

Thomas Alan Linzey
on the Model Ordinance on Corporate Personhood

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natural_persons list

To: natural_persons@yahoogroups.com
From: Thomas Alan Linzey, Esq.
Mailing-List: list natural_persons@yahoogroups.com; contact natural_persons-owner@yahoogroups.com
Date: Fri, 18 Apr 2003 14:50:38 -0400
Subject: [natural_persons] Re: Jim Henderson's Comments on Corporate Personhood Ordinance

Hello all,

Many thanks to Jim Henderson for taking the time to read the Model Ordinance on Corporate Personhood and to provide this list with grist for discussion. Although full answers to all of his questions would probably require more time than we currently have, I'd like to take this opportunity to respond to his response:

Several years ago, our organization began helping rural municipal governments in Pennsylvania to deal with two primary issues -- the proliferation of factory farms, and the land application of "Class B" sewage sludge on farmland in Pennsylvania. As many of you know, there are a myriad of environmental groups working on these issues, primarily through "regulatory" windows. Using the regulatory system to deal with those issue areas -- and others -- means that activists attempt to minimize environmental harms resulting from those activities.

The more we looked at factory farms, however, the more that we realized that the "regulatory" system was serving to actually validate the "corporatization of agriculture" that was well underway. For example, when Pennsylvania established a regulatory permitting system for factory farms, it solely required permits for manure loading rates on farmland. By its very nature, it failed to address the economic, cultural, or social issues that arise when family farmers in rural communities are exterminated by the four agribusiness corporations that now control over 80% of the beef, hog, and poultry production in the United States.

So, when environmental activists in Pennsylvania began confronting factory farms, they did so through appealing permits. Through that process, they were told that the only valid issue they could raise dealt with manure loading rates, and that they couldn't raise any other issues during their battles. In essence, by establishing a permitting system for factory farms, the state had "legalized" those facilities through the permitting process. Activists were then effectively channeled into regulatory fora in which they hadn't written the rules, and were told that they could only argue about certain harms.

One writer said it so well when she wrote several years ago that "the only thing that environmental regulations regulate is environmentalists." Indeed, the regulatory system is all about making our actions "predictable" and channeling our activism into predetermined "energy sinks".

In addition, when we "regulate" something, we automatically allow it to come in. That's the essence of regulating -- and represents a shift from being able to say "no" to relegating ourselves to a position of simply regulating the way that the activity is undertaken.

On the factory farm issue, we felt that we were doing a disservice to communities who were coming to us for ways to stop factory farms -- which hold absolutely no public benefit -- by telling them that they could "win" through using the state's permitting programs.

Because of that, we turned to the work of activists in nine Midwestern states, who took a different approach, by banning non-family owned corporations from owning farms or engaging in farming. Those laws, known loosely as "anti-corporate farming laws", take aim at the whole host of harms that are caused when four corporations concentrate their control of the agricultural industry.

More interesting, perhaps, was that those state laws have been upheld by state and federal courts, including the U.S. Supreme Court. Using them as a model, we drafted municipal Ordinances incorporating the approach, and those Ordinances have now been adopted by ten municipal governments in five Counties in Pennsylvania.

They don't "regulate" factory farms, but instead assert community, democratic control over the vision of agriculture that these communities want. That's a fundamentally different approach that begins to reveal the power imbalance between corporations and communities.

Now, what does all that have to do with the Corporate Personhood Ordinance?

When we researched the anti-corporate farming laws further -- to actually examine some of the challenges to the laws brought by agribusiness corporations -- and we looked at legal challenges by sludge corporations to our sludge Ordinances, we discovered that corporations often use their claims to constitutional rights to overturn municipal Ordinances.

Many times, those challenges do not simply assert corporate constitutional rights, but also seek individual damages from elected officials under Civil Rights laws originally adopted to protect African-Americans from institutional discrimination.

After we began working with municipal governments to explain to them how the will of local communities is routinely trumped by corporations asserting constitutional rights originally intended only for people, those communities wanted us to work to end the use of those corporate privileges at the municipal level.

Hence, we developed the Corporate "Personhood" Ordinance, which focuses not just on corporate Bill of Rights protections, but also on protections conferred under the Commerce and Contracts Clauses to the U.S. Constitution.

Over the past six months, that Ordinance has been adopted unanimously by two municipal governments in Northwestern Pennsylvania, and we're working to have at least a dozen municipal governments adopt the Ordinance over the next two years.

The Ordinance, you see, grew from a real and practical need -- the necessity of protecting self-government from federally conferred "corporate rights."

And it all grows from one central understanding:

"That Democracy is impossible when corporations wield constitutional rights to deny the rights of communities and people."

In terms of practical strategy using these tools, there are several applications:

1. The discussions that have arisen around the adoption of these Ordinances are priceless. In one conversation, there was active discussion about how the Commerce Clause has been used to strike down local laws dealing with out-of-state trash (*WMX v. Commonwealth of Virginia*), and laws dealing with a ban on corporate packer ownership of livestock, to prevent a monopoly in livestock ownership and packing (*Smithfield Corp. v. Iowa*). These are just two examples, but there are thousands of how constitutional protections are now conferred on property and capital, in the form of the corporation.

The Ordinance brings the discussion to a head, and enables people and communities to link their "on the ground" issues with the larger issue of corporate power. That energy then drives the discussion about building a movement to end the use of corporate rights to trump individual and community rights.

In one rural Township in Pennsylvania, the Chairman of the Board of Supervisors perhaps said it best when he declared "Individuals have rights, corporations don't." Another Supervisor stated that the Ordinance simply "fills in the loopholes" of vindicating democracy.

That conversation must happen in 50,000 municipalities across the United States. In many ways, it provides the framework for a moving "Democracy School" -- educating folks about how corporate legal privileges are routinely used to override democratic control.

That's the organizing mileage that we get from these Ordinances.

2. On the legal front, law evolves through challenges to existing law. That's the nature of law in this country. Creating a model legal challenge to corporate personhood means finding a situation and creating a scenario that builds the right dynamic for the courts.

In our Townships, the elected municipal officials adopted the Corporate "Personhood" Ordinance to protect their ability to deal with sludge and factory farms. As such, the Ordinance is a defensive Ordinance, which will be used if sludge and factory farm corporations sue to overturn the underlying, substantive factory farm and sludge

Ordinances. In that context, the local government would assert that the corporations have no right to assert constitutional rights to overturn local law. That scenario establishes the right dynamic that can then be taken on appeal through the appellate courts, eventually ending up at the Supreme Court.

At that point, either a movement has been built or it hasn't. Changing law in this country has little to do with lawyers and good arguments, and almost everything to do with whether movements are built and sustained. A sustained movement, anchored in local governments across the country challenging corporate constitutional rights through hundreds of different single issues areas, is the key to eventually changing the law.

3. Throughout all of this, we need to begin to examine the "rule of law" and how law is used by those in power to consolidate that power. Currently, the law is used to empower corporations with constitutional rights and authority, which is then used to trump democratic rights of self-government. Can a democracy be built on that foundation? Absolutely not.

Part of our collective jobs is to reveal that inconsistency. Revealing that inconsistency means doing more than simply registering our dissent at a given action of the federal government. Revealing that inconsistency means beginning to pass binding laws that confront a federal government that has little interest in building democracy and more interest in consolidating corporate power in this country.

Just yesterday, the Arcata, CA City Council took a big step in that direction -- adopting a binding local Ordinance in which they refuse to comply with the USA Patriot Act. Up to this point, eighty plus municipalities had passed nonbinding resolutions against the Act, but Arcata is the first municipality to go beyond merely registering dissent, to affirmatively declaring that the local government refused to be complicit in the enforcement of the Act.

Something similar happened in the late 1700's, when the Nullification Doctrine was born. Thomas Jefferson and James Madison authored the Virginia and Kentucky Resolutions, which stated that there was not only a right for states to refuse to follow federal acts deemed to run contrary to the guarantees of the Constitution, but a duty to do so, because governments were created to secure liberties on behalf of their citizens.

The Virginia and Kentucky Resolutions were adopted to challenge the federal government's passage of the Alien and Sedition Acts -- which made it illegal to criticize the federal government. In response, both the Virginia and Kentucky legislatures adopted laws nullifying the federal acts, stating that it was their duty to nullify the laws to protect the citizens of those states.

I think that's where we are now. It's not enough to simply register dissent or play within the rules that have been written precisely to divert our energies elsewhere. It is time to withdraw our consent from the actions being taken by the federal government in our names. Only then, will it be revealed that a democracy cannot function when corporations have hijacked what our forebears fought, bled, and died for in the Revolution.

In closing, there is a great quote from Virginia Rasmussen of WILPF and POCLAD that I've always found to be right on point. It goes directly to the heart of what our work needs to be -- moving away from merely dissenting to doing the job of governing. Here it is:

"We're fed up with behaving like subordinates content to influence the decisions of corporate boards and the corporate class. Having influence is valuable, but influencing is not deciding. We're weary of waging long, hard battles simply for the "right to know." Knowing is critical, but knowing is not deciding. We're tired of exercising our right to dissent as the be all and end all. Dissent is vital, but dissenting is not deciding. Influencing, knowing, dissenting, participating -- all are important to a democratic life, but not one of them carries with it the authority to decide, the power to be in charge."

In Solidarity,

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To: natural_persons@yahoogroups.com
From: "Jim Henderson '87"
Date: Sat, 12 Apr 2003 12:16:50 -0400
Subject: [natural_persons] The first response from the corporate lawyer

Hello to all.

First of all, I would like to thank Adam for the opportunity to contribute to this group. It's an interesting problem that you are trying to address.

In my responses to this group, I'm going to limit the "political" content of what I write in favor of relatively pure legal analysis. I share your concerns about corporate "personhood", but so long as you are working toward a ballot question, such question must be legally solid and not overtly politicized.

On the Pennsylvania ordinance...

If the drafters of this document simply want to pass a piece of local legislation that makes them feel good, but has no particular legal effect, then it is fine. However, it is so thoroughly defective from a legal perspective that I would not want my name associated with it.

Corporations (and other such legal entities) are creations of the state, not the local jurisdiction, so it really doesn't matter what an individual jurisdiction says. The courts will interpret laws affecting corporations so they are constant across the state, so a change in one town will not be upheld if it is in conflict with any state or federal law. A local ordinance should apply to local matters to the extent the state has given the locality the ability to act. Laws about corporations that affect their general operations do not fall into this category.

Toward that end, no local ordinance can overrule an interpretation of the federal constitution, no matter how "illegitimate" one may think it is. In fact, if you want to make a persuasive legal argument against a Supreme Court decision, it is better to cite good law (see my discussion below) than to be dissin' the Supremes.

I'm not going to go through a point by point review, as that is not a good use of my time (and your attention) here. If you have specific questions, though, let me know.

On Nike v. Kasky...

This is a very interesting case, and I think some of the issues raised here could be the cornerstone of your ballot question efforts. Boiling the issue in the case to the bare minimum, Kasky is more-or-less arguing that any statement that Nike (or any corporation, for that matter) makes constitutes "commercial speech", which can be regulated more strictly than typical First Amendment (let's call it "political") speech. Nike is arguing that statements made in response to "political" speech from individuals is itself "political" speech that cannot be regulated under the federal constitution.

The amicus brief that Adam attached is a pretty good example of applying the law, without too much political hyperbole, in an effort to argue against permitting corporations to partake in "political" speech. In my opinion, this is a much better approach to take in preparation of a ballot question.

I found the materials, including the opposing viewpoints, on the ReclaimDemocracy.org web site to be quite helpful. I would suggest you take a look.

To me, the bottom line is this: can a corporate partake in "political" speech? I think that we would all agree (at least within this group) that the answer is no. From my perspective, all for-profit corporations (and other similar entities) are established for commercial reasons. The officers and directors (managers, general partners, etc.) have a legal duty to act on behalf of the owners of the entity to enhance the value of that ownership stake, an inherently commercial act. Even when a corporation acts in an arguably non-commercial way (through philanthropy, for instance), there has to be an understanding that acting in that manner will, in some way, inure to the benefit of the owners. There is no room for statements or actions that are not commercial in nature, in my opinion.

Therefore, one approach you could take with the ballot question would be to suggest a simple statement that all acts of for-profit corporations (and other legal entities) are inherently commercial in nature. This would arguably take away the proposition that a corporation can partake in non-commercial First Amendment (i.e., not subject to regulation) speech.

If you want to go beyond this in your ballot question, then allow me to ask you this: what do you want to accomplish, practically speaking? Keep in mind that the effect of a change in Massachusetts law will have limited effect on entities that are not formed in Massachusetts, which is the case with vast majority of the big corporations with significant political and market power. Please share your thoughts in this regard, and I will gladly give you my opinion.

I look forward to hearing from you.

Jim Henderson