

CELDF is pleased to share updated monthly excerpts from the book “*How Wealth Rules the World: Saving Our Communities and Freedoms from the Dictatorship of Property*,” by long-time staff member Ben G. Price. Here is Part Five

## **HOW WEALTH RULES PART FIVE**

# **THE EMANCIPATION OF PROPERTY FROM DEMOCRACY**

**Ben G. Price**

*“...Out of this modern civilization, economic royalists [have] carved new dynasties.... The royalists of the economic order have conceded that political freedom was the business of the Government, but they have maintained that economic slavery was nobody's business. It was natural and perhaps human that the privileged princes of these new economic dynasties, thirsting for power, reached out for control over government itself. They created a new despotism and wrapped it in the robes of legal sanction.... And as a result, the average man once more confronts the problem that faced the Minute Man...” -- Franklin D. Roosevelt <sup>1</sup>*

### **Privatizing the Village: Pulling the Rug Out from Under Us**

The courts have transformed the *Contract Clause* from a safeguard of bilateral business agreements into a pry bar for ripping municipal governments out of the hands of local communities.

As more of what was once considered in the public domain is given over to the “private sector,” democratic power diminishes in proportion. More of what once was of society-wide concern is transformed into a business concern, beyond deliberation and control by public law. This is what the enclosure and privatization of law and government look like.

The Supreme Court laid the groundwork for privatizing local governments across the U.S. in 1819. All it took was for Chief Justice John Marshall and fellow Associate Justice Joseph Story to invent a legal distinction between *private* and *public* corporations. Inventing this distinction, with no precedent to rely upon, made it possible to declare every municipal government in the nation the property of the state in which it is located. It allowed the courts to rule that the people have no right to use their municipal governments to make enforceable laws that serve the interests of their communities. Marshall and Story are responsible for the legal sophistry that tempts us to believe that local governments have no authority to protect the people.

The distinction between *public* and *private* corporations I am making is not at all related to publicly traded vs privately held business corporations. Both are what Marshall would categorize as *private* corporations in that they are chartered by the state and there are owners who receive the charter.

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<sup>1</sup> Franklin D. Roosevelt, re-nomination acceptance speech, June 27, 1936, Philadelphia

John Marshall, a member of the Federalist Party and protégé of Alexander Hamilton, was appointed Chief Justice of the U.S. Supreme Court by John Adams at the end of his term of office, in 1800. To deprive the succeeding president, Thomas Jefferson, an Anti-Federalist, of a Supreme Court appointment, Adams took advantage of the *Midnight Judges Act*, passed hurriedly by Congress. It authorized the reduction of the Supreme Court from six to five members.

Justice Joseph Story was appointed to the Court by President James Madison in 1811. Also a strong Federalist, he would tag-team with John Marshall to prove his ideological allegiance to wealth and opposition to democracy. According to cultural historian David Brion Davis, Judge Story saw the pushback against the Federalists' counter-revolution under Andrew Jackson's presidency as *oppression* of the wealthy minority's rights in property by a government representing the majority of less wealthy men.<sup>2</sup>

R. Kent Newmyer, Professor Emeritus, at the University of Connecticut, and Professor of Law and History at the University of Connecticut School of Law wrote that "*Consolidated wealth sufficient to underwrite largescale economic projects did not exist in the early nineteenth century. For the state to bestow economic prerogatives on select individuals would be to create a privileged elite which was antithetical to the principle of republican equality . . . For the state to extend corporate status, sovereign power, and economic privilege to associations of individuals, however, was a solution which satisfied both economic expediency and republican ideology. This was reflected in the phenomenal growth of business incorporation during the first three decades of the nineteenth century.*"

Corporations chartered prior to the Revolution by the king still existed. Dartmouth College in New Hampshire is the example in our sights. It was chartered in 1769, to serve as a kind of finishing school for the colonies' well-to-do, but also to train Native Americans to accept absorption into the European culture.

Thomas Jefferson's friend and the governor of New Hampshire, William Plumer, proposed that the school's charter be changed to make Dartmouth a state college rather than a privately-run institution. The idea was to make Dartmouth the nucleus of a statewide system of public education. He went to the state legislature and asked them to draft the legislation necessary to make the change. They agreed and soon Dartmouth became a state college with a charter that no longer enumerated the privileges once granted by the sovereign king but now placed the school under the command of the sovereign people of New Hampshire.

The trustees of the college objected. They took their case to court, claiming that the king's grant of a charter was between them and the king and none of the business of New Hampshire or its citizens. Eventually the New Hampshire Supreme Court ruled that the legislature had acted with full authority to change the terms of the corporate charter that created Dartmouth. The sovereign, that is, the people, retained their power to command the creations of their laws.

As you might guess, the trustees were not satisfied. They appealed to the federal courts, and eventually the case reached the U.S. Supreme Court. The bizarre rulings of the Court in this case set the stage for the Federalist's counter-revolution to really take off, branch out, and lay the foundations for our modern crisis of government.

The Federalists had a keen interest in the outcome of the *Dartmouth* case. They saw it as an opportunity to free the private interests of industry and capital from democratic oversight. This outcome was on Chief Justice John Marshall's mind. It was on Associate Justice Joseph

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<sup>2</sup> David Brion Davis, *Antebellum American culture* (1997), pp. 14-15

Story's mind. They were looking for a legal argument that would reshape corporations as vessels of privilege for the propertied class.

Freeing them from the purview of *public law* and placing them in the realm of *private law* was the best course of action toward this end. But no precedent existed to justify the desired outcome. R. Kent Newmyer lays out the situation this way: "*The corporation, all agreed, was a creature of the state, 'an artificial being, invisible, intangible, and existing only in contemplation of law'. . . . But having been created by law, a fundamental question had to be answered: would the corporation derive its legal rights by analogy to the individuals who comprised it or from the public authority that created it? If the former, then the corporation, in addition to the power accrued by its associative character, would fall heir to the impressive body of property rights given to individuals by Anglo-American law. If the latter, then the state could control corporate power in the interest of the public.*"<sup>3</sup>

The practical motivation for freeing private incorporated businesses from the governance of their state creators had to do with the aspirations toward commercial expansion, and continental expansion. Newmyer hinted at the negative impacts on the general welfare when he wrote that "*To free the corporation from state regulation. . . would obscure the impact on the public of these new concentrations of political and economic power.*"<sup>4</sup>

Marshall was able to cut the Gordian knot that constrained business corporations to the authority of the states that chartered them with an unprecedented bit of legal creativity. He conscripted the Constitution's *Contract Clause* to his aid, and according to Newmyer was able to conclude that "*. . . a state charter to a corporation was also a contract* [emphasis added] *within the meaning of the contract clause. The consequences of this decision were immense . . . the new business corporation came under the protective mantle of the [Constitution]. The tendency. . . to define corporate rights by reference to the authority that created them was silently abandoned. Assured of this protection, capital flowed into corporations, insuring their preeminence as vehicles of economic growth.*"<sup>5</sup>

In a concurrence that went far beyond what Marshall's arguments proposed, Justice Story offered an expanded thesis on the new arrangement. Not only would the charter creating new business corporations become, instead of a grant of privileges from the sovereign people, a contract. Justice Story went much further. He invented two classes of corporations: one for the peasants and one for the gentry.

Without precedent from American courts or the British common law, he declared that, while business corporations would enjoy equal status with the state that creates them, as partners in a mutual contract, "*Public corporations are such as exist for public political purposes only, such as towns, cities, parishes, and counties.*" Corporations like the city of London, that under English common law had the same status as the British East India Company, would have a different status in the United States. The new municipal corporations would be state-created subunits having no contractual relationship with the state and utterly subordinate to the state.

Judge Story saw an opportunity to magnify the status of business corporations by deflating the status of his newly defined *public* corporations used by the people to govern their local affairs. Under his novel theory, only with state permission could municipalities challenge the power of the state's contractual partners, the wealthy *private* corporations.

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<sup>3</sup> R. Kent Newmyer, *Justice Joseph Story's Doctrine of Public and Private Corporations and the Rise of the American Business Corporation* DEPAUL LAW REVIEW, Vol. 25:825, P. 826

<sup>4</sup> Newmyer, p. 827

<sup>5</sup> Newmyer, p. 828

According to Newmyer, “*Story understood the radical law-making potential of the college cause. He had followed it from its inception in New Hampshire, not as an impartial observer, but as an active partisan of the college and a useful friend of its chief counsel, Daniel Webster. Story had been one of those ‘few friends’ who, after the argument in 1818, had received copies of Webster’s argument with instructions to ‘send them to each of such Judges as you think proper’ . . . More importantly, Story advised Webster on the strategy of litigation.*”<sup>6</sup>

The Federalist judges were on a mission, and it seems they engaged in questionable *ex parte*<sup>7</sup> communications with the corporate party to the case. Their intention was clearly to shape the outcome. There was no precedent for them to follow to arrive at the novel rulings of the Court. They could have ruled quite differently.

Again, Newmyer tells us “*Conceivably, the definition of public and private might have followed function, which, in fact, Judge Richardson’s decision had done [in the New Hampshire Supreme Court]. Such a functional approach to corporations would have invited American law to consider the public nature of private corporate property. . . such an analysis would have failed to put the force of law behind the creative efforts of American capitalists.*”

By declaring business corporations to be private entities with contractual equality with the states chartering them, says Newmyer, the high court “*blinded the law to certain realities of corporate power.*”<sup>8</sup>

This explains the wonder of how the Supreme Court could rule in the 1883 Civil Rights Cases that chartered businesses are *private actors*, not *state actors* and thus incapable of violating rights the Constitution forbids government from violating.

*Private* business corporations became independent sovereignties with contractual agreements with the states – and by extension with the people of the states. They were liberated from democratic oversight and control. *Public* municipal corporations became the property of the states, and as property they were placed in the purview of *private law*. The states would publicly enforce severe limitations on what local governments had authority to do.

Because municipalities would henceforth be treated not as tools for local self-governance, but as possessions of the state, the public right of self-government was privatized and removed from the public province. Where the Declaration of Independence asserted that the people are the source of governing authority, the federal Constitution, as interpreted by the Court made the states the font of governing power. The impact of this sea change was not felt immediately in the towns, cities, and boroughs of the United States.

In the early nineteenth century municipalities had few conflicts with the interests of capital and property. Later, when industrialization directly impacted the interests and rights of municipal residents, the contest between *public* and *private* corporations became more frequent, until today litigation over whether rights vested in property or rights inherent to the people will prevail are a daily occurrence.

To review, Marshall’s court imposed two big changes in the realm of corporations. First, since a municipal corporation would now be a state-owned administrative unit rather than a community government through which the democratic rights of residents could be expressed, it would have no legal agency commensurate with the autonomy of *private* business corporations.

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<sup>6</sup> Newmyer, p. 828

<sup>7</sup> *Ex parte communication* “occurs when a party to a case, or someone involved with a party, talks or writes to or otherwise communicates directly with the judge about the issues in the case without the other parties’ knowledge.” Hawai’i State Judiciary, [http://www.courts.state.hi.us/self-help/exparte/ex\\_parte\\_contact](http://www.courts.state.hi.us/self-help/exparte/ex_parte_contact)

<sup>8</sup> Newmyer, p. 834

Second, the charter given to *private* business corporations would no longer represent privileges bestowed on the incorporators by the sovereign people. Going forward, the so-called *private* charter would be a contract between the state issuing the charter in the name of the people and the individuals receiving it. The incorporators would have legal agency to govern the corporation independent of state control.

Importantly, since the charter was now a contract, the state could not unilaterally alter the internal affairs or revoke the self-governing authority of the business corporation. The same cannot be said for *public* municipal corporations or the rights of unbanked citizens to govern themselves. The state, increasingly swayed by wealth concentrated in the corporate form, had new authority to prevent municipal corporations from intervening to govern the business of private corporations, even when those activities violate residents' rights.

To understand the implications of this two-part judicial revolution is to know the story of how the Federalists achieved a stupendous victory for wealth over commoners. The judiciary yoked the general population in every state to a central government doling out privileges for the rich and disenfranchising all of us from democratic control of our local communities. Compounding this intolerable situation, *private* business corporations have been weaponized to invade municipal jurisdictions and exploit communities across the continent, backed by the U.S. Constitution's *Commerce Clause*, and the *Contract Clause*, since the *Dartmouth* counter-revolution.

Managers of for-profit business corporations, especially those engaged in interstate commerce, are in a superior position that allows them to treat municipalities like resource colonies. Nominal regulation legalizes their harmful extractive and monopolistic practices while lending a veneer of protective limitations on the damage they can inflict. The distinction the Federalists made between corporate *privileged property* and *public* state-owned municipal corporations not only emancipated the rich from democracy but gave them a powerful tool with which to govern our communities in our place.

### **A Second-Class Township and its Second-Class Citizens**

The Commonwealth of Pennsylvania classifies its municipalities as cities, boroughs, and townships, and further categorizes them by class, based on population. By far the most numerous types of municipalities are the second-class townships. According to the Pennsylvania State Association of Township Supervisors (PSATS), townships account for ninety-five percent of the Commonwealth's land area and are home to forty-four percent of its population. There are more than fourteen hundred townships of the second-class. It should be no surprise that the people living in them are treated like second-class citizens.

That's how the folks in Grant Township, Pennsylvania felt when a judge told them they have no authority to protect themselves against dangerous toxins a corporation called Pennsylvania General Energy (PGE) planned to inject into the ground under their homes.

In 2014 the people of Grant got wind of a spin-off money-saving project related to "fracking." That's the extraction of natural gas by a process involving pumping a secret concoction of toxic chemicals deep into underground rock formations to crack them open and release the combustible vapors. When millions of gallons of the protected trade-secret potion are pumped down under extreme pressure, what's loosened gets forced up and out. That includes methane and other fossil fuels, but also highly saturated brine, radioactive minerals and gases, plus the toxins used to shatter the rock formation.

The flow-back waste material is collected above ground. Disposing of it used to mean trucking it to Ohio, where the rules for pumping it back into the ground under high pressure were laxer than in Pennsylvania. The cost of transporting the waste out of state cut into the profits of the mining company until industry lobbyists won the day and the Pennsylvania state legislature loosened its rules. The company eyed little Grant Township, home to under eight hundred people, as the site for only the third injection well in the state.

The families living in Grant depend on well water to survive. They had heard about how the people of Dimmock Pennsylvania and other towns in the Commonwealth had their clear, clean drinking water turned into a dark brown smelly brew because of fracking. They didn't want that to happen in their township, so they enlisted CELDF's Pennsylvania community rights organizer, Chad Nicholson, who worked with the local community group – the East Run Hellbenders Society (named after a giant local salamander) – to draft a law that would elevate the rights of the community above corporate property and ban frack waste disposal within the municipality.

In the summer of 2014, the Township advertised the ordinance in advance of voting on its passage. The Board of Supervisors soon received a letter from the corporation's attorney threatening litigation that would ask the court for damages and legal costs if the ordinance was enacted.

The threat didn't stop adoption of a Community Bill of Rights that recognized the right of the people of Grant Township to clean air and water and a right of local community self-government to protect those rights. It also included a provision that CELDF has championed since 2006 – it recognized legally enforceable rights for ecosystems.

It was a decisive piece of legislation. The ordinance said it would be a violation of the people's and nature's rights for the company to site an injection well in the community.

PGE corporation hit Grant Township with a lawsuit that said the municipal corporation was violating the business corporation's civil rights. It also said the municipality had no legal authorization from the state to enact such a ban. It was a claim with roots in John Marshall and Joseph Story's creative invention of *private* corporations for the wealthy and *public* corporations for commoners. The people had no controlling interest in the municipal corporation, as did the owners and directors of PGE in theirs.

When the lawsuit came, the municipal officials sent their legal representatives from CELDF to argue for the residents' right to protect their water, health and environment with a local ban on the industrial threat. Then in October of 2015 magistrate judge Susan Paradise Baxter ruled on the case without considering those arguments.

She overturned the parts of the ordinance that prohibited depositing oil and gas mining waste in the municipality and that subordinated so-called *corporate rights* to the unalienable rights of community residents. The rationalization for a judicial veto of these parts of the Township's law was this: under Pennsylvania law Grant Township was a *Second-Class Township* governed not by the people living in the municipality, but by a municipal code written by the state legislature and subject to absolute state control.

The ruling said the municipal government that the people had elected to represent them has no legal authority to make or enforce governing decisions to protect the community without

state permission. At best they could administer nominal state regulations but could not prohibit what the state had permitted.

The underlying message was that when the state issues a permit to legalize the use of *privileged property* cloaked in the trappings of a *private* corporation, the people may protest, but they can't prohibit the profitable violation of the community's rights.

Grant Township is what community organizers call a "sacrifice zone." What's sacrificed is health and safety, and environmental sustainability, along with the democratic rights of the people. They are given over as rights vested in property and enjoyed by the owners of a wealthy corporation, with the complicity of a state that claims to own and control Grant Township and every other municipality within its borders.

When the people of Grant Township and their municipal Board of Supervisors received Judge Baxter's decision, they weren't surprised. Not only were they expecting it, but they had also planned for it. Even before the court stripped their community rights ordinance down to its bare bones, the Hellbenders and their allies organized a campaign to change Grant from the official status of a *second class township* to a home rule municipality.

Going home rule would require electing what's called in Pennsylvania a *Government Study Commission* made up of seven community members. When elected, those seven would constitute a kind of local constitutional convention, charged with writing a home rule charter, the legal equivalent of a local constitution. They intended to write and adopt a local constitution rooted in unalienable rights.

Even before the court rejected their local ordinance in October, as the Hellbenders and Grant Supervisors anticipated it would, they had elected their Study Commission at the primary election in May of that year. Then in November, less than two months after the judge's decision, the Study Commission proposed a charter that was placed on the ballot and adopted overwhelmingly by a vote of the people of Grant.

Grant's legal counsel, CELDF, applied to the court for dismissal of all complaints pertaining to the ordinance since it had been made moot with adoption of the home rule charter. The court declined to act on this filing. Judge Baxter's decision to protect the rights of the corporation against what she had declared the municipality's *unconstitutional* ordinance was accompanied by notice of a jury trial to determine what damages and legal fees Grant would have to pay to PGE to make the corporation whole again.

Then the state went on the attack. With the judiciary busily representing the interests of PGE, an executive branch agency filed suit against the township. It became a national story when the Pennsylvania Department of Environmental Protection (DEP) sued Grant Township for protecting its environment more thoroughly than state law allows. *Ceiling preemption* raised its head. The suit argued that the ordinance illegally held DEP personnel liable for violating the community's rights when they issued permits to a corporation, thereby legalizing the injection of poisons into the ground.

During the other litigation, a temporary settlement was reached with the agency when Grant agreed not to enforce that single provision of the ordinance against DEP employees.

Piling on, Judge Baxter agreed with a request by the PGE industrialists to sanction the CELDF attorneys who had argued the case for Grant Township. Baxter imposed monetary sanctions against the attorneys in the amount of \$52,000.00. One of the attorneys was also referred to a disciplinary board of the Bar Association.

What lawyerly misbehavior was being sanctioned? Judge Baxter said the attorneys had repeatedly sought to vindicate the community's right of local self-government despite the court's repeated refusal to recognize it as a valid right. The judge also found it intolerable that the attorneys had repeatedly argued that the legal rights bestowed on corporations could not be used to defeat the rights of the residents of the municipality. Judge Baxter claimed such arguments were "frivolous" and sanctionable. She agreed with the PGE legal team that the CELDF lawyers should be fined and, if possible, disbarred for proposing such audacious legal theories.

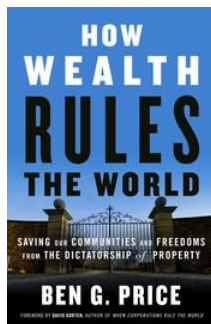
The legal doctrine that made it possible for the court to overturn the original Community Bill of Rights, and then nullify parts of Grant Township's home rule constitution was a spin-off of the Supreme Court's *Dartmouth* ruling. It was grounded in a legal theory based on *Dartmouth* that ignores the democratic rights of the residents of municipalities and champions the autonomous powers lodged in business corporations. The doctrine was developed after the Civil War to free a burgeoning industrial economy from the constraints of local law.

It is called *Dillon's Rule* and we turn to it in the next installment.

## **NEXT MONTH**

### **HOW WEALTH RULES PART SIX**

# **THE MUNICIPAL COLONIES OF AMERICA**



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