FIXING CORPORATIONS--PART 1:
LEGACY OF THE FOUNDING PARENTS

by Jane Anne Morris[1]

The people who founded this nation didn't fight a war so that they could have a couple of "citizen representatives" sitting in on meetings of the British East India Company. They carried out a revolution in order to be free of oppression: corporate, governmental, or otherwise; and to replace it with democratic self-government.

It seems that things have slipped a little. Today, as soon as any group or movement puts together a coherent critique of the role of corporations, tongues start clucking. Politicians, mainstream reformers, degreed experts, and media commentators fall all over each other in an effort to dismiss such clear, practical, focused thinking as mere "conspiracy theories" cooked up by unbalanced "crackpots."

They forget that 17th century political philosopher Thomas Hobbes called corporations "worms in the body politic."[2] Adam Smith condemned them for their effect in curtailing "natural liberty."[3] And most of the so-called "founding fathers" of this nation shared an opinion of corporations that today would earn them the label "lunatic fringe" from the same mainstream tongue-cluckers.[4]

Those who won independence from England hated corporations as much as they hated the King. For it was through state-chartered corporations that the British government carried out some of its most pernicious oppression. Governments extending their power by means of corporations, and corporations themselves taking on the powers of government, are not new problems.

Because they were well aware of the track record of government-chartered corporations, and because they guarded their freedom so jealously, citizens of the newly independent United States of America chartered only a handful of corporations in the several decades after independence.[5]

On those few occasions when states did charter a corporation, "the powers which the corporation might exercise in carrying out its purposes were sparingly conferred and strictly construed."[6]

But inevitably, the generation that had fought against injustices perpetrated by corporations like the British East India Company and the Hudson Bay Company was followed by others whose memories of corporate oppression were less vivid. Still, the warnings against corporations continued.

On the eve of his becoming Chief Justice of Wisconsin's Supreme Court, Edward G. Ryan said ominously in 1873,

"[There] is looming up a new and dark power... the enterprises of the country are aggregating vast corporate combinations of unexampled capital, boldly marching, not for economical conquests only, but for political power.... The question will arise and arise in your day, though perhaps not fully in mine, which shall rule -- wealth or man [sic]; which shall lead --money or intellect; who shall fill public stations --educated and patriotic freemen, or the feudal serfs of corporate capital...."[7]

The feudal serfs of corporate capital made a lot of headway during the next fifteen years. But in 1888 President Grover Cleveland echoed Justice Ryan's sentiments:

"Corporations, which should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people's masters."[8]

Well into the twentieth century corporate excesses were acknowledged and condemned by some pretty prominent persons. Louis D. Brandeis, a multimillionaire (from his own law practice and astute investments) by the time he became a Supreme Court Justice in 1916, referred to corporations as "the Frankenstein monster which States have created by their
Far from being "radical," harsh criticism of corporations has a long, respectable, and mainstream political lineage. Now that you know you're in good company, let's dream a little. Imagine what grassroots environmental activism would be like if corporations were restructured to be responsive to the people and to serve the public interest.

What if...

** corporations were required to have a clear purpose, to be fulfilled but not exceeded.[10]  

** corporations' licenses to do business were revocable by the state legislature if they exceeded or did not fulfill their chartered purpose(s).[11]  

** the state legislature could revoke a corporation's charter for a particular reason, or for no reason at all.[12]  

** the act of incorporation did not relieve corporate management or stockholders/owners of responsibility or liability for corporate acts.[13]  

** as a matter of course, corporation officers, directors, or agents could be held criminally liable for violating the law.[14]  

** state (not federal) courts heard cases where corporations or their agents were accused of breaking the law or harming the public.[15]  

** directors of the corporation were required to come from among stockholders.[16]  

** corporations had to have their headquarters and meetings in the state where their principal place of business was located.[17]  

** corporation charters were granted for a specific period of time, like 20 or 30 years (instead of being granted "in perpetuity," as is now the practice).[18]  

** corporations were prohibited from owning stock in other corporations in order to prevent them from extending their power inappropriately.[19]  

** corporations' real estate holdings were limited to what was necessary to carry out their specific purpose(s).[20]  

** corporations were prohibited from making any political contributions, direct or indirect.[21]  

** corporations were prohibited from making charitable or civic donations outside of their specific purposes.[22]  

** state legislatures set the rates that corporations could charge for their products or services.[23]  

** all corporation records and documents were open to the legislature or the state attorney general.[24]  

ALL OF THESE PROVISIONS WERE ONCE LAW IN THE STATE OF WISCONSIN. And similar ones in most other states.

Much activism today concerns itself with struggling to induce government agencies to enforce their own laws, or exerting superhuman efforts to close gaping loopholes in existing laws. When we're not doing that, we're perhaps trying to add an obviously toxic chemical to a list of prohibited substances. Or maybe we're trying to coax a corporation that profited greatly from poisoning our air and water to pay for even a small portion of the cleanup costs.

One reason that we the sovereign people don't know our own strength is that too often we think of corporations and business as more or less synonymous. But corporations are not simply big businesses. You don't need a corporate charter to sell apples on the corner, or to operate a widget factory. Individuals, sole proprietorships, partnerships and other business forms can do business without obtaining a corporate charter from a state. Corporations are a special case.

A corporate charter granted by a state gives special privileges not possessed by other businesses. And in return, the state retains the power to alter, amend, or repeal said charter. The legislature of a state thus possesses not only the power to grant charters but to revoke them. This power is laid out in what is called the "reserved power clause," and is explicitly spelled out in the laws or constitution of almost every state. Corporations are all set up by states to serve a "public need" and act "in the public interest." This is a long-established doctrine.

The corporation, insofar as it is a legal entity, is a creation of the state... It is presumed to be
Corporations are instrumentalities of the state, not independent entities. How have we strayed so far from this notion?

Next week, we will outline some of the legal doctrines that were built up as obstacles to the sovereign people's ability to direct corporate actions. Then we will explore the potential of specific provisions -- similar to the ones enumerated above -- that we can add to state constitutions, corporation laws, or corporate charters themselves, to reclaim our historic right to make corporations serve the public interest.

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[3] In his WEALTH OF NATIONS (1776), Adam Smith was concerned that people's liberty was being encroached upon through the use of corporations to restrain competition and establish monopolies.


FIXING CORPORATIONS--PART 2:
CORPORATIONS FOR THE
SEVENTH GENERATION

by Jane Anne Morris[1]

[Note: This is second of two articles that explore
strategies for going beyond the usual calls for
"corporate accountability." (Part 1 appeared in
REHW #488.) The author is part of a movement,
already taking root in over a dozen states, that
advocates retaking the historic right of the
sovereign people to determine and direct
corporate action.]

In view of the historic provisions that used to
govern corporations (see REHW #488), their
representatives must be pleased that at least in
this country, boycotts and divestment strategies
are considered radical, and "dialoging" is the
preferred mode of interaction. The rest of this
paper is an exploration of ways to restructure
today's corporation so that citizen activist efforts
to eliminate corporate wrongs can amount to
more than just a few hard-won needles in a
corporate haystack.

As we saw last week, corporations are a special
form of business entity given a state charter and
certain privileges in exchange for being subject to
the will of the sovereign people as expressed
through state legislatures.

Over the last half a dozen generations,
corporation representatives have managed to set
up barriers to insulate the corporation from citizen
influence. Several trends have made it more
difficult to direct the corporation towards serving
the public interest it was created to serve.
Among them: ** Under cover of the U.S.
Constitution's "commerce" clause[2] as
interpreted by the U.S. Supreme Court, federal
regulatory agencies have usurped many of the
powers once exercised regularly by state
legislatures. Today's corporations are ideally
suited to wage battles on the regulatory front,
because it is so difficult for citizens' groups to
match their resources.[3] (In many ways, the late
19th century ascendance of the "commerce"
argument is an eerie foreshadowing of today's
NAFTA and GATT controversies.)

** Through a series of leveraged expansions of
the "diversity clause" of the U.S. Constitution[4]
(allowing "citizens" from two different states to be
heard in federal court instead of the presumably
more biased courts of either's home state), the
U.S. Supreme Court "deemed" corporations
"citizens" and thus gave them nearly unrestricted
access to federal courts.[5] This saved
corporations the trouble of defending themselves
in the courts of the state where they actually
cause the harms. ** In 1886 the U.S. Supreme
Court decreed that corporations are "persons"
under the 14th amendment, thus granting them
protection under the Bill of Rights.[6] Such
guarantees of free speech, due process, and
equal protection under the law were long
considered to apply to human persons. This
ruling gave corporations unprecedented "rights"
to question almost any law applied to them, and
frustrated the ability of the people to direct
corporate action in service of the public good.

** Stockholders, who used to really run
corporations, have seen their power dramatically
reduced. Today the powerful corporate manager
class is insulated from stockholder influence by a
variety of stock voting tricks and governance
structures that they themselves set up. They are
protected from most liability by state corporation
codes and lax laws and enforcement. And they
write their own paychecks.[7]

In order to have a world that we would not be
ashamed to bequeath to the Seventh Generation,
we must make two major changes in the
governance of the corporation. First, we must
remove obstacles to citizen control of the
corporation. Second, we must reinstate
provisions such as those (enumerated in REHW
#488) once governing corporations, and add
others that are particularly suited to our times.

"Model" provisions can become part of 1) state
constitutions, 2) state corporation codes and/or 3)
the actual corporate "charters," which are the
documents states give to corporations to formally
bring them into existence. A program to institute
such changes would include areas such as the following.

People's power over corporations.

1. We the people can demand that state legislatures, the most direct expression of the people's will, use their "reserved power" to revoke the charters of errant domestic corporations. (A domestic corporation is one chartered in that state.) The people of Delaware and a few other states with "easy" chartering policies would have a more exciting time than the rest of us here, since the overwhelming majority of offending (U.S) multinational corporations are chartered there.

2. In other states, citizens can demand that their attorneys general (or whatever agent is specified in their state laws and constitutions) revoke the permission of errant foreign corporations to do business in their state. (A foreign corporation is one chartered in another state in the U.S. Those chartered in other countries are called alien corporations.) Such actions have already been initiated against Weyerhaeuser, WMX (formerly Waste Management, Inc.), and CSX corporations.[8] (See REHW #455.)

** Annul "rights" given corporations by judge-made law. We can work for state constitutional amendments that underline corporations' status as subservient to the people and the legislatures, and assert that corporations are not legal constitutional "persons" and thus are not protected by the Bill of Rights of the U.S. Constitution.

** Re-open corporate affairs to legislative scrutiny. At one time, all corporate records and affairs were open to legislatures or other designated state officials so that state governments, on behalf of the people, could monitor and evaluate corporate actions. We can reinstate such provisions in state corporation codes.

** Reinstate stockholder/owner control over corporate management and policy. For decades, concerned stockholders have attempted to curb some of the worst excesses of corporate policies, only to find their efforts thwarted by corporate management. We can modify states' corporation codes to return a modicum of control of corporations to their putative owners, the stockholders. Some basic provisions might include a) a one stockholder, one vote policy, b) prohibitions against issuing non-voting stock, c) removal of obstacles to stockholders' access to information, initiation of policies, and removal of unsatisfactory corporate management.

** Give state courts clear authority to hear all corporation cases. State courts, more sensitive to local needs and conditions and more accessible to citizens, once heard most corporation cases. During the last years of the nineteenth century, numerous unsuccessful attempts were made at the federal level to reinstate this practice. Both federal legislation and federal constitutional amendments were proposed. Either one would do the trick.

** Reinstate historic limits on corporations. State corporation codes and/or corporate charters can be amended to include provisions such as the following: a) Require corporations to have a specific purpose, with a penalty of charter revocation if said purpose is either not fulfilled or is exceeded. This would include a prohibition on the kind of "look how ethical we are!" advertising that currently dissipates stockholders' dollars and discombobulates public perceptions. b) Require a percentage of stockholders to live within the chartering state. c) Prohibit corporations from owning stock in other corporations. d) Issue corporate charters for only a specific term of existence, perhaps ten or twenty years. e) Limit real estate holdings to that necessary for corporate purposes. f) Prohibit any and all political donations by corporations. g) Prohibit all civic, charitable, or educational donations not specifically provided for in the corporate purpose. h) Impose strict liability for all corporate officers and/or stockholders.

** Initiate new limits on corporate activities. We can add provisions (to state codes, charters, and/or constitutions) that:

a) Forbid corporations from doing business under pseudonyms or alternative names.

b) Require corporations to use earth-friendly materials in all stages of operations, and to list all ingredients.

c) Prohibit corporations from buying up patents for the purpose of preventing others from exploiting them.

d) Require every corporate document to be signed by a human being who thereby takes responsibility for the veracity of statements and the soundness of judgments therein.

e) Require a corporation to pay for periodic health, safety, and environmental audits by independent experts selected by workers and affected communities.

f) Require that in the event of bankruptcy, corporate management pay and perks be withheld until all other debts and creditors are
paid, starting with workers and small businesses.

g) Require 95% recycling.

h) Prohibit corporations from seeking or accepting "incentive" packages from any government entity.

i) Establish a maximum ratio (like 1:5) between compensation of the lowest-paid worker and the highest-paid executive.

j) Establish a process similar to "recall" procedures for elected officials, so that citizens can initiate revocation referendums for corporate charters (in the case of domestic corporations) and for certificates of authority (that allow foreign corporations to do business in one's state).

k) Require uniformity of health benefits within each corporation for all corporation employees (from CEOs to wage-laborers).

This is just a sampling of some of the options open to us. Priorities might include working to revoke corporate charters, to end the privileges granted corporations under the judicial "corporate personhood" doctrine, and to prohibit political contributions. Most of the obstacles we face are in the arena of judge-made law, but historic legislation and constitutional provisions offer us a solid body of favorable precedents. Much debate lies ahead. But it is high time we shifted the controversy from whether we control corporations to how we do so.

The sky's the limit. What are we waiting for?

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