporations run by a hundred men; we are headed for economic oligarchy, if not there already.

He beat Hoover by seven million votes.

Once in office, Roosevelt asked Congress to enact a flurry of initiatives intended to jump-start the economy. As soon as Congress enacted them, the Supreme Court struck them down. In February 1937, returned to office by another huge majority, Roosevelt asked Congress for the authority to add one judge for every one who was over seventy. His attempt to pack the Court with six more judges, rejected by the Senate Judiciary Committee, is often given credit for causing the Court to budge. However, Justice Owen Roberts, the member whose defection to the pro-Roosevelt faction gave it a one-vote majority, wrote in his memoirs that Roosevelt's pressure was less influential than the social unrest that gripped the country. He feared that if the Court continued to block liberalizing reforms, an aroused public would finally challenge the system itself. According to Roberts, the Court changed its ways in response to grass roots pressure. Indeed, two New Deal justices, William O. Douglas and Hugo Black, wanted to reverse *Santa Clara*, but could not persuade enough of their colleagues. Nevertheless, between 1922 and 1970 only one Supreme Court decision expanded corporate rights: In *Fong Foo v. United States* (1962) the Court gave corporations Fifth Amendment protection against double jeopardy.

In 1937 Roberts wrote a decision to uphold a state law that fixed minimum wages for women and children (*West Coast Hotel Company v. Parrish*). Previously the Court had invalidated such laws under a social

Darwinist interpretation of corporate rights. If Roberts' decision put an end to laissez-faire on the Supreme Court, Roosevelt banished the social Darwinist vision from public discourse: A well paid, secure workforce was compatible with an expansion of corporate activity and profits. This view prevailed for the next three decades, as corporate growth remained brisk and American wealth became more evenly distributed than before the Great Depression: The top 1 percent owned nearly 45 percent in 1929, but only 20 percent in 1971.

To liberal economist John Kenneth Galbraith it looked as if the New Deal had achieved for good a new social contract, with health insurance for factory workers and other middle class benefits. The old Progressives had been wrong to worry so much about excessive corporate power. Labor was now part of the American establishment. He saw a new self-adjusting mechanism: Corporate power produces an equal and opposite reaction, so that "Private economic power is held in check by the countervailing power of those who are subject to it." But what would happen if business were sufficiently irked by the encroachment of working-class incomes on profits, or government regulations on corporate prerogatives? If big business truly flexed its political muscle, would countervailing power really hold big business in check? The events that began to unfold in 1971 show that the answer was "no."

The counterattack began in 1971 with a chat between two neighbors in Richmond, Virginia: Eugene B. Sydnor, a businessman high in the U.S. Chamber of Commerce, and Lewis Powell, Jr., a well connected corporate attorney. Intrigued by Powell's ideas, Sydnor asked him to send them in a memo to the Chamber's Education Committee, which he headed.

Powell wrote his memo at a time when the public held businessmen in low esteem. The Vietnam war had produced the biggest social upheaval since the Great Depression. The social order had unraveled; there were huge antiwar protests on the mall and riots in the cities; the economy was stagnant, profits were down. Republican President Nixon supported anti-business measures: repeal of the Kennedy investment tax credit, an increase in the capital gains tax, limits on the use of tax shelters, a strengthened bill on occupational safety and health, and tough regulations on air pollution. Consumer and environmental groups had proliferated like mushrooms. There was the environmental protection act, the clean air act, the ban on cigarette commercials, the cancellation of the supersonic transport. There was the Environmental Protection Agency, the Occupational Safety and Health Administration, and the Consumer Product Safety Commission. There was implacable Ralph Nader, arch enemy of corporate power, out to jail executives by the dozens–not the fly-by-night hucksters, but top management of blue chip businesses, who had defrauded the consumer with shoddy goods, poisoned our food with additives, and willfully made products so unsafe that they would kill or maim the buyer. There were the university campuses, stocked with social science faculties unsympathetic to the free enterprise system. It was the darkest hour of the American capitalist system. The businessman was the forgotten man.

Powell's confidential memo, entitled "Attack on the American Free Enterprise System," described as he saw it the malaise that afflicted American business and laid out a plan of counterattack. Two months later President Nixon nominated Powell, a conservative Democrat, to the Supreme Court, where he would have an incomparable opportunity to advance the goals listed in his memo.

What set his memo apart was its call for long-range planning: Corporations would have to create new institutions and give them sustained support. The reponse was immediate. In 1972 executives from General Electric and Alcoa answered the call by forming the Business Roundtable, composed of CEOs from the top 200 financial, industrial and service corporations. It was the policy committee of the Business Roundtable in 1977 that organized and directed the lobbying effort that defeated a legislative proposal, backed by unions, to reform federal labor law and repeal the right-to-work provisions of the Taft Hartley Act. In the same decade many other institutions sprang up to defend corporate interests: foundations, think tanks, litigation centers, publications, public relations and lobbying agencies.

In contrast to the Business Roundtable, which operated in the open at the federal level, another group pursued the corporate agenda more surreptitiously, at the state level. Founded by conservative leader Paul Weyrich in 1973, the American Legislative Exchange Council first focused on abortion and school prayer, but later shifted to business issues. Over three hundred corporations were involved in its funding. It posed as a nonpartisan provider of technical services to understaffed state legislators. It specialized in the drafting of "model bills," and was especially helpful in such complex areas as electricity deregulation, where the legislators needed the group's technical expertise. The apparently neutral model bills, supplemented by the efforts of such lobbyists as Kenneth Lay, of Enron, were especially effective. Such bills were prepared by the thousands, and enacted by the hundreds.

There were also short-term coalitions, such as USA*NAFTA, which lasted only long enough to pass or defeat a particular piece of legislation. New techniques were invented, such as "astroturfing," in which a consulting firm would serve up an instant "grassroots" citizen campaign on any issue the client might desire. Lawsuits were used to intimidate critics of corporations. In a famous example of SLAPP–strategic lawsuit against public participation–the Cactus Cattle Corporation sued Oprah Winfrey when she renounced hamburger in response to a guest who had warned her TV audience about mad cow disease. Of course Winfrey won in court, but the suit took six years and cost millions in legal fees. Another invention was the "judicial education" seminar, where pro-corporate foundations provided free trips for federal judges to attend training sessions at fancy resorts.
There they could attend such seminars as "Misconceptions About Environmental Pollution and Cancer," or "Why We Should Run Public Lands Like Businesses." After one such seminar, a judge wrote the host "As a result of my better understanding of the concept of marginal costs, I have recently set aside a $15 million antitrust verdict."

Most important, the corporations found a way to pump oceans of money into political campaigns. Given the climate of Watergate it would not have been wise to attempt a repeal of the Tillman Act of 1907, an often violated ban on corporate contributions to federal campaigns. The solution came from a union invention, the Political Action Committee, which provided a way for union members to pool their individual donations. Already there were corporate PACs, but they could accept contributions only from stockholders, over whom corporations have no real leverage. That was changed in 1975 by an obscure ruling from the Federal Election Commission that permitted corporations to solicit funds from their own employees, and use their own treasuries to manage their PACs. After that ruling, corporate employees began to feel the squeeze, and the money began to roll in. Who decided how to spend the PAC money? The managers. There is not much democracy in a corporation.

In 1974 labor PACs outnumbered corporate PACs, 201 to 89. Ten years later corporate PACs held a big edge, 1,682 to 394. Their clout grew even bigger with the advent of organizations whose sole job was to coordinate corporate PAC activity.

Soft money, approved by the Federal Election Commission in 1978, was also part of the picture. The ruling allowed corporations, unions and wealthy individuals to contribute money to the parties for party-building activities unrelated to federal elections. In practice, the money flowed from national parties to state parties, where it was spent in ways that supported candidates. Labor unions contributed soft money, but corporations contributed ten times as much. In 1999 the numbers were $33 million and $368 million. In 2002, stung by public outrage over the Enron scandal, Congress passed the Bipartisan Campaign Reform Act in an effort to stanch the flow of soft money and thereby reduce corporate influence on federal legislation. Opponents immediately sued on the grounds that the act violated the free speech rights of corporations. No doubt the issue will end up before the Supreme Court, which may well decide that the act violates corporate rights under the First Amendment.

Why not simply ban corporations from the political arena? The proposal is not so fantastic; Wisconsin had just such a law on its books until 1970, and some thirty other states have or had similar laws. The Wisconsin statute said, in effect, that no corporation doing business in the state could contribute money, property or services, directly or indirectly, for any political purpose, whether elective or legislative. Enacted at the federal level, such legislation would clear away the sixty thousand corporate lobbyists who throng the hallways of the Capitol–a hundred for every representative and senator. The improbability of such legislation is patent. Accordingly, activists have turned to the state level as a more likely scene for the resuscitation of democracy in America. As they do so, they often butt heads with a formidable opponent, the U.S. Supreme Court.

California has one of the lowest alcohol taxes in America. Encouraged by the California Highway Patrol, in the 1980s a coalition that included Mothers Against Drunk Driving pressured the state legislature for a nickel-a-drink tax on bars and restaurants. The revenues would go to trauma centers, law enforcement, alcoholism prevention and treatment, child abuse prevention and services for addicted newborns.

Polls of the public showed 73% support, but the tax got nowhere in Sacramento. Giving up on the legislators, the coalition turned to the citizens by means of an initiative, Proposition 134, placed on the 1990 ballot. Liquor leaders, sensing a dangerous precedent in the making, organized both state and national opposition, $38 million worth, that paid for attack ads, counterinitiatives, and front groups. Big liquor spent $18 million on broadcast advertising, initiative proponents only $40,000. With plenty of money left over, big liquor mounted a $5.5 million direct mail campaign. Corporate money succeeded as planned; on election day confused voters rejected both the citizen initiative and the industry alternative. In the words of one who supported the tax, “We couldn’t make the public understand how important the tax was; we were just outshouted.”

Again and again the same fight recurs across the land. The score: Corporations spent at least twice as much as citizen initiatives could muster, and won 90% of the time. As a result, citizen groups have tried to preserve the integrity of the initiative process by stemming the flood of corporate funds.

Montana is a case in point. For decades the state was controlled by mining interests whose practices devastated large tracts of land, spewed tons of toxic asbestos dust every day and lied to their miners about the health hazards of the dust, a laundry list of fatal lung diseases. In the 1970s, when Anaconda Copper turned its attention to Chile and other nations, citizens seized the day. A coalition of ranchers, greens, labor unions and others enacted both a new state constitution and stronger environmental laws. In 1996 the same coalition, plus campaign-finance reformers from other states, set out to keep corporate money away from citizen ballot initiatives. Their flatbed truck campaign worked barbecues, town meetings and county fairs to secure a ballot initiative that would keep corporate general funds out of future ballot initiatives. Initiative 125 drew heavy corporate opposition, but passed with 52% of the vote. Proposals could now be floated in the public arena of the editorial, the talk show, the public debate and the door-to-door leaflet without risk of drowning in an expensive corporate flood of television and radio advertising.

Two years later Montana voters passed an intiative that banned cyanide from gold mining. Montana corporations sued in federal court and argued that Intiative 125 violated the First Amendment. The federal judges agreed, citing a decision in which the U.S. Supreme Court had overturned a similar Massachusetts statute (*First National Bank v. Bellotti*, 1978). When the case went up to the U.S. Ninth Circuit Court of Appeals the court ruled in favor of the Montana Chamber of Commerce, and I-125 was dead.

The First Amendment had become a killer of grass roots campaign finance reform, thanks to several Supreme Court decisions between 1976 and 1986–many written by Justice Lewis Powell. They are reminiscent of his famous memo to the U.S. Chamber of Commerce, part of which reads as follows: "American business and the enterprise system have been affected as much by courts as by the executive and legislative branches of government. Under our constitutional system, especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change." [Condenser's note: See the 2000 Presidential election.]

In Powell's time the two biggest Supreme Court decisions on campaign finance reform were *Buckley v. Valeo* (1976) and *First National Bank of Boston v. Bellotti* (1978). It has been said that in *Buckley* the Court ruled that "speech = money." According to the Court, because it is often necessary to spend money in communicating a message to a large audience, restrictions on political spending must satisfy the same strict standards that restrictions on speech must satisfy if such restrictions are to be considered constitutional. Such restrictions are justified only if there is no other way to protect a vital public interest. The decision upheld restrictions on donations to candidates, so as to avoid quid pro quo corruption. However, it overruled restrictions on the ability to spend money on one's own campaign, because one cannot corrupt oneself. The decision has been criticized for having created a system where money rules. By refusing to accept limits on spending by rich candidates in their own behalf, the Court made it difficult for ordinary citizens to compete unless they curry favor with big money sources, such as corporations.

In *Bellotti*, the Court protected corporate spending on state legislative initiatives. The case involved a Massachusetts law that banned corporations from buying advocacy ads on citizen initiatives. A consortium of corporations joined in a lawsuit, and the Supreme Court sided with the consortium. The majority tried to sidestep the tricky issue of the corporation's entitlement to free speech protection under the First Amendment. They appealed to the public's right to a free discussion of governmental affairs, and the need to stop government from limiting the public's stock of information. But the opinion went on to let the cat out of the bag: "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." In terms of First Amendment protection, the majority saw corporations on a par with humans. Dissenters White and Rehnquist saw corporations as different from humans, entities whose special properties, perpetual life and limited liability, posed special dangers and invalidated any claim on First Amendment protection.

Appearances notwithstanding, the Supreme Court has never developed a coherent rationale for the bill of rights that corporations enjoy today. This insight begins with an understanding of what a corporation is: an organization with a legal entity, separate from that of its owner(s), that comes into being only when the government issues a charter of incorporation. It is not born, but legislated. As Marshall wrote in *Dartmouth College* (1819), a corporation is an "artificial being, invisible, intangible and existing only in contemplation of law." It cannot claim rights against its legislative creator, which can regulate it or put it out of existence as it sees fit. This "artificial entity" theory does not deny corporate rights, but limits them to those needed for action in the legal arena: the rights to own property, enter into contracts, and defend its property and enforce its contracts in court. Field's opinions in *San Mateo* and *Santa Clara* appealed to the rights of shareholders, but overlooked a crucial difference between the limited liability of shareholders and the liability of other property holders.

Given a central role in society as an honest, respectable participant, a corporation might merit human rights under "natural entity" theory. This rationale has never had an explicit champion in the Supreme Court, perhaps because it has a lethal opponent in the Constitution. At the time of its writing the founders had every chance to confer special protection on corporations, but chose to confer it on only two groups, the press and religious institutions. In the historical context of the East India Company, the Boston Tea Party and the Constitutional Convention there is no evident desire to protect corporations, but rather the opposite, an evident desire to restrain them.

Nevertheless, from the 1890s and into the 1920s legal scholars conducted numerous debates about the connection between "corporate personality" and legal personhood as a possible justification for corporate rights. These debates came to an end after a 1926 essay by John Dewey, who argued that discourse about corporate personality was too abstract to have any practical value. Instead, Supreme Court decisions have simply granted new corporate rights with virtually no supporting argument or with some bizarre blend of rationales.

No new rights were granted to corporations from 1922 to 1962, during which time Justices Black and Douglas wrote stinging dissents that advocated the reversal of *Santa Clara.* Black wrote that "No section of the [Fourteenth] amendment gave notice to the people that, if adopted, it would subject every state law and municipal ordinance, affecting corporations, and all [administrative actions under them] to censorship of the United States courts. No word in all this amendment gave any hint that its adoption would deprive the states of their long-recognized power to regulate corporations." (*Connecticut General Life Insurance Company v. Johnson*, 1938). Douglas wrote that "If [the people] want corporations to be treated as humans are treated, if they want to grant corporations this large degree of emancipation from state regulation, they should say so. The Constitution provides a method by which they may do so. We should not do it for them through the guise of interpretation." (*Wheeling Steel v. Glander*, 1949).

But *Santa Clara* was not reversed; the concept of corporate rights had gained a life of its own. Beginning in 1962, the Court resumed the expansion of corporate rights: the Fifth Amendment right against double jeopardy (*Fong Foo*, 1962), the Seventh Amendment right to jury trial in a civil case (*Ross v. Bernhard*, 1970), the First Amendment right of "commercial free speech" (*Virginia Board of Pharmacy v. Virginia Citizens Consumer Council*, 1976, and *Central Hudson Gas*, 1980), the Fourth Amendment right against unwarranted regulatory searches (*Marshall v. Barlow,* 1978), the First Amendment right to spend money to influence a state referendum (*Bellotti*, 1978), and the First Amendment right of "negative free speech" (*Pacific Gas & Electric Co. v. Public Utilities Commission*, 1986).

In no case did the Court cite any of the old defective rationales. Instead, it introduced two new methods, one based on history, the other based on the intended purpose of a particular constitutional right.

In *Marshall v. Barlow* the Court ruled that government safety inspectors could not enter corporate property without a search warrant under Fourth Amendment protection of "the right of the people to be secure in their persons, houses, papers, and effects." Corporate property might seem to fall in none of those categories, but the Court, undaunted, appealed to the time of the American Revolution, and the colonial anger aroused by British searches of colonists' shops. Dissenting justices questioned the equating of major corporations with colonial shops, and might also have pointed out that colonial attitudes were distinctly anti-corporate.

In *Bellotti* Justice Powell went to the intended purpose of a right as the Court extended First Amendment free speech rights to corporations. He did not claim that corporations had any intrinsic human qualities, but that the First Amendment protected speech, not the speaker.

In *Central Hudson Gas* the Court struck down a state law against corporate ads that promoted electrical consumption during a period of energy shortage. The majority decision said that the Court's purpose was to protect not corporation rights, but the public's right to have the maximum possible amount of information on a given issue.

However, the Court seemed to contradict itself when it created a novel right for corporations, that of "negative free speech." In *Pacific Gas & Electric* an electrical utility company had a newsletter that expressed company views on energy policy. The state regulatory body, wishing to increase the diversity of information, passed a rule to require that the company enclose in its billing envelopes, four times a year, the newsletter of a consumer group. The company objected, and the Court ruled in its favor. In view of *Central Hudson Gas*, how could this be? Justice Powell had the answer: To force such a company to enclose a newsletter from a ratepayer group would violate the company's First Amendment free speech right *not* to be associated with statements it disagreed with. And there you have it, folks: The corporation has a right to negative free speech, and it trumps the public's right to have the maximum possible amount of information on a given issue.

It appears that the Court had come gradually to accept for corporations a privileged status that the Court itself had helped to create. Orwellian in its ability to bend language to the needs of the corporation, the Court had engineered an immense transfer of power from democratic institutions to private ones. And students of constutitional law will look in vain for any coherent rationale in the Court's creation of the corporate bill of rights.

Many critics of corporate privilege would be dismayed to learn that the American Civil Liberties Union has been part of the problem. The ACLU embraces the theory that any restriction of First Amendment rights for one segment of society will endanger those rights for other segments–the slippery slope theory. This theory would account for ACLU support of "negative free speech" for Pacific Gas and Electric. It would also account for big tocacco's endorsement of the ACLU as a staunch ally in the fight against efforts to ban tobacco advertising.

Critics have suggested that the ACLU position has actually diminished human rights by expanding corporate ones. Perhaps the ACLU has chosen the wrong metaphor: A corporation is not a speaker, but the owner of a megaphone that drowns out everyone else. To ask its owner to put the megaphone away abridges no freedom of speech, but merely protects the others' ability to be heard. Similar reasoning applies to the campaign finance laws that ACLU has opposed. Laws that restrict corporate political expenditures protect First Amendment rights by keeping the corporate megaphone from drowning out the rest of us. They leave corporate managers perfectly free to express their opinions, while protecting expression of other points of view by employees, stockholders, dissenting managers and the public at large.

The fallacy of the corporation as speaker is also apparent in the recent chain of events that began when critics charged that Nike had tolerated sweatshop conditions in Asian factories run by its subcontractors. Nike responded with a media blitz of denial and counter-claims: Its workers were paid twice the minimum wage, received free meals and health care, endured no corporal punishment or sexual abuse, and worked under conditions set by health and safety regulations. Marc Kasky, convinced that much of Nike's response was false, filed a false advertising lawsuit under California's Business and Professions Code. Nike lawyers argued that factuality was irrelevant because Nike was protected by the First Amendment. In other words, the company could broadcast any information it pleased, even information it knew to be false. The ACLU rushed to defend Nike, citing "the fundamental First Amendment principles that protect the rights of those on both sides of a debate to speak their minds freely." ACLU was joined by numerous corporations, newspaper editorials and even the AFL-CIO.

The crux of the matter is whether the corporate mind is equivalent to the mind of a person. If a person issues a false statement, the person bears responsibility. If a corporation does the same, who is responsible? Plenty of machines emit words, but no such machine is entitled to free speech. It is human speakers that the First Amendment protects, not machines. If the free market of ideas is at stake, it seems absurd to protect that market by giving corporations a First Amendment right to lie. The case is working its way to the Supreme Court, and the outcome is anybody's guess.

Corporations are already under intense pressure to fabricate tales for the outside world. The collapse of Enron in 2001, far from the exception that apologists first claimed, was only the first in a long parade of scandals: Adelphia, AOL Time-Warner, Arthur Anderson, Bristol-Myers Squibb, Global Crossing, Halliburton, Johnson & Johnson, Qwest Communications, Tyco, WorldCom and Xerox. A common symptom of the disease was illicit accounting tricks to make company finances look better than they were, which in turn raised the value of the stock option part of the executive pay package. President George W. Bush denounced "destructive greed," then tried to explain why he had earned hundreds of thousands of dollars by selling his stock in his company, Harken Energy, just before the company broke a ton of bad news that sent the stock to the bottom. Vice President Cheney watched as the Securities and Exchange Commission (SEC) investigated charges that his old company, Halliburton, had engaged in dubious billing and accounting practices when he was running the company.

The Business Roundtable stepped in with both a deeper explanation of the corporate crime wave and a handy cure. Business had not kept up with the times. Enron was a "troubling exception" to a system with an "overall record of success." Nevertheless, the Roundtable soon released a review of its previous previous corporate governance standards with recommendations for "best practices" concerning the organization of boards and committees, the approval of stock options and the disclosure of pertinent information. No essential changes were recommended for the use of stock options in executive compensation, because it was appropriate to link executive compensation to the interests of shareholders, including long- and short-term incentives.

The legislation that came out of the scandals, the Sarbanes-Oxley Act, was a mild set of measures that barely exceeded the Roundtable recommendations. It required the CEO to certify the company's financial reports. It tightened the regulations for corporate auditing committees. It banned inside loans to executives and board members. It kept accounting firms from serving as consultants to their clients during audits (but not during other times). It required disclosure of off-balance-sheet items, and increased fines for fraud and other violations.

The Roundtable applauded Sarbanes-Oxley, to no one's surprise, but some wondered why Congress had not fought for stronger measures. Let us follow the money.

In the 10 years before the scandal corporations had given $1.08 billion in campaign contributions, $636 million to Republicans and $449 million to Democrats. In the same decade big business lobbyists had beaten back three potential reforms concerning stock options, tort reform and conflict of interest among auditors.

In 1993 the Financial Accounting Standards Board (FASB) tried to require that companies report as expenses the stock options awarded to employees and executives. Big business lobbied against the reform and Congress, led by Democrat Senator Joseph Lieberman, pressured the FASB not to treat stock options as a corporate expense.

In 1995, as part of the Contract with America, proponents of tort reform denounced frivolous lawsuits and passed legislation that made it harder for investors and others to sue corporations and their accounting firms. The measure passed over President Clinton's veto. The result was a slack environment with little fear of lawsuits.

In 2000 SEC Chairman Arthur Levitt proposed that auditing firms not be allowed to consult with companies they were auditing. Arthur

Anderson had already been fined $7 million for its role in advising Waste Management, Inc., which had paid $457 million in penalities for overstatement of earnings. In its effort to defeat the proposal Anderson was joined by two other big accounting firms; their lobbying on Capitol Hill included almost $23 million in campaign contributions to both parties. When the committee that oversees the SEC threatened his agency's funding, Levitt withdrew the proposal.

All of the above were mere symptoms of a deeper problem: overwhelming corporate influence in democratic government, and a blurring of the line between corporate and governmental power. The problem was apparent in the decision to attack Iraq, which came from notions of "regime change" and "pre-emptive war" developed even before the 2000 election by corporate-supported think tanks. The founders of one of them, Project for a New American Century, included men who later became top members of the Bush administration: Donald Rumsfeld, Dick Cheney and Paul Wolfowitz. Many policymakers came to the administration straight from the top defense contractors, such as Lockheed Martin and Northrop Grumman.

The same pattern, for the most part perfectly legal, is evident in many other areas where corporate influence meets public policy: energy, finance, pharmaceuticals, telecommunications, media, agriculture, tobacco, high technology, criminal justice and many others. In the wake of the corporate scandals that opened the 21st century a few greedy villains went to jail, but it was business as usual in the think tanks and the political action committees.

From its Washington Citadel the Supreme Court has led many American crusades for new corporate rights, but international traders have also fought hard for the same goal. Globalization itself is nothing new. In the sixteenth and seventeenth centuries trading and settlement corporations such as the British East India Company, the Virginia Company and the Royal African Company led British imperial expansion around the world. The Dutch, the Japanese, the French and the Germans followed a similar pattern of imperial expansion.

More typical than direct corporate rule was the domination of Third World governments by corporate interests, backed up on occasion by military intervention. The original banana republic model was nineteenth century Central America, where an American entrepreneur named Minor Cooper Keith built a railroad system, then branched out into fruit. His enterprise eventually became United Fruit Company, puppet master of many generations of Central American dictators. In Guatemala in 1954 United Fruit prepared the way for a CIA-sponsored coup that overthrew an elected president, Jacobo Arbenz. It shipped in weapons on company boats and housed coup leaders on company property. It flew American journalists to Guatemala on stage-managed junkets, and the journalists returned home to file stories on threats of a communist menace. It used Secretary of State John Foster Dulles, a former United Fruit attorney, and his brother Allen Dulles, head of the CIA, to make its case for intervention in Guatemala. Similar collaborations between corporate interests and the CIA were involved in the overthrow and deaths of Patrice Lumumba in the Congo (Belgian mining interests) and Salvador Allende in Chile (International Telephone and Telegraph).

When the Cold War ended, methods became more sophisticated. On hand to shape the global economy was the Bretton Woods Agreement, which arose from talks between Winston Churchill and Franklin Roosevelt in 1944. Delegates from 44 countries forged international financial institutions to handle the aftermath of World War II. The World Bank would provide reconstruction loans for Europe, and the International Monetary Fund (IMF) would provide short-term loans for national governments. A few years later the General Agreement on Tariffs and Trades (GATT) arose as a series of negotiations to smooth the way to international trade and investment. In 1994 the World Trade Organization (WTO) became the third big Bretton Woods institution.

Each of the three has fed the growth of transnational corporations. In the 1970s low interest rates encouraged low-income countries to borrow from American and European banks. In 1980, when their external debt was enormous, interest rates began to climb and many countries found themselves unable to meet their repayment schedules. This crisis created the “structural adjustment” loan by the IMF and the World Bank, in the Phillipines in 1980, then Mexico in 1982. Such loans provided emergency relief, but not without the government’s agreement to a number of conditions meant to improve its balance of payments. The austerity measures dictated by the IMF included cuts in social services and privatization of state-owned enterprises.

The requirement to sell state-owned businesses created a lush opportunity for transnational companies in public utilities, toll roads, bus systems, oil pipelines and power plants. Enron was able to generate $23 billion in foreign revenues in 2001. It struck deals in India, the Dominican Republic, Panama, Colombia and Guatemala, and got financing from the World Bank and national governments, plus a $3 billion loan from the U.S. government.

Another weapon of transnational corporate expansion besides these “structural adjustment” programs was the “special industrial zones” created in many countries, especially China. After decades of economic isolation, China in 1980 began to open five special economic areas; the result was a bonanza of economic expansion that involved $300 billion in investments by Wal-Mart, Kmart, J.C. Penney and others eager to get their hands on China’s non-union factory labor.

The transnational grab worked both ways. Around the world the number of companies operating outside their home countries tripled between the 1960s and the 1990s. Although American companies were the most aggressive, foreigners increased their share of U.S. manufacturing assets from only 3% in 1970 to 19% in 1990.

As they straddled countries the transnationals encountered multiple regulatory systems, a problem that called for a new doctrine of corporate rights to trump unwanted regulation. The GATT process could handle multilateral negotiations among more than a hundred countries, but that very size made the process slow and unwieldy. Regional treaties were the ticket. They started in 1987 with a U.S.-Canada Free Trade Agreement, which became the North American Free Trade Agreement (NAFTA) when Mexico joined in 1994. Waiting in the wings is the Free Trade Area of the Americas (FTAA). [Condenser’s note: This one was scuttled by dissident Latin American delegates.]

The regional agreements confer new global rights on corporations, powerful legal mechanisms that let a corporation based in one country overturn the laws or judicial decisions of another country. The rights of NAFTA are particularly potent. Whereas the WTO allows a *government* to challenge the domestic laws of another government, NAFTA allows a *corporation* to sue a foreign government over its laws, regulations or court decisions. Such challenges are handled by secret arbitration boards that forbid public participation.

Among NAFTA's corporate rights, perhaps the most explosive is the right of compensation for regulatory taking. This particular right goes far beyond protection against the kind of expropriation that occurred in 1938 when Mexico nationalized its oil industry, and far beyond what the U.S. Supreme Court has allowed. For example, in 2002 the Court ruled that landowners were not entitled to compensation for a 32-month moratorium on property development that was imposed to allow preparation of a land-use plan (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*). Environmentalists cheered the decision as a sign that the Court had no intention of creating a new property right that would forbid land-use regulations and other environmental protections. At the same time, NAFTA was permitting U.S. companies to assert that very right in Mexico, and Mexican and Canadian companies to assert it in the U.S. In 2001 pending claims in such suits totaled about $13 billion.

In one case an American firm that had bought a toxic waste dump in Mexico was awarded $16.7 million from the Mexican government when local residents, worried about contamination of their town's water supply, got the government to block the firm's use of the site after a geological study of the hazards. Still pending is a similar case in which Methanex, a Canadian producer of a chemical involved in a gasoline additive, MTBE, sued the U.S. government under NAFTA. The trouble began when the California governor, Gray Davis, ordered the phasing out of the additive. He did so when the foul smelling, foul tasting and possibly carcinogenic MTBE turned up in Shasta Lake, in drinking wells in the Lake Tahoe basin, in thirty public water systems and thirty-five hundred groundwater sites. Methanex denied any harmful effects, and sued for $970 million.

Never content, corporate interests next proposed a global version of NAFTA that would let them sue national governments directly, in closed courts of arbitration, in demand of compensation for environmental or other laws that had the "effect of taking" corporate assets. The new agreement, prepared in secret, was the Multilateral Agreement on Investments (MAI).

News of the proposed agreement, leaked in 1997, moved citizen groups by the hundreds to oppose MAI. Over 565 organizations in over 70 countries urged the suspension of MAI negotiations. In 1998 they won a major victory when the European Parliament passed a resolution against MAI by a vote of 437 to 8. A month later MAI was removed from the agenda of the Organization for Economic Cooperation and Development.

Popular movements in the past had focused on particular problems caused by multinational corporations. This time the movement had taken aim at corporate power itself, the international institutions and trade agreements that leveraged corporate power at the expense of democracy.

How can we fight back?

Incipient street preachers could emulate Reverend Billy Talen, who goes to a Starbucks and quietly sips his latte, but finally stands on a table to deliver his sermon for the Church of Stop Shopping.

We could join Alliance for Democracy. In 1995 Ronnie Dugger, former editor of the *Texas Observer*, wrote in *The Nation* magazine: "We are ruled by Big Business and Big Government as its paid hireling, and we know it." He recounted the history of the populist movement and called for a revival to reclaim democracy. The article evoked hundreds of letters and led to a new activist organization, Alliance for Democracy.

We could emulate those citizens of the world–greens, unionists, farmers from Saskatchewan and indigenous leaders from Venezuela–who went to the Seattle Convention Center in 1999 to demonstrate against the World Trade Organization. Their example recurred in Quebec City, Washington, Los Angeles, Prague, Gottenburg and Genoa. Be prepared for opposition from the police, who respond to such demonstrations much as they did to the labor, populist and anti-war demonstrations of the 19th and 20th centuries. It may be inspiriting to keep in mind that the Seattle demonstration was not the first of its kind; it was preceded by similar ones in Jakarta, Vancouver, Brasilia and Hyderabad, India.

Like the students who picketed Gap stores and boycotted Nike, we can bring unwelcome attention to Americans who profit from sweatshops.

Those who question its efficacy need only recall the reaction to the news that Kathy Lee Gifford's brand of clothing was made by sweatshops in New York and children in Honduras.

Remember that when corporations hire detectives to spy on activists, and lawyers to hound them in court, the tables can sometimes be turned. In the wake of the Exxon Valdez oil spill, Alyeska Pipeline hired Wackenhut detectives to gather information on oil company critics. They bugged hotel rooms, videotaped meetings in secret and spied on activists. When the operation came to light the House Committee on Interior and Insular Affairs found that Wackenhut had engaged in deceitful if not blatantly illegal conduct in " . . . Alyeska's disastrous campaign to silence its critics." In London, McDonald's Corporation hired spies to infiltrate a group of environmental activists, then sued the group. Two of its members held a squad of corporate lawyers at bay in the longest libel trial in English history as they called one expert after another to defend their charges against the corporation's environmental and labor practices. The British press pursued the story closely, and the two activists, Helen Steel and Dave Morris, became international folk heroes.

Beware of industry offers to create codes of conduct. They typically enable corporations to parlay a weak, unenforceable promise of better working conditions into a fraudulent "no sweat" label or certification. It is particularly telling that corporate attorneys themselves have described codes of conduct as a way to "muzzle the offshore watchdog" groups.

Keep your eye on the ball. It is fine to demand safer nuclear plants, or no nuclear plants, but do not be surprised if such efforts fail to produce any progress toward the development of alternative energy sources. The real target is the control of giant electric utility corporations. It may be hard to believe today, but public utilities were created to serve the people, not to steal ratepayer cash by the carload.

Learn some history. Consult POCLAD, the Program on Corporations, Law, and Democracy, on the early history of the American corporation. According to POCLAD's Richard Grossman, the way to deal with corporate power is to get the people to assert their sovereignty. He reminds us that King Charles I had the same problem, after he chartered the Massachusetts Bay Company in 1628. In 1664, when he sent his commissioners out to check compliance with the charter, the governors of the company objected to the investigation as an infringement on their rights. The commissioners responded: When the King made you a corporation he did not give up his sovereignty over you. When he gave you the power to make laws and administer justice, he did not give up his right to judge your use of that power. Grossman adds, “From childhood, this King had been led to act as a sovereign should. What about us?”

Act on the lessons of history. In 1998 POCLAD revived a recourse often used in the 19th century to discipline errant corporations. In behalf of POCLAD, together with dozens of environmental and human rights organizations, lawyers filed a complaint with the California attorney general, Dan Lundgren. The book-length complaint documented the case against Unocal Corporation, an oil giant with a long record as a corporate scofflaw and a collaborator with oppressive governments. Repeatedly convicted of violating environmental and worker safety standards, it continued its violations. It had pled guilty to deceiving the courts and its shareholders. In Burma it had used forced labor to build its pipeline under the permissive auspices of a ruthless military dictatorship. In Afghanistan it partnered with the Taliban, despite the regime’s oppression of women and homosexuals. The POCLAD suit asked the state of California to acknowledge this pattern of unlawful behavior by revoking Unocal’s corporate charter.

There was abundant precedent for revocation of charter. It was not uncommon in 19th century America. It is a legal option today in every state, and it is not uncommon that smaller corporations be suspended for failure to comply with regulatory requirements. In fiscal 2001-2002 California suspended 58,000 corporations for failure to pay taxes or to file proper statements. In the late 1990s Florida revoked the charters of several corporations involved in stock fraud schemes. In 1998 New York moved to revoke the charter of the Council for Tobacco Research (CTR) for having “fed the public a pack of lies in an underhanded effort to promote smoking and to addict America’s kids.” A state court appointed a receiver for CTR, and CTR agreed to donate its assets to cancer research institutes.

Nevertheless, Lundgren dismissed the petition against Unocal out of hand. Perhaps he should have known, as state attorney general, that statutes can be enforced only with sanctions that provide a credible deterrent. Failing that, the petition may have reminded him that a corporate charter is not a natural right, but a revocable grant from the citizens.

Another promising avenue is a law written originally to sue pirates and protect diplomats. The Alien Tort Claims Act (ATCA) applies to violations "against the law of nations," i.e., outside the context of the U.S. legal system. Burmese villagers have used ACTA to file suit against Unocal for having used forced labor to build its pipeline. Other suits have targeted Shell for human rights abuses in Nigeria, Texaco for dumping toxic waste in Ecuador, Coca-Cola for using paramilitary forces to suppress union activity in Colombia, Del Monte for hiring thugs to torture union leaders in Guatemala, DynCorp for spraying villagers in Ecuador with toxic chemicals, and Drummond Company for hiring gunmen to assassinate union leaders in Ecuador. (All of the above charges are allegations.)

Similar suits have targeted corporations for human rights abuses in the U.S. In 2002 Deadria Farmer-Paellmann filed a class-action lawsuit for herself and other descendants of slaves against corporations that had used slave labor to build their assets. Any settlement would be directed to a humanitarian trust fund. At first the suit cited FleetBoston Financial Corporation (for financing slave ships), Aetna, Inc. (for insuring slaves) and CSX (for building railroads with slave labor). As further evidence of slave-related activities emerged, she added many more companies, from JP MorganChase to Lloyd's of London. Aetna offered an apology, but nothing more.

You could lend your support to a constitutional amendment that states clearly that Constitutional rights are reserved for human beings, not corporate entities. Such an initiative already has the support of many groups, including the Green Party, the Alliance for Democracy, and the Women's International League for Peace and Freedom. It has also been suggested that "corporations are not persons" amendments should be passed at all three levels of government: local, state and federal. It should be noted that no constitutional amendment is strictly necessary, because the Supreme Court has the power to reverse the corporate rights it granted. Perhaps the best known example of the Court's power of reversal is *Brown v. Board of Education* (1954), which reversed the Jim

Crow system inflicted by *Plessy v. Ferguson* (1896). When the heat goes up, the Court sees the light.

That is one good reason to praise and emulate the tiny city of Port Arena, California, the first municipality to pass a resolution against corporate personhood rights. Another good example is Porter Township, Pennsylvania,which passed an ordinance to declare that corporations operating in the township could not exercise constitutional rights to override township decisions. A boy in a nearby township had died from a massive infection after riding in a field that Synagro Corporation, a sludge-hauling company, had spread with sludge. Township supervisors reacted by adopting a sewage-sludge testing ordinance. In turn, Synagro sued the township and the supervisors for violating its constitutional rights. Porter Township chose to bypass the state regulatory body, as too beholden to corporations, and go directly to the issue. It passed its own township ordinance for testing sludge, in conjunction with the "personhood elimination" ordinance.

One way to fight the corporate co-opting of regulatory agencies is to keep corporate money out of elections. Citizen initiatives in Maine, Vermont and Arizona have passed "clean money reform" that allows candidates who wish to avoid private fund-raising to receive public monies instead.

You can support the "International Right to Know Standards" proposed by such groups as Amnesty International, Oxfam America and the Sierra Club, under which corporations would have to release information on their actions in terms of environmental impact, labor practices, worker safety and human rights practices, such as forcible relocations. Such standards could have an effect like that of the Foreign Corrupt Practices Act (1977), whose reporting requirements are thought to have greatly reduced the use of foreign bribes by American corporations.

Try to obtain a realistic understanding of the anticorporate struggle in American history. Try to learn the origins of earlier movements: the agrarian populists, the National Farmers Alliance, the pre-World War I socialists, radical unions, such as the Industrial Workers of the World (IWW, the "Wobblies"), and the Progressives. As you try to understand why they collapsed, it would be wise albeit disquieting to face one of the more straightforward explanations: simple repression. Probably like every other nation, ours has a dark side to its history. It includes anti-labor measures carried out by company security forces, police and military units. It includes federal labor injunctions, the 1920 Palmer raids, the Ludlow Massacre (21 killed), the Homestead Strike (13 killed), the Great Steel Strike (20 killed), the Latimer Massacre (19 killed) and the 1877 Railroad Strike (90 killed). There was a docile conservative wing of the labor movement that survived, and a militant wing that received more lethal treatment.

If labor was defined in narrow terms favorable to corporate interests, so were U.S. media. For example, in the 1920s and 1930s, when Canada and Britain were moving to organize strong public media, such as the CBC and the BBC, comparable efforts in the U.S. were defeated. In the early 1980s fifty conglomerates dominated our mass media. By 2000 the dominant conglomerates were down to six. Similar concentrations are evident in all sectors: film production, theater ownership, newspapers, book publishing, cable television, music, book retailing and radio stations.

Further concentration has been opposed by grass roots campaigns, directed at the Federal Communications Commission (FCC), organized by such institutions as Fairness and Accuracy in Reporting and the Institute for Public Accuracy. Some activists have worked to expose the copious junkets that media conglomerates have financed for the benefit of FCC employees, members of Congress and senior staffers. At the local level, media activists have fought corporate advertising in schools and cafeterias, and have supported such noncorporate alternatives as the Pacifica radio network. Hundreds of community groups have fought for low-power FM radio stations.

With National Public Radio increasingly dependent on corporate funding, we can expect critical discussions of corporate power to become increasingly rare, and the few discussants rarely invited back. The taboo is well illustrated by President Eisenhower's farewell address on radio and television in 1961, when he issued his famous warning about unwarranted influence by the military-industrial complex. Ike had been President for eight years. If the danger was so grave, why did he withhold his warning until three days before he left office, and why did he name no names? He had come awfully close to forbidden ground, and he knew it.

Finally, understand the corporate fundamentals. For example, ExxonMobil is the fractional remnant of John D. Rockefeller's truly gigantic Standard Oil. ExxonMobil is so rich, with total revenues of $200 billion annually, that it is a world power as well as a business. Its operations affect tens of thousands of employees, millions of customers and enormous areas of the planet. Its revenues exceed the governmental budgets of all but seven nations. Its CEO runs its annual meeting like an omnipotent dictator, but dissident stockholders are allowed a few seconds at the microphone. A church representative wants to tie management pay to indices of environmental and social performance. The chairman cuts her off and says she has one minute and forty-five seconds. Another stockholder asks the company to forbid discrimination against gays and lesbians. Another proposes that Exxon-Mobil change its position on global warming; another opposes drilling in the Arctic National Wildlife Refuge. Another asks that the company change its ways in Indonesia, where it allegedly provided buildings where the military could torture local activists and bulldozers to dig mass graves for the victims.

Security guards stand ready to eject any speaker who tries to exceed the meager time limit. These worthy stockholders are essentially ignored, and everyone knows it. All of the decisions have already been made by management. If the chairman had experienced some Scrooge-like transformation, with a compassionate speech about human rights and the fate of the planet, he would have been frog marched off the stage and fired, or he and the board of directors would have faced and lost a shareholder lawsuit.

This scenario is neither hypothetical nor fanciful. It happened to Henry Ford when he wanted to plough his company's retained earnings into building more factories so as to employ more workers and spread the industrial benefits more widely. In 1919 the Michigan Supreme Court ruled in favor of the stockholders, who wanted any retained earnings to go into their dividends: Corporate law required that profits be the only goal Mr. Ford could pursue with the company he had made.

The modern corporation has great power, but it did not come from nowhere, it is not irresistible, and it is not impervious to reform. Think of the dinosaurs. Think of monarchical rule. Humans made it what it is, and humans can change it.

Here is a short list of changes in the cause of democratization. (1) Revoke the doctrine of corporate constitutional rights. (2) Require corporations to renew their charters every five years. (3) Ban corporations from political activity. (4) Define noncorporate space. For example, ban advertising aimed at children. (5) Expand the scope of worker and customer rights. (6) Strengthen countervailing institutions, especially unions. (7) Promote noncorporate institutions: Public schools, municipal utilities, family farms, consumer cooperatives and employee-run enterprises.

The corporation can be a useful beast, but it needs to be domesticated and democratized. Should that day arrive, we will still need to warn our children: Watch out; keep an eye on it. It can bite.