

Gaveling Down the Rabble: How “Free Trade” Is Stealing Our Democracy

by Jane Anne Morris

Does your town, or state, have the power to ban pesticides or radioactive waste, restrict truck traffic, or require rigorous recycling? Could it prohibit a corporation from doing business within its jurisdiction? Who are the all-powerful people who can deny voters, invalidate the decisions of elected representatives, and void constitutional amendments?

To some, freshly passed ordinances or laws are little more than rough drafts, and the legislative process is not truly over until the corporate lawyers squawk. Even when agricultural, chemical, biotechnology, and other corporate trade groups fail to win the hearts and minds of the electorate or the lawmakers, the corporate elite they represent does not abandon its fight. The tried-and-true forum for corporate relief from domestic democracy is the federal court system; one of the most successful remedies is a dose of “free trade” made famous by the North America Free Trade Agreement (NAFTA) and other global trade agreements. The domestic brand name for the generic “free trade” fix is “interstate commerce,” and the willing supplier is the U. S. Supreme Court. Corporate lawyers submit formulaic claims about laws that threaten corporate power, then usually take home the prescriptions they seek: favorable court rulings that declare irksome laws unconstitutional.

Many local efforts, especially the bolder ones that make a difference, follow this plot line. After a measure becomes law, a coalition of transnational corporations and their attendant non-profit trade industry groups challenges it in court...

Similar scenarios have played themselves out thousands of times in the U. S. since Reconstruction. Usually, corporate interests won. My aim...is not to describe the grass roots struggles -- over labor, the environment, civil rights, suffrage, health, and the like -- that precipitated legislation, but to explain the “interstate commerce” constitutional language that corporate lawyers concocted to defeat the laws. Once unheard of, the language has become so common, so stealthily ubiquitous, as to be scarcely discernible, which is where we are now. I would like our domestic “free trade” zone to receive the attention it deserves.

...It was as an outsider -- a corporate anthropologist, not a lawyer -- that I read the legal literature about our in-country “free trade” zone. The experience was little different from going backstage in any context: a restaurant, an archeological dig, a boardroom. Like a mix of medicine cabinet and dirty laundry, it was thrilling and appalling at the same time. My daily subliminal haze -- of dandelions going to seed, large one-occupant cars in traffic, icy spots on the sidewalk, food cart smells -- became laced with the phlogiston of “free trade.”

As I did research for what was intended to be a brief background paper on the domestic “free trade” zone, I was astonished at how contentious it had been and how invisible it has become. I would like to see it return to contentiousness and visibility...

...I look at...how interpretations by the courts and legislatures developed over time to promote the anti-democratic facets of “free trade.”... and...explore the historical development of interpretations by the Supreme Court of the Commerce Clause. I begin ...with the Singer Company (of sewing machine fame) and corporate meat packing companies and their efforts to expand their markets up through the beginning of the twentieth century.

Chapter 4 looks at the efforts to expand the interpretations of the Commerce Clause throughout industry, covering everything from chicken feed to migrant labor... provides a historic overview of the ebb and flow in use of the Commerce Clause to invalidate local, state, and national legislation.

Beginning with the New Deal, the Commerce Clause is used not only to support expansion of corporate control of our economy, but as the constitutional basis for many of the federal laws which make up our so-called safety net. The implications of basing so many social programs on the same constitutional “peg” that has been used to undermine state and local decision-making power are explored.

I then turn to an examination of the Commerce Clause role in current controversies in three arenas: the environment, civil rights, and labor.

Much of our current environmental legislation has been linked to the Commerce Clause as a way to shield it from constitutional attack by corporate interests. Chapter 5 reveals the history of such legislation and the precarious position our environmental protection efforts are in because of this tactic...

...I review the efforts of civil rights proponents to base legislation on something more sturdy than the Commerce Clause, to no avail. The three Reconstruction Amendments (Amendments Thirteen, Fourteen, and Fifteen) and other uplifting human rights language in our Constitution were bypassed, as hopes for civil rights for all instead became pinned to the Commerce Clause.

And in a parallel and related development, Labor failed in its efforts to ground far-reaching labor legislation in Thirteenth Amendment guarantees, and had to settle for a more narrowly based and more vulnerable link to the ubiquitous Commerce Clause.