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Now Corporations Claim The "Right To Lie"

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While Nike was conducting a huge and expensive PR blitz to tell people that it had cleaned up its subcontractors' sweatshop labor practices, an alert consumer advocate and activist in California named Marc Kasky caught them in what he alleges are a number of specific deceptions. Citing a California law that forbids corporations from intentionally deceiving people in their commercial statements, Kasky sued the multi-billion-dollar corporation.

Instead of refuting Kasky's charge by proving in court that they didn't lie, however, Nike instead chose to argue that corporations should enjoy the same "free speech" right to deceive that individual human citizens have in their personal lives. If people have the constitutionally protected right to say, "The check is in the mail," or, "That looks great on you," then, Nike's reasoning goes, a corporation should have the same right to say whatever they want in their corporate PR campaigns.

They took this argument all the way to the California Supreme Court, where they lost. The next stop may be the U.S. Supreme Court in early January, and the battle lines are already forming.

For example, in a column in the *New York Times* supporting Nike's position, Bob Herbert wrote, "In a real democracy, even the people you disagree with get to have their say."

True enough.

But Nike isn't a person -- it's a corporation. And it's not their "say" they're asking for: it's the right to deceive people.

Corporations are created by humans to further the goal of making money. As Buckminster Fuller said in his brilliant essay *The Grunch of Giants*, "Corporations are neither physical nor metaphysical phenomena. They are socioeconomic ploys -- legally enacted game-playing . . ."

Corporations are non-living, non-breathing, legal fictions. They feel no pain. They don't need clean water to drink, fresh air to breathe, or healthy food to consume. They can live forever. They can't be put in prison. They can change their identity or appearance in a day, change their citizenship in an hour, rip off parts of themselves and create entirely new entities. Some have compared corporations with robots, in that they are human creations that can outlive individual humans, performing their assigned tasks forever.

Isaac Asimov, when considering a world where robots had become as functional, intelligent, and more powerful than their human creators, posited three fundamental laws that would determine the behavior of such potentially dangerous human-made creations. His *Three Laws of Robotics* stipulated that non-living human creations must obey humans yet never behave in a way that would harm humans.

Asimov's thinking wasn't altogether original: Thomas Jefferson and James Madison beat him to it by about 200 years.

Jefferson and Madison proposed an 11th Amendment to the Constitution that would "ban monopolies in commerce," making it illegal for corporations to own other corporations, banning them from giving money to politicians or trying to influence elections in any way, restricting corporations to a single business purpose, limiting the lifetime of a corporation to something roughly similar to that of productive humans (20 to 40 years back then), and requiring that the first purpose for which all corporations were created be "to serve the public good."

The amendment didn't pass because many argued it was unnecessary: Virtually all states already had such laws on the books from the founding of this nation until the Age of the Robber Barons.

Wisconsin, for example, had a law that stated: "No corporation doing business in this state shall pay or contribute, or offer consent or agree to pay or contribute, directly or indirectly, any money, property, free service of its officers or employees or thing of value to any political party, organization, committee or individual for any political purpose whatsoever, or for the purpose of influencing legislation of any kind, or to promote or defeat the candidacy of any person for nomination, appointment or election to any political office." The penalty for any corporate official violating that law and getting cozy with politicians on behalf of a corporation was five years in prison and a substantial fine.

Like Asimov's *Three Laws of Robotics*, these laws prevented corporations from harming humans, while still allowing people to create their robots (corporations) and use them to make money. Everybody won. Prior to 1886, corporations were referred to in US law as "artificial persons," similar to the way Star Trek portrays the human-looking robot named Data.

But after the Civil War, things began to change. In the last year of the war, on November 21, 1864, President Abraham Lincoln looked back on the growing power of the war-enriched corporations, and wrote the following thoughtful letter to his friend Colonel William F. Elkins:

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

"As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is

destroyed. I feel at this moment more anxiety than ever before, even in the midst of war. God grant that my suspicions may prove groundless."

Lincoln's suspicions were prescient. In the 1886 *Santa Clara County vs. Southern Pacific Railroad* case, the U.S. Supreme Court ruled that the state tax assessor, not the county assessor, had the right to determine the taxable value of fenceposts along the railroad's right-of-way.

However, in writing up the case's headnote -- a commentary that has no precedential status -- the Court's reporter, a former railroad president named J.C. Bancroft Davis, opened the headnote with the sentence: "The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteen Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws."

Oddly, the court had ruled no such thing. As a handwritten note from Chief Justice Waite to reporter Davis that now is held in the National Archives said: "we avoided meeting the Constitutional question in the decision." And nowhere in the decision itself does the Court say corporations are persons.

Nonetheless, corporate attorneys picked up the language of Davis's headnote and began to quote it like a mantra. Soon the Supreme Court itself, in a stunning display of either laziness (not reading the actual case) or deception (rewriting the Constitution without issuing an opinion or having open debate on the issue), was quoting Davis's headnote in subsequent cases. While Davis's *Santa Clara* headnote didn't have the force of law, once the Court quoted it as the basis for later decisions its new doctrine of corporate personhood became the law.

Prior to 1886, the Bill of Rights and the 14th Amendment defined human rights, and individuals -- representing themselves and their own opinions -- were free to say and do what they wanted. Corporations, being artificial creations of the states, didn't have rights, but instead had privileges. The state in which a corporation was incorporated determined those privileges and how they could be used. And the same, of course, was true for other forms of "legally enacted game playing" such as unions, churches, unincorporated businesses, partnerships, and even governments, all of which have only privileges.

But with the stroke of his pen, Court Reporter Davis moved corporations out of that "privileges" category -- leaving behind all the others (unions, governments, and small unincorporated businesses still don't have "rights") -- and moved them into the "rights" category with humans, citing the 14th Amendment which was passed at the end of the Civil War to grant the human right of equal protection under the law to newly-freed slaves.

On December 3, 1888, President Grover Cleveland delivered his annual address to Congress. Apparently the President had taken notice of the *Santa Clara County* Supreme Court headnote, its politics, and its consequences, for he said in his speech to the nation, delivered before a joint session of Congress:

"As we view the achievements of aggregated capital, we discover the existence of trusts, combinations, and monopolies, while the citizen is struggling far in the rear or is trampled to

death beneath an iron heel. Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."

Which brings us to today.

In the next few weeks the U.S. Supreme Court will decide whether or not to hear Nike's appeal of the California Supreme Court's decision that Nike was engaging in commercial speech which the state can regulate under truth in advertising and other laws. And lawyers for Nike are preparing to claim before the Supreme Court that, as a "person," this multinational corporation has a constitutional free-speech right to deceive.

The U.S. Chamber of Commerce, Exxon/Mobil, Monsanto, Microsoft, Pfizer, and Bank of America have already filed amicus briefs supporting Nike. Additionally, virtually all of the nation's largest corporate-owned newspapers have recently editorialized in favor of Nike and given virtually no coverage or even printed letters to the editor asserting the humans' side of the case.

On the side of "only humans have human rights" is the lone human activist in California -- Marc Kasky -- who brought the original complaint against Nike.

People of all political persuasions who are concerned about democracy and human rights are encouraging other humans to contact the ACLU (125 Broad Street, 18th Floor, New York, NY 10004) and ask them to join Kasky in asserting that only living, breathing humans have human rights. Organizations like ReclaimDemocracy.org are documenting the case in detail on the web with a sign-on letter, in an effort to bring the ACLU and other groups in on behalf of Kasky.

Corporate America is rising up, and, unlike you and me, when large corporations "speak" they can use a billion-dollar bullhorn. At this moment, the only thing standing between their complete takeover of public opinion or their being brought back under the rule of law is the U.S. Supreme Court.

And, interestingly, the Chief Justice of the current Court may side with humans, proving this is an issue that is neither conservative or progressive, but rather one that has to do with democracy versus corporate plutocracy.

In the 1978 *Boston v. Bellotti* decision, the Court agreed, by a one vote majority, that corporations were "persons" and thus entitled to the free speech right to give huge quantities of money to political causes. Chief Justice Rehnquist, believing this to be an error, argued that corporations should be restrained from political activity and wrote the dissent.

He started out his dissent by pointing to the 1886 *Santa Clara* headnote and implicitly criticizing its interpretation over the years, saying,

"This Court decided at an early date, with neither argument nor discussion, that a business corporation is a 'person' entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment. *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886). . . ."

Then he went all the way back to the time of James Monroe's presidency to re-describe how

the Founders and the Supreme Court's then-Chief Justice John Marshall, a strong Federalist appointed by outgoing President John Adams in 1800, viewed corporations. Rehnquist wrote:

"Early in our history, Mr. Chief Justice Marshall described the status of a corporation in the eyes of federal law:

"A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.' . . ."

Rehnquist concluded his dissent by asserting that it was entirely correct that states have the power to limit a corporation's ability to spend money to influence elections (after all, they can't vote -- what are they doing in politics?), saying:

"The free flow of information is in no way diminished by the [Massachusetts] Commonwealth's decision to permit the operation of business corporations with limited rights of political expression. All natural persons, who owe their existence to a higher sovereign than the Commonwealth, remain as free as before to engage in political activity."

Justices true to the Constitution and the Founders' intent may wake up to the havoc wrought on the American political landscape by the *Bellotti* case and its reliance on the flawed *Santa Clara* headnote. If the Court chooses in the next few weeks to hear the *Kasky v. Nike* case, it will open an opportunity for them to rule that corporations don't have the free speech right to knowingly deceive the public. It's even possible that this case could cause the Court to revisit the error of Davis's 1886 headnote, and begin the process of dismantling the flawed and unconstitutional doctrine of corporate personhood.

As humans concerned with the future of human rights in a democratic republic, it's vital that we now speak up, spread the word, and encourage the ACLU and other pro-democracy groups to help Marc Kasky in his battle on our species' collective behalf.

Thom Hartmann is the author of *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*. (www.unequalprotection.com) This article is copyright by Thom Hartmann, but permission is granted for reprint in print, email, or web media so long as this credit is attached.

See Also:

- *Unequal Protection: The Rise of Corporate Dominance and the Theft of Human Rights*, 12/4/02
- First Local Government in the United States Refuses to Recognize Corporate Claims to Civil Rights: Bans Corporate Involvement in Governing, 12/02
- The Railroad Barons Are Back - And This Time They'll Finish the Job, 12/11/02
- Americans Revolt in Pennsylvania - New Battle Lines Are Drawn, 12/19/02