

When Corporations Wield the Constitution

by Richard L. Grossman and Ward Morehouse

Co-Founders, PROGRAM ON CORPORATIONS, LAW & DEMOCRACY

November 2002

The following is reproduced with permission of the authors.

Copyright © 2002 by Richard L. Grossman and Ward Morehouse.

This appeared as the Foreword in George Draffan's *The Elite Consensus: When Corporations Wield the Constitution* (Apex Press: 2003)

The 1st Amendment "does not intend to guarantee men freedom to say what some private interest pays them to say for its own advantage. It intends only to make men free to say what, as citizens, they think."

Alexander Meiklejohn

Philosopher & Educator (1872-1964)

"Over the past 200 years, all over the world but especially in the United States, legal systems have been changed to accomplish two things: limit the legal liabilities of corporations, and give corporations the rights and protections of citizens" by extending "constitutional rights to corporations." So writes George Draffan in this book about the few who govern the many.

These two accomplishments have enabled corporate officers "to make decisions and control resources . . . to unite to influence political agendas" towards transforming their values and goals (maximizing production, paying as few workers as possible as little as possible, building complex industrial systems, propelling America as Empire, etc.) into law and policy.

What does this mean for all the people hired and fired at will by corporate managers? For people who value cooperation, love, human rights, ecological sanity, democracy and consent of the governed? It means that a unified corporate class uses the law of the land to deny the majority's fundamental right to govern.

It means that a relatively small number of corporate operatives use "the rule of law" to keep millions and millions of people divided and disempowered.

Routine corporate decisions involving investment, labor and the natural world cause so much harm to life, liberty and property that millions struggle to figure out which corporation is doing what to whom. They scrutinize each new corporate technology, corporate merger, and proposed corporate law; study finance and interlocking corporate structures. Millions have become experts on water, forests, soils, climate; have learned chemistry, physics, hydrology, biology and finance; have learned how to make their way through regulatory and administrative agencies.

Time and again people have come together to oppose corporate plans. They have declared: Not In Our Names. Not Here. Not There. Not Anywhere. This civic work has been vital -- to save life and land, to lift the human spirit, to teach children. But while people were resisting corporate assaults and working for sane investments and technologies, corporate operatives

were making the rules for governing the nation.

So people are saying "No" in ways which challenge corporate claims to constitutional authority; which reveal the histories of slave owner -- and then corporation owner -- usurpations; which confront public officials with trampling upon people's basic rights.

George advances this exciting evolution as he dissects the elite consensus -- "larger than any industry" -- relentlessly pitching its manufactured histories, destructive values, false choices and global empire; aggressively selling and reselling ever-more production of everything possible as the fount of liberty.

He reveals the motivation driving this corporate consensus that "rises above the competitive advantage of particular corporations, and is larger than any industry." It is "to build and maintain power itself." To thwart democracy. To govern the Earth.

Today's corporate leaders received a head start from the men of property who wrote the Constitution.

When the overwhelmingly white male voters of the thirteen states ratified the Constitution, the "rule of law" they adopted defined the majority of human beings in those states as property, or as invisible. Contrary to the democratic ideals unleashed by the American Revolution, the law in this newly-formed republic denied rights to women, African American slaves, indentured servants, Native peoples, and white males without property.

All these human beings were written out of "We the people."

Who represented their needs and aspirations? Not the men meeting behind closed doors in Philadelphia's Constitution Hall that hot summer of 1787. These men not only denied rights to the majority but also built barriers to democratic processes into their Constitution: indirect election of the president through the electoral college, indirect election of US senators by state legislators, a commerce clause, a contracts clause, an appointed Supreme Court as an eternal closed-door constitutional convention,[1] to name a few.

The Revolutionary Era's propertied and slave-owning gentlemen who wrote the Constitution used law to keep the histories, experiences, needs, values and aspirations of the denied from being transformed into public policy. Parading their stolen powers as "constitutional rights," they provided future elites with the "legal" means to expand their rule even after whole classes of people had won the right to vote, to run for public office, to own property, to speak, to go to school, to form unions, to serve on juries and testify in court, to enjoy public accommodations, etc.

Since Southern slaveowners and northern men of property controlled the mechanisms of governance in the nation's early years, they saw no need to muscle up the corporation -- a tool of kings with which they had direct experience. These men who were doing very well did not want rival ruling power controlled by others, like the East India Company, to arise in their midst. So their state legislators wrote corporate charters -- and then state corporation laws -- limiting how long corporations could exist and limiting their real property and capital

holdings. Laws in all states specified corporate purpose, banned corporations from owning other corporations, preserved rights of minority shareholders, made directors and shareholders liable for corporate debts and harms, and barred corporate involvement in elections and lobbying.

The culture regarded corporations as subordinate to the sovereign people.

After the Civil War, however, the men setting out to industrialize this land with machines and workers without rights made the corporation their ruling institution. As men of property had wrapped the Constitution around themselves in 1787, men of the Gilded Age enlisted judges and legislators to wrap the nation's sacred text around their new financial and industrial conglomerates.

By the end of the 19th Century, corporations had been baptized in the contract, commerce, property and personhood pools the Revolutionary elite had dammed into the Constitution one hundred years before. Public officials in New Jersey, and then Delaware, lay down for Rockefeller's Standard Oil Corporation, for the DuPont family and for men of great wealth controlling everything from food to steel to matches to armaments to whiskey. Robber barons began buying up other corporations, using them to create *even more* corporations swaddled in the Constitution.

A century later, corporate lobbying and propaganda think tanks, charities, foundations and other corporate clones masquerade as We the People. They sport goodness and mercy monikers like "Patriotic Citizens for Secure jobs and All-American Energy" and "Good Neighbors for Fair and Democratic Chemicals." On talk shows; in op-ed pages; in seances with elected officials in governors' offices, legislatures and judges' chambers; at meetings of the World Trade Organization and the United Nations; at international conferences; and in endless advertisements, corporate shells say what they are paid to say.

They tell governments what to do.

Wielding such power generation after generation breeds a special arrogance. Consider this: a few years ago, leaders of Travelers Group and Citibank corporations decided to merge. There was one minor problem: such a merger was against the law. But confident that in no time they could pass a new law wiping out a fifty-year old law, they went full speed ahead.

Their confidence was justified. A *New York Times* Corporation photograph adorning our POCLAD walls captures a blissed-out elite consensus moment at the White House. The caption reads:

"Depression-Era Rules Undone. Alan Greenspan, left, the Federal Reserve Chairman, and Congressional leaders applauded President Clinton yesterday after he signed the Financial Services Modernization Act, which allows merging of banks, securities firms and insurers. It repeals parts of the Glass-Steagall Act."

Why do corporations get away with it? Because with few exceptions, civic activists have not looked closely at this history. They have not contested the nation's corporate class over its grab of governing authority.[2] So let's look more closely at how the nation got into this mess.

Until the Civil War, political power was held primarily by the representatives of large slave holders like George Washington, Thomas Jefferson and James Madison, who used their domination of southern state governments to direct the United States government. The constitution that they wrote guaranteed profits from the new government's denial of human rights by, among other things, directing government to guarantee the return of all "persons held to service or labor in one State"[3] to their rightful owners. ("Persons" here meant both African American slaves and white slaves better known today as indentured servants.) The Constitution provided as well that the armed might of the United States would aid states against rebellions (called "domestic violence"[4]) by workers -- whether they were chattel slaves or wage slaves.

Their Constitution also decreed their domination of politics and lawmaking. A slave was to count as "3/5 of a person"[5] for assigning representation in the House of Representatives and the Electoral College. This meant that slave state elites could turn their ownership of human beings into domination over congressional and presidential elections.[6]

The rise of northern industrialists after the Civil War brought the end of slave master rule and the beginning of rule by corporate kings. As happened after the Revolution had been won, Southern and Northern men of property again united. They wrote slavery out of the Constitution with the "Civil War Amendments,"[7] and wrote corporations in. Industrialists then used government to defeat organized resistance by women, former slaves, farmers, workers and small businessmen seeking to reconstruct the nation as a democracy based on free labor and equal rights. They did the same to Native peoples seeking to preserve their independence.

These elites stole the presidential election of 1876.[8] They then established "new trends in legal doctrine and political-economic theory" to enable "the corporate reorganization of the property-production system." [9]

After ratification of the 13th, 14th and 15th amendments, judges and legislators concocted constitutional doctrines legalizing racial segregation and exploitation, [10] and denial of workers' rights no matter the worker's race, creed, gender or color.[11] As a result, men of property could call upon sheriffs, militias, police, jails and courts to enforce Jim Crow, anti-free labor, anti-union, anti-strike, conspiracy and sedition laws at local, state and national levels. They directed the coercive force of law -- legalized violence -- to prevent the majority from using elections, lawmaking and lawsuits to remedy harms or pass the laws they wanted.

Over succeeding generations they directed government force and violence to deny African Americans, Native peoples, Asians, women, immigrants from the global south, war resisters -- anyone spouting anti-elite values -- their most fundamental rights.

These industrialists were simply acting in an old tradition. After all, the forebears of the new corporate class had written a constitution trashing the Declaration of Independence's "all men are created equal; that they are endowed by their Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness. That to secure these right, Governments are instituted among Men, deriving their just powers from the consent of the governed . . ."

So for more than two centuries, the nation's elite minority has arrayed government against the assembling, speaking out and petitioning by African Americans, enslaved and free; by working people and their unions; by Native peoples and immigrants; by family farmers and small businesspeople. They have arrayed government against people whose lands and labor they desired; or whose appearance, thoughts, speech, assembling and governing they feared.[12]

They did this despite the plain and simple language of the Constitution's very first amendment: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Since 1868, they did this despite the plain and simple language of the 14th amendment: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

They did all this without writing the words "slave," or "segregation," or "labor union," or "foreigner," or "unAmerican," or "separate but equal," into the nation's plan of governance. While raving about "democracy," "liberty," "freedom." While making gods of the "Founding Fathers."

Now that's wielding the Constitution!

There is another word which does not appear in the Constitution -- "corporation."

Men of property have had no difficulty encouraging Supreme Court justices to find corporations in the nation's sacred text. Beginning with the 1819 *Dartmouth College* case,[13] judges bestowed the privileges upon corporations which white, male, propertied human persons had already seized for themselves. This, of course, meant the denial of *everyone else's* rights.

During railway workers' 1894 strike against the Pullman Corporation, the justices upheld local judges who had banned American Railway Union officials from speaking with members and had thrown union leaders in jail. For a unanimous Court, justice David Brewer declared: ". . . the army of the Nation, and all its militia, are at the service of the Nation to compel obedience to its laws." [14]

This is not the language justices used when human persons petitioned them for redress of grievances. (See, for example, *Dred Scott*, [15] *Plessy*, [16] *Minor*, [17] *Mackay*, [18] *Brown*, [19] and hundreds of Supreme Court decisions).

On the contrary: judges decreed that corporations could brandish those "due process of law" and "equal protection of the laws" powers of the 14th Amendment and the "due process" clause of the 5th Amendment. They expanded corporations' commerce, contract and other constitutional authority. In so doing, they barred municipal, state and congressional legislation making the economy subject to public law, or directing government power to kick

corporations out of village squares, elections, government halls, judges' chambers and the Constitution.

Since World War II, judicial gifts of 1st Amendment powers to corporations have continued undermining the ability of voters to instruct elected legislators. As Professor Mark Tushnet observed: "The 1st amendment has replaced the due process clause as the primary guarantor of the privileged. Indeed, it protects the privileged more perniciously than the due process clause ever did . . ."[20]

Today, corporate directors and their non-profit corporations straddle the twin pillars of the 14th and 1st amendments, as Matt Wuerker portrays on the cover of this book. Unleashing their intellectuals, propagandists and lobbyists for hire, buying the loyalty of or silencing community groups, schools and the press (including public radio and public television), they drive the nation's debate, values, investments, technologies, legal relationships and wars.

Non-profit corporate creations of today's elites subvert people's ability to "secure the blessings of liberty to ourselves and our posterity." [21] They shut people up and out of any decisionmaking which counts. Their Supreme Court nullifies any people's laws which even minimally challenge corporate authority.[22]

The majority of people in these United States are constitutionally disabled.

No wonder people are exhausted and disillusioned from forays into campaign finance reform, corporate responsibility, EPA, NLRB, SEC, NRC, FDA, FCC and other corporate regulatory struggles. No wonder there is so much cultural pressure on communities, concerned citizens -- and even academics and public interest lawyers -- against linking people's multiple single-issues struggles against corporate assaults. No wonder that people are instructed over and over again (often by many leaders of environmental, human rights and labor groups) that we must not aspire to anything more than begging for "acceptable" levels of corporate class lobbying, election domination, wage enslavement and Earthly poisoning.

No wonder people are rethinking their work in this corporate world.

Enter George Draffan and *The Elite Consensus*.

In this book George examines "institutions which support corporate power" from the World Bank, the International Monetary Fund and the World Trade Organization to the Council on Foreign Relations, the Cato Institute, NATO and the United Nations. He includes public relations and advertising corporations into which elites pour hundreds of billions of tax-deductible [23] dollars . . . along with corporate propagandists posing as journalists and pundits.

George shows how a few people shape ideas, policies, values, news, information and language while writing laws and rewriting histories. He makes clear that by the time "issues" or even honest candidates appear before the voters, they have been sterilized, sanitized, disinfected and fumigated to order by the elite consensus.

By *that* time, intellectuals at corporate think tanks have done their trashy-but-footnoted studies and reports. By that time, journalists, editors, TV news writers, public officials and community leaders have been properly educated. Peoples' energies have been channeled into Potemkin Villages propped up by corporate fairy tales and democratic myths, as depicted in Matt Wuerker's cover.

Shill corporations like the Cato Institute, the Chamber of Commerce, the Business Roundtable and the Heritage Foundation have spent years and billions of dollars fabricating idea deconstruction systems constantly spewing cockamamie that frames and reframes and reframes the country's agendas. Their managing of the nation's discussions can be seen in the ways Social Security, fast track legislation, global rights agreements like NAFTA, war in the Middle East, energy and health care policies, revelations of corporate usurpations and other issues in the news are mass-produced from coast to coast.

Encouraging people to deny their own experiences and crushing people's aspirations -- that's power. Using police, militias, courts and jails to limit people's ability to exercise rights collectively (such as speech and assembly) they cannot exercise as individuals -- that's mastery.

George's first chapter, "Cultural Power: The Colonization of Our Minds," looks at how mass media, PR and other corporate foundations, think tanks and lobby groups do this work.

Chapter two probes the corporate use of the "rule of law" as a means of "leveraging authority." The third chapter focuses on the reality that so many industries and services are oligopolies dominated by a few corporate conglomerates wealthier than most nations.

Next, George looks at the iron fist inside the PR-camouflaged corporate glove. He helps us remember that even when huge groups of people challenged governance by corporations, public officials responded with violence.

Haven't demonstrators against global corporatization and war -- from Seattle to Los Angeles, Philadelphia, Washington DC and smaller communities -- found our own government arrayed against them wrapped in the uniform of Ninja warriors?

The second part of *The Elite Consensus* profiles leading terrorist corporations -- such as the Chamber of Commerce, the Trilateral Commission, the Council on Foreign Relations. George provides useful information about the origins, budgets, directors and work of each. We learn, for instance, that Defense Secretary Donald Rumsfeld was a director of the Hoover Institution (which had placed many of its members in the Reagan administration). So was David Packard of "military and electronics giant" Hewlett-Packard Corporation. We see that in the mid-1990s, National Public Radio correspondent Anne Garrels spent two years in Russia as a "fellow with the Council on Foreign Relations."

A decade ago, 79 of the Business Roundtable's directors "held 206 board seats in 134 corporations." In 1999 the Brookings Institution had \$225 million in net assets. Petroleum corporation millionaires David and Charles Koch fund not only the Cato Institute but also Citizens for a Sound Economy. Among the directors of that group have been C. Boyden Gray (former counsel to George H. W Bush) and James C. Miller III (former director of the

Office of Management and Budget and chair of the Federal Trade Commission).

As icing on the cake, George offers eight appendices documenting selected dynamics of corporate power. He ranks corporate expenditures for writing laws, links top lobbyists with their corporate clients, follows the flow of corporate money as it violates the body politic, and summarizes studies examining creative corporate extractions of public funds.

These corporate profiles bring the elite consensus to life!"[24]

The Elite Consensus reveals how a propertied class which long ago figured out how to write -- and keep on writing -- the Constitution kills democratic thought, nips democratic institutions in the bud and diverts organizing for democratic self-governance, over and over again. George's analysis complements the work and publications of the Program on Corporations, Law & Democracy described at the end of this volume. POCLAD is pleased to join with The Apex Press to bring you this new edition of George's book.

Richard L. Grossman and Ward Morehouse
Co-Founders, Program On Corporations,
Law & Democracy (POCLAD)
November 2002

NOTES

1. As justice Robert Jackson said of this august body: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v Allen*, 344 US 443, 540 (1953).
2. Since the great corporate-imposed un-American scare following World War II, and the government repression of thought, speech, assembly and civic action it spawned, corporate leaders have been far more conscious about strengthening their governing role than have been most of their critics. In the 1970s, for example, they launched (and funded with millions of dollars) a nonprofit corporate attack group called "Americans Against Union Control of Government," a "subsidiary" of the National Right to Work Committee. As Gerald Colby described, "Like the Liberty Lobby of the 1930s, these groups served as a front for DuPont and other large corporations . . ." *DuPont Dynasty*, Secaucus NJ: Lyle Stewart Inc., (1984), p. 750. As far as we know, there has never been a people's group with a name like "Americans Against Corporate Control of Government." Only in the past few years have contemporary activists defending against corporate assaults begun to grapple with the reality that corporations *govern the nation enabled and protected by the rule of law . . . by the Constitution*.
3. Article IV, section 2, part 3.
4. Article IV, Section 4.
5. Article 1, Section 3.
6. In 28 of the nation's first 32 years, the president was from a slave state: Washington, Jefferson, Madison, and Monroe, each of whom served two terms in office, were from Virginia.
7. The 13th Amendment, banning slavery and involuntary servitude, was ratified in 1865; the 14th amendment, defining "All persons born or naturalized in the US . . ." as citizens of the US, and declaring that no state shall "deprive any person of life, liberty or property, without due process of law," was ratified in 1868; the 15th amendment, declaring that the "right of citizens of the US to vote shall not be denied or abridged by the US or by any State on account of race, color, or previous condition of

servitude," was ratified in 1870.

8. See "Property Picks A President," by Mike Ferner, in *By What Authority*, volume 3, number 2, Spring 2001.
9. Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916, The Market, The Law and Politics*, NY: Cambridge University Press, 1988, p. 85.
10. See, among many examples, *Plessy v Ferguson*, 163 US 537 (1896).
11. See, among many examples: *Topeka & Santa Fe Railway Corporation v Gee*, 139 F. 582, 584 (C.C.S.D. Iowa), (1905) -- "[t]here is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing, or lawful lynching. When men want to converse or persuade, they do not organize a picket line."
12. See, among many examples: *Schenck v United States*, 249 US 47 (1919); *Whitney v California*, 274 US 357, 372 (1927).
13. *Dartmouth College v Woodward*, 4 Wheat. 518 (1819). See "You've Heard of Santa Clara, Now Meet Dartmouth," by Peter Kellman, in *Defying Corporations, Defining Democracy*, published for POCLAD by The Apex Press, 2001.
14. *In Re: Debs*, 158 US 564 (1895).
15. *Dred Scott v Sandford*, 19 HOW. 393 (1857).
16. *Plessy v Ferguson*, 163 US 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).
17. *Minor v Happersett*, 88 US 162 (1875).
18. *NLRB v Mackay Radio & Tel. Co.*, 304 US 333 (1938).
19. *Brown v Board of Education*, 347 US 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).
20. "An Essay on Rights," *Texas Law Review*, Vol. 62, 1984.
21. From the Preamble to the Constitution of the United States.
22. See among many, many Federal court decisions, e.g., George A. O'Toole of Federal District Court nullifying a Massachusetts "law requiring tobacco companies to list the ingredients of their products, saying it forces the companies to give away trade secrets," *New York Times*, 10 September 2000; nullification of a New Jersey law banning the transit of toxic waste through its borders, *Philadelphia v New Jersey*, 437 US 617 (1978).
23. Law today defines corporate propaganda, along with lawyers' fees and a large proportion of executive salaries and expense accounts, and penalizing fines, as normal costs of business. These costs are tax-deductible . . . which means that We the People pay for much of our own manipulation.
24. The Enron Corporation Saga shows that George is on the money. *The Nation* ("Ken Lay's Good Works," 11 February 2002, and "A Naked Emperor Disrobed", by Nate Blakeslee, 4 March 2002, p.15), reports that Ken Lay financed a chair at the corporate think tank Resources For the Future (RFF), a creation of the Brookings Institution. "Lay's gift to RFF, according to the group's newsletter, was to underwrite research 'to improve the way decision-makers consider important issues on the top of the nation's policy agenda.'" *The Nation* also reveals that Lay was a "board member and funder of the conservative American Enterprise Institute."