

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 Four

HOW WEALTH RULES PART FOUR OF LAWS AND MEN

Ben G. Price

“Property and sovereignty, as every student knows, belong to entirely different branches of the law. Sovereignty is a concept of political or public law and property belongs to civil or private law. This distinction between public and private law is a fixed feature of our law-school curriculum. It was expressed with characteristic eighteenth-century neatness and clarity by Montesquieu, when he said that by political laws we acquire liberty and by civil law property, and that we must not apply the principles of one to the other.” -- Morris R. Cohen¹

Protecting the Minority of the Opulent against the Majority

John Adams argued that the United States is *“A government of laws, and not of men.”*² What laws? Well, the ones he and the propertied class devised. The Federalists would govern the new nation down through the years with laws that mere citizens could not alter because the courts were bound to enforce the legal precedents set by the Federalists.

Adams had no faith in democracy. He trusted that the better men of society would rule well if their affairs were unhindered by a majority with different priorities. *“Democracy never lasts long. It soon wastes, exhausts and murders itself. There was never a democracy that did not commit suicide,”*³ he remarked. Like his fellow Federalists, he counted himself among the wise. *“Thanks to God that he gave me stubbornness when I know I am right,”* he wrote to Edmund Jennings five years before the Constitution was composed in Philadelphia.

The Federalists were not authorized by “the people” to secretly deliberate over the text of a new constitution. Their wealth-protecting purpose did not reflect the general will of the people, and they knew it. *What of it?* wondered an indifferent James Madison at the Philadelphia convention. In his notes of Tuesday, June 12th, 1787, he quoted his own comments to his peers, saying *“. . . if the opinions of the people were to be our guide, it would be difficult to say what course we ought to take. No member of the convention could say what the opinions of his*

¹ Morris R. Cohen, “Property and Sovereignty,” from the *Book Law and Social Order* (Harcourt, Brace and Co., 1933), Originally published: Cornell Law Quarterly XIII (1927),

² John Adams, *Novanglus Essays*, No. 7, (1825)

³ John Adams, letter to John Taylor, (1814)

Constituents were at this time. . . We ought to consider what was right & necessary in itself for the attainment of a proper Government.”

The delegates may not have known the opinions of their constituents, but probably because they hadn't bothered to ask. Unsurprisingly, the Federalists diligently protected wealth from redistribution by peasant revolutionaries. They preserved English common law and made legal precedent into a judicial insurance policy against democratic innovation or redistribution of what once had belonged to no one.

Sir William Blackstone, the noted legal scholar of English common law, wrote that “*So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the common good of the whole community.*”⁴

Precedent, when preserving this level of reverence for property, is nothing more than the *rule of property* weaponized into a forever legal tradition guaranteeing that “*decisions under which property rights have been acquired will not be overruled, though erroneous.*” Precedent became the most reliable weapon in property's arsenal once the Constitution and its array of publicly enforceable *private law* became the public law of the land.

Thomas Jefferson argued against importing English common law into the American legal code because it justified an unequal class structure that American revolutionaries had rejected. Jefferson's warnings went unheeded.

The Federalists were happy to retain the empire's common law – its judicial precedents – as an exegesis to the federal constitution. It added another layer of protection against “the excesses of democracy” that threatened to interfere with privileges for the wealthy. The scheme of government the Federalists proposed came as close to modeling the British system of Lords and Sirs as decorum would allow.

Alexander Hamilton reluctantly agreed to drop his openly elitist New York Plan that would have created a monarchy in all but name. He decided to back James Madison's Virginia Plan. It proposed a less openly class-based constitution. It had the advantage of offering the superficial trappings of a republic that would be less objectionable to the masses. Hamilton commented that while the constitution thus framed would not establish the limited monarchy he preferred, the Virginia Plan would be “*but pork still, with a little change of the sauce.*”⁵

And yet today there is a Broadway musical offering a popular rehabilitation of the memory of Alexander Hamilton. Holding the cultural high ground for wealth requires constant rejuvenation of the false memories sardonically referred to as American history. If Hamilton is claimed to be a founding father, I demand a blood test.

A century later, historian J. Allen Smith wrote that U.S. law, by endowing property with the ability to convey rights. . . “*has given to the minority a greater protection than it has enjoyed anywhere else in the world, save in those countries where the minority is a specially privileged aristocracy. This doctrine briefly stated is that property rights once granted are sacred and inviolable. A rigid adherence to this policy. . . would disregard the fact that vested rights are*

⁴ William Blackstone, *Commentaries on the Laws of England*, Volume 2, *The Rights of Things*, (1766)

⁵ James Madison, paraphrasing Alexander Hamilton, *Madison's Notes on Debates in the Federal Convention*, Monday, June 19th, 1787

*often vested wrongs. A government without authority to interfere with vested rights would have little power to promote the general welfare through legislation”*⁶

James Madison understood how the Constitution was being shaped to accommodate this change from a genealogical to a financial aristocracy. He addressed the convention saying, “...in all civilized countries, the interests of a community will be divided. There will be debtors and creditors, and an unequal possession of property, and hence arises different views and different objects in government. This indeed is the ground-work of aristocracy; and we find it blended in every government, both ancient and modern. Even where titles have survived property, we discover the noble beggar haughty and assuming.”⁷

The Federalists concluded at every turn that it is the possession of wealth, not lineage, which legitimizes aristocracy. Without riches, inherited aristocratic status was pathetic. Madison favored a system of government that on its surface respected no special status for any class. But he crafted one that put the power to govern into the hands of those in possession of wealth.

By blocking popular participation, all would be left to the propertied citizens to decide. At the convention in Philadelphia Madison told the rest of the delegates that “*if elections were open to all classes of people, the property of the landed proprietors would be insecure. . . our government ought to secure the permanent interests of the country against innovation. Landholders ought to have a share in the government, to support these invaluable interests, and to balance and check the other. They ought to be so constituted as to protect the minority of the opulent against the majority.*”⁸

In the mind of James Madison, and apparently others among the Federalists, “*the permanent interests of the country*” meant the interests of the propertied class.

The North American Free Trade Agreement of 1789

With Washington presiding over the convention, the Federalists from the northern states proposed a mechanism that would block commoners and their elected representatives from getting in the way of wealth accumulation and empire building. It comes down to these few words, known as the *Commerce Clause*: “[Congress shall have power] to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁹

A constitutional prohibition against popular governance of interstate and international commerce comes later in the Constitution, where it says, “*No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress.*”¹⁰

It was the great federal preemption clause. It, along with the *Commerce Clause*, meant that whenever congress decides an issue involves interstate or international commerce, however

⁶ J. Allen Smith, *Growth and Decadence of Constitutional Government* (Chapter XI: Individual Liberty and the Constitution - The doctrine of vested rights - page. 299), (1930)

⁷ James Madison, quoted by Robert Yates, *Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Right Honorable Robert Yates, Chief Justice of the State of New York, and One of the Delegates from that State to the Said Convention*, Tuesday, June 26th, 1787

⁸ Robert Yates quoting James Madison, “Notes of the Secret Debates of the Federal Convention of 1787, Taken by the Right Honorable Robert Yates, Chief Justice of the State of New York, and One of the Delegates from that State to the Said Convention,” entry for June 19, 1787.

⁹ Article I, Section 8, Clause 3 of the U.S. Constitution.

¹⁰ Article I, Section 10, Clause 2 of the U.S. Constitution

tenuously, it can forbid states from regulating the enterprise. It stripped the states of their sovereign authority to maintain tariffs, import quotas, and other “barriers to trade,” as they are referred to in World Trade Organization (WTO) agreements today.

“The Constitution vests in Congress plenary control over foreign and interstate commerce,” wrote Charles Beard, *“and thus authorizes it to institute protective and discriminatory laws in favor of American interests, and to create a wide sweep for free trade throughout the whole American empire. A single clause thus reflects the strong impulse of economic forces in the towns and young manufacturing centers. In a few simple words the mercantile and manufacturing interests wrote their Zweck im Recht [Purpose in Law]; and they paid for their victory by large concessions to the slave-owning planters of the south.”*¹¹

The northern framers accomplished their primary goal in jettisoning the Articles of Confederation and drafting the U.S. Constitution. They established what today we might call the first North American Free Trade Agreement. Together with the *Commerce Clause*, which stripped state and local governments of power to govern commercial activities that cross state boundaries, Article 4, Section 3,¹² stripped states of authority over their prior territorial claims. It gave the central government full power to add territory to the nation and expand its boundaries. It was a conscious ploy to advance the establishment of a North American economic empire without interference from “we the people.”

By 1825, Thomas Jefferson was alarmed enough by the federal government’s use of the *Commerce Clause* to nullify the states’ law-making authority that he wrote in a letter: *“This will contain matters not intended for the public eye . . . the federal branch of our government is advancing towards the usurpation of all the rights reserved to the states. Under the power to regulate Commerce. . . and aided by a little sophistry on the words ‘general welfare’ a right to do, not only the acts to effect that which are specifically enumerated and permitted, but whatsoever they shall think, or pretend will be for the general welfare.”*

That same letter went into more detail, accusing the Supreme Court, the president and Congress of conspiring to *“strip the states authorities of the powers reserved to them,”* to favor the largest of industries over the smallest and to cut down mountains for the construction of roads and canals for private interests. Then he asked, *“Are we then to stand to our arms?”* He decided the time would be right *“only when the sole alternatives left are the dissolution of our union with them, or submission to a government without limitation of powers. Between these two evils when we must make a choice, there can be no hesitation.”*¹³

Commandeering oversight of commercial activities from state and local governments is justified to this day by claiming centralized regulation serves the “general welfare.” Even the most tenuous claim that a public act crosses a state border is enough to elicit claims that a national interest is involved. If it’s a profitable activity or a proposed regulation that advances the project of empire, then *voila’!* It’s no longer the business of the states or municipalities to oversee.

Usurpation of the majority’s governing authority on this basis is, thanks to the Federalists, both constitutional and legal.

¹¹ Charles A. Beard, *An Economic Interpretation of the Constitution of the United States*, p. 175, (1913)

¹² Article 4, Section 3 of the U.S. Constitution declares, *“New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.”*

¹³ Thomas Jefferson to William Branch Giles, December 26, 1825.

If Jefferson could only see the mountains now, exploded, gutted, and crumbled into ravines where mountain streams once flowed. If he could see the rivers and lakes made into cost-saving cesspools for private industry. If he could have known what was to become of the once plentiful forests, now clear-cut, the impoverished neighborhoods nestled in the shadow of oil refineries, superfund sites sprinkled throughout communities like the patchwork quilt of local regulations from which big business has achieved exemption. If he had known the scope of the disaster that would result from the Federalists' centralized control of commerce, maybe he would have said that the time for dissolving the federal union had come long ago.

In 2001, the U.S. Supreme Court ruled on a case involving a challenge by Waste Management Holdings and the owners of a landfill in Brunswick County Virginia against the Governor of Virginia, the Secretary of Natural Resources, and the Department of Environmental Quality (DEQ).¹⁴ At issue were five state laws enacted in 1999 to limit the importation of waste from outside of Virginia for dumping in privately owned landfills.

About 30% of all waste disposed of in Virginia comes from out of state. A 2011 report noted that “wastes arrived in Virginia last year from 24 states and several foreign countries, including Canada, Mexico and others in Central and South America.”¹⁵ Years before, state citizens balked at the enormous influx of trash and state representatives responded by capping imported tonnage, banning barge shipments on several rivers, and regulating truck traffic and axle numbers.

The lawsuit against Virginia made several claims for the unconstitutionality of the state laws, but the primary charge was that they violated the U.S. *Commerce Clause*. Congress had never ruled waste to be a commodity or a matter of commerce, but the Supreme Court had, by the time of this litigation, expanded the meaning of the *Commerce Clause* so that it not only reserves to Congress exclusive power to regulate trade across borders but also “restrict[s] the powers of states to regulate or impose burdens on interstate commerce” and “in the absence of Congressional approval, [invalidates] regulatory measures designed to benefit in-state interests at the expense of out-of-state interests”¹⁶

Whether or not Congress had claimed a regulatory monopoly on a cross-border activity, the Court held in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992) that it must be assumed it would at some time in the future, and that option must be preserved. In *Waste Management Holdings, et al. v. Gilmore* the Court ruled against the people of Virginia and for the waste hauling industry. The Court said it was unconstitutional for the commonwealth to hinder the transportation of trash into Virginia.

This interpretation of the Constitution's *Commerce Clause* is called the *Dormant Commerce Clause*. With its invention the Court again fulfilled its mission to maintain and expand the Federalists' original intent to exempt the uses of wealth from public governance. Immunity against community, once again.

¹⁴ Waste Management Holdings, et al. v. Gilmore, No. 00-1185.

¹⁵ Scott Harper, *Trash imports into Virginia increase, report says*, The Virginia Pilot, June 14, 2011

¹⁶ Dennis A. Walter, Staff Attorney, State of Virginia, Division of Legislative Services, Virginia Legislative Issue Brief, Number 24, July 2001

For all human history, until this ruling, what to do with waste had been a matter of local community discretion. But canny investors saw opportunity in moving urban waste out of one jurisdiction and into another. They had law on their side, and the unlucky receiving communities did not.

It's Commerce if Congress Says it Is

Every municipality, rural village and urban metropolis is supine before the juggernaut of the Federalists' constitutional mechanisms for protecting wealth and the propertied class from obligations to community priorities. The diversity of lobbyists and industry front groups that have referred to local community law-making that conflicts with their business plans as a "patchwork quilt of regulations" is amusing and disturbing. The breathtaking repetition of the phrase is a reminder that wealth has a winking relationship with the law and that the appropriation of state and local authority to govern the uses of wealth is the inevitable outcome of any confrontation between community and capital.

Antidemocratic impunity is trickle-down, and while the federal government rules the states, the states rule the municipalities. The claim that uniformity of regulations at the state level is proper and just because allowing community self-governance would make commercial ventures too burdensome has by now lost all its persuasive power. The total privatization of the public economy rests on the counter-revolutionary premise that commerce is the business of businessmen, not the people or their elected representatives. The presumption is that the public has no legitimate role in defining or governing production, labor, and finance. *Private law*, including the *Contract Clause* and the *Commerce Clause*, ensures the separation of wealth and state.

Everything from privately owned fossil fuel pipelines, trucking, trash hauling, telecommunications, retail chains, copyrights and patents, banking, food production, medicine, alcohol, tobacco, and firearms . . . you name it . . . has been declared an issue of interstate commerce and removed from state and local control, that is, governance by the people. The law chooses winners based on wealth. The losers are derided as NIMBYs (Not in My Back Yarders).

In recent times this ploy of invoking the *Commerce Clause* "for the general welfare" has come to include issues with doubtful relevance to interstate commerce. Here's an example that at first blush may seem a welcome invocation of the *Commerce Clause* where the general welfare was protected. Under intense political pressure "from the streets" in the 1960s a reluctant Congress enacted laws against racial segregation. Lawmakers declared that they had authority to regulate how businesses operating in multiple states treat minority customers.

In *Katzenbach v. McClung*, (1964) the Supreme Court upheld Congress' authority to ban racial discrimination in restaurants because it is a burden to interstate commerce. Instead of treating bigoted business policies as violations of constitutional rights, the federal government found it easier to categorize racial discrimination as a regulated component of commerce. One reason for relying on the *Commerce Clause* to regulate rather than eliminate racial injustice by businesses goes back to a watershed court case that exempted wealth from public law prohibiting Bill of Rights violations.

In 1875 the Civil Rights Act was passed by Congress banning racial discrimination by the hospitality, transportation and other industries. Unhappy business owners brought a series of lawsuits against the Act, claiming that Congress has no authority to regulate their treatment of customers. Eight years later the U.S. Supreme Court bundled and reviewed those cases in what is called the Civil Rights Cases of 1883.

To reach its conclusion, the 8-1 majority interpreted the post-Civil War Fourteenth Amendment to the Constitution in a way that had the effect of amending the amendment.¹⁷ As ratified, it reads, in part: “*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*”

All but Judge John Marshall Harlan concluded that the Fourteenth Amendment forbade states from passing discriminatory laws but that it gave no power to Congress to impose accommodating treatment of patrons on private businesses. The ruling declared businesses and corporations to be private in nature. Even though the Fourteenth Amendment prohibited states from making laws that violate “*the privileges or immunities of citizens,*” the Court determined that business entities created by state chartering and licensing laws were not “state actors,” and that the state does not violate the rights of African Americans when it charters and licenses businesses that do.

As “private actors” discriminating against freed slaves, corporations and private businesses were deemed *incapable* of violating people’s constitutional rights. For nearly a hundred years the decision stood as precedent, clearing the way for Jim Crow laws and greenlighting individuals and businesses to violate minority rights at will. American apartheid was legalized by the U.S. Supreme Court.

According to the 1883 Civil Rights Cases ruling, it’s not possible for corporate property, that is, *privileged property*, to be used to violate the rights of the people because it is not a “state actor.” It is shielded from public responsibility because it exists in the realm of *private law*. The people, on the other hand, through the government that ostensibly represents them, are capable of violating and being held to account for violating the civil rights of corporate property, which was chartered into existence in their name. What to simple logic seems an obvious case, at minimum, of judicial boorishness, gives license to the wealthy to use their corporate property to violate human and civil rights with impunity to this day.

The Court also considered the Thirteenth Amendment and concluded that it abolished slavery but did not protect freed slaves from the “inconvenience” of discrimination.

Once again, private law immunized *privileged property* from public governance and *public law* allowed private wealth to hold the people responsible for encroaching on its privileges. Having your cake and eating it too has never tasted sweeter for the propertied class.

When political pressure forced the hand of the federal government to curtail racial discrimination in the 1950’s and 60’s, lawmakers were reluctant to find constitutional reasons to do so. The Federalists’ decedents were committed to preserving the constitution as a guarantor of the rights vested in *privileged property*, including the elite privilege of committing unfettered social indecencies. To quell increasingly violent protests, they were willing to regulate the violation of African-American’s basic rights as a business practice. But prohibiting private citizens and corporations from violating the unalienable rights of minorities would be inconsistent with the Federalists’ original intent. Congress turned to the *Commerce Clause* as a more palatable alternative.

It was a strategy that avoided enforcing the constitutional right to equal protection of the law for everyone. *Commerce Clause* regulation of business practices involving minorities eventually could be repealed, unlike constitutional protections. The Voting Rights Act of 1965,

¹⁷ The “Civil Rights Cases”

recently under assault and partial repeal, is an example of this kind of regulated (rather than unconstitutional) discrimination.

The U.S. Supreme Court has a long history of reserving Bill of Rights constitutional protections for *privileged property* bundled in the corporate form.¹⁸ Notoriously, it has allowed Congress to regulate social injustices against people through laws couched as commercial policies. Had the justices reached a constitutional conclusion that unambiguously perpetuated racial justice, perhaps the nation would have avoided the continuing oppression of targeted racial groups. Instead, the Court and Congress legalized discrimination by “private actors” and then, when it was politically unavoidable to do so, regulated it. To regulate, let’s remember, is to allow under certain conditions.

Regulation: Wealth’s Shock Absorber

Commerce Clause “remedies” for racial discrimination set the example for environmental and labor regulation. Pigeonholing pollution and mistreatment of workers as matters of interstate commerce kept protection of the environment and the rights of workers within the realm of *private law*, where safeguards could be increased and decreased depending on commercial priorities.

Privatizing decisions about the rate of allowable environmental destruction and the tolerable level of mistreatment of workers on the job required Congress to create an empire of administrative agencies with authority to issue government “permits” and regulations. The permits legalize pollution and the regulations define the *maximum* allowable protections for nature and working people. Both nature and labor are thus defined as commodities. The intended result is that the rights vested in property remain unscathed.

In historical terms, this situation is ironic. Prior to the American Revolution, John Dickinson complained bitterly of the ministerial condescension of the empire toward the colonies and how the crown put the interests of a giant corporation ahead of the rights of British subjects. He wrote that “*The Rights of free States and Cities are swallowed up in Power. Subjects are considered as Property...Are we...to be given up to the disposal of the East India Company? ...[they] would sacrifice the Lives of Thousands to preserve their Trash and enforce their measures.*”¹⁹

Following the Revolution and the Federalist counter-revolution, regulation of anti-social commercial behavior got its start. In place of outright prohibitions against assaults on community wellbeing, Congress and the states created a whole legal universe of administrative agencies that act as buffers between the communities harmed and the wealthy perpetrators.

The first institutional regulatory regime under the *Commerce Clause* dealt with the railroads as an interstate commercial activity. In 1887 Congress enacted legislation creating the very first federal regulatory agency, the Interstate Commerce Commission (ICC). It was publicly sold to the public as a reasonable solution to rein in the power of the railroads with rules and guidelines. Despite what was said publicly, industry leaders understood that regulation would work to their benefit. Charles F. Adams, president of the Union Pacific Railroad Company, is quoted as saying “*What is desired is something having a good sound, but quite harmless, which*

¹⁸ More on this in Part 8. Also see CELDF’s Model Brief for Elimination of Corporate Rights at <https://celdf.org/wp-content/uploads/2015/08/Model-Brief.pdf>

¹⁹ John Dickinson, *The Writings of John Dickinson*, Letters on the Tea Tax, Nov. 27, 1773. (1895)

will impress the popular mind with the idea that a great deal is being done, when, in reality, very little is intended to be done."²⁰

In 1893, then U.S. Attorney General Richard Olney assured the president of the Burlington Railroad that there was nothing for corporate bosses to worry about: *"The [ICC]...is, or can be made, of great help to the railroads. It satisfied the popular clamor for a government supervision of the railroads, at the same time that the supervision is almost entirely nominal. Further, the older such a commission gets to be, the more inclined it will be to take the business and railroad side of things. It thus becomes a sort of barrier between the railroad corporations and the people and a sort of protection against hasty and crude legislation hostile to railroad interests."*²¹

Regulatory agencies established after the ICC are no different. They have been erected as *"a sort of barrier between the corporations and the people and a sort of protection against [local] legislation hostile to [corporate] interests."* They protect *privileged property* from local democracy and against being governed directly by the people. The regulatory system has, in fact, erected a nearly impenetrable barrier between the people and their legal creations, the mighty corporations of today. And it has guaranteed that so long as citizens play along and seek relief from corporate assaults by turning to regulatory agencies, the privileges conferred on the propertied class will continue to go unchallenged.

Today, people are denied access to justice by laws that demand they exhaust all regulatory "remedies" first, before being recognized by the courts as having grievances relative to the violation of their rights. If we are to understand how the regulatory system is used by the wealthy minority to deny the people's right of self-government, then we must be clear that regulatory law begins with a set of givens that are put beyond the authority of the people to amend. Legislatures, on behalf of powerful minorities using corporations to engage in commercial activities, define what corporate officers may legally do in our communities. These include activities that are oppressive of rights and dangerous to the community.

During the Progressive Era, historian J. Allen Smith anticipated the undemocratic outcomes to be expected from the substitution of state regulation for local self-governance, saying *"Satisfactory regulation is not, as seems to be implied in much of the discussion favoring the substitution of state for local control, merely a question of placing this function in the hands of that governmental agency which has most power and prestige behind it. The power to exercise a particular function is of little consequence, unless there is an adequate guaranty that such power will be exercised in the interest of the local public for whose protection it is designed. . . [I]t should be lodged in some governmental agency directly responsible to the constituency affected."*²²

Of course, regulatory agencies are erected with no such democratic niceties in mind. An example: in Minnesota, a mining corporation's owners sued Winona County for enacting local legislation at the request of citizen a local citizen's group, the Land Stewardship Project (LSP) that banned the extraction of sand that's used in the process of hydraulic fracturing for methane gas ("fracking"). Minnesota Sands' corporate directorate objected to the ban, but the Minnesota Court of Appeals found 2-1 in favor of the county.

²⁰ Jane Anne Morris, *Sheep in Wolf's Clothing*, in *By What Authority*, from the Program on Corporations, Law & Democracy, (Vol. 1, No. 1 - Fall 1998)

²¹ Richard Kazis and Richard Grossman, *Fear at Work: Job Blackmail, Labor and the Environment*, 1991, p. 76

²² J. Allen Smith, "Centralization and Popular Control," in *The Growth and Decadence of Constitutional Government*, 1930 pp. 195-196

The court ruled that since the ban affected all heavy industrial extraction, and not just the sand operation, that it was not a discriminatory law. A statement by the corporate folks following the decision stated that *“The ban eliminates landowner mineral rights and creates an economic risk and threat to anyone who benefits from the use of their land. We believe that allowing it to remain in place is the wrong way for Winona County to try to address issues that are beyond their authority. If Winona County has concerns related to mining within its borders, it has every right to adopt reasonable regulations instead of imposing what we continue to believe is an unconstitutional ban.”*²³

The “unconstitutionality,” from the corporate perspective, lay in the challenge to Bill of Rights protections lodged in corporate property by the U.S. Supreme Court, along with the federal government’s sole authority under the *Commerce Clause* to regulate interstate commerce. In 2018 the corporate legal team brought an appeal of the decision to the Minnesota Supreme Court, stating that *“This case will have far-reaching consequences. Several other counties in Minnesota have silica-sand deposits, and many more have other exportable minerals. They are watching this case closely because it will set the ground rules for how they can regulate those exports. Those rules should come from this court.”*

If the court’s review and ruling reflect the corporate statement that the residents should never have asked their county representatives *“to address issues that are beyond their authority,”* and the court in fact does set new rules allowing counties to regulate the size of such mining operations, but not if they can proceed, then the corporate owners will have successfully used the rights lodged in their property to nullify the democratic will of the people of Winona County.

LSP Policy Organizer Johanna Rupprecht stated *“We are confident that, in the unlikely event the Supreme Court even chooses to hear this petition, the ban will once again be upheld. The right of local governments to protect their communities from harmful, extractive corporate activities, such as frac sand operations, is very clear.”*²⁴ While the higher court may decline to hear the corporation’s appeal, it is a mistake to imagine that current law recognizes the authority of local governments to protect their communities, as we will see.

Regulation through administrative agencies is a ministerial form of governance, the very sort that American revolutionaries like Sam Adams vehemently opposed. What is allowed and what is forbidden are determined by a central government. Communities are left to administer prescribed rules, but not make their own. The premises on which regulation operate are predetermined by private arrangements between government and wealth. Regulatory schemes presume the legality of harms inflicted in the course of profit-making. Minnesota Sands, Inc. could claim in confidence that the county *“has every right to adopt reasonable regulations,”* based on knowledge that regulations seldom block mining and other corporate activities in the long run. Nor is litigation and appeal a burden on the company’s profit-seeking. Administrative law places minimal restrictions on profitable activities that damage communities and the environment. And legal expenses are tax deductible as a business expense for corporations. Not so for community organizers and local governments.

Bureaucratic permitting processes effectively strip states, counties and municipalities of the authority to govern anti-social commercial enterprises. Everything from industrial violations of local sanitation policies to payday lending predation has been declared a matter of *private law*

²³ WXOW.com (ABC News), La Crosse, MN, *Statement from Minnesota Sands on frac sand ban*, Aug 01, 2018

²⁴ https://www.winonapost.com/news/frac-sand-co-appeals-to-supreme-court/article_d920e010-0dd6-574c-a15f-4f0a1a705bd4.html

and regulated through administrative agencies or through the courts via the *Commerce Clause*. Corporate attorneys can invoke the *Commerce Clause* like it was just another corporate right and call on the courts to use it as a shield against local governments trying to protect community rights. The law denies that corporations can violate the people's constitutional rights, but it "knows" that local governments representing those people can violate the corporate property's rights.

It's no different for workers' rights than it is for communities or the environment. Regulation of labor issues as commercial activities rather than as matters of human rights means that the relationship between people who work and people who profit from their work will reliably support minority profiteering at the expense of the majority. The regulations don't put businesses on notice to behave well. They put a government bureaucrat between the worker and employer as a buffer. Letting lawmakers keep an active hand in deciding labor issues as matters of commerce ensures the rights of working people remain negotiable and don't become black letter law.

In past generations, organized labor has pushed back vigorously against industrial abuse. To avoid costly disruptions of production and loss of profit, government regulatory schemes offered perfunctory concessions to workers and instituted rules of conduct. But there was never a willingness on the part of the federal courts, the states or Congress to recognize constitutional protections for worker's rights.

Gradually it has dawned on reformers that the regulations they fought so hard to get have limited effect. What protections they may have promised are subject to legal challenge and vulnerable to changing political winds in the legislature. The rights of corporations and the contractual immunity from interference by government inoculate employers from having to respect the rights of workers. Over time the regulations have been eroded and, in some cases, discarded. Because they aren't constitutionally protected rights, statutory protections *can be* eroded and discarded.

Unlike corporations, working people and the environment have nothing comparable to the *Commerce Clause* to trigger *private law* that works exclusively to protect their rights. When they engage in what the law calls "commercial activities," people disadvantaged for lack of *privileged property* are at the mercy of legally weaponized wealth.

Supreme Court sophistry over "private actors" and "state actors" proves the point that under U.S. law rights vested in property can negate human and civil rights. Simultaneous with the invention of a public sector and a private sector came the establishment of a two-track system of law. Wealth is protected like an unalienable right while unalienable rights of people are treated as concessions and compromises that can be waived in deference to economic priorities.

The solution to this mess is to protect unalienable rights through bedrock constitutional protections and to subject state-chartered corporations and businesses to the governing authority of the people at all levels of government, especially at the community level where corporate harms will be felt directly. The U.S. Constitution and the laws derived from it forbid this solution.

Possession is Nine-Tenths of the Law: The Mathematics of Injustice

The northern Federalists got their *Commerce Clause* by agreeing to concessions with the southern slavocracy. Those compromises include the most startling examples of injustice to be sewn into the U.S. Constitution. Enslaved humans were made into a kind of *privileged property*. They became reservoirs of political power transferred from the people at-large to plantation

aristocrats. The Federalists' attached powerful governing privileges to ownership of human property in the grammatically awkward Three-Fifths Clause of the Constitution. Here it is: *"Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."*

By vesting a right to superior political representation in enslaved human property, the Federalists knew they were indirectly elevating a host of wealthy men above all other Americans. The number of votes in the House of Representatives and the Electoral College allotted to each state was determined proportionally by population. The enslaved would be counted as 60% of a whole human being in the census. Slave owners got an additional say in Congress and the White House by counting each natural person owing their future labor to them as 60% of a person.

The Federalists gave disproportionate control of the House of Representatives and the Electoral College to owners of *privileged human property*. That meant the southern slavocracy controlled one house of Congress, the presidency and, indirectly, the Supreme Court.

Slaveholders' human property was more than just a source of free labor – it was a source of political power. The Three-Fifths Clause blatantly conveyed disproportionately more governing power to a wealthy plantation aristocracy through the slaves in their possession, and the more human property owned, the more plantation aristocrats were rewarded politically. In other words, the Federalist *founding fathers* wrote a constitution that not only legalized slavery, it incentivized slavery.

In our day, private corporations endowed with court-bestowed rights to spend unlimited amounts on elections and legislative meddling empower the wealthy to own the White House, Congress, and the Supreme Court. Long dead Supreme Court judges appointed by bigoted presidents chosen with the help of the Three Fifths Clause invented a goodly number of other legal doctrines still used today by the propertied elite against the majority. Judicial precedent ensures the permanence of those racist Federalist legal inventions.

Wealth Turns Other People's Work into Property: The True Nature of Servitude

The last paragraph of Article IV, Section 2 in the U.S. Constitution tells Americans that *"No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."*

To protect rights conveyed through property to slave owners and creditors, the Fugitive Labor Clause voided these unalienable rights:

- The right of enslaved people and debtors to due process of the law. On a mere property claim, the liberty of an accused slave or debtor was forfeit
- The rights of enslaved humans and debtors to life, liberty, and the pursuit of happiness
- The right of local community self-government – specifically, the right of individuals, states, local governments, and communities not to support slavery and involuntary servitude.

In 1865, the Thirteenth Amendment banned slavery and involuntary servitude. It didn't utterly gut the last paragraph of Article IV, Section 2, but only those parts specific to slavery. A

creditor's claim to ownership of a debtor's future labor was deemed a legally protected form of *privileged property*. By not touching this aspect of the Fugitive Labor Clause, the Thirteenth Amendment preserved the rights vested in property as superior to the human and civil rights of debtors and laborers.

The Fugitive Labor Clause was rendered moot as it applies to slaves and debtors fleeing to so-called "free states." But its underlying principle – that to protect rights conveyed through *privileged property*, the rights of the people to own their own labor had to be nullified. The core tenant of the Federalists, that a debtor's labor belongs to the creditor, wasn't repealed, and today we have a generation of people indentured through student loans, stripped of legal recourse to bankruptcy, owing a fair chunk of their productive years to people happy to receive a cut of their paychecks as pure unearned profit.

A Gentlemen's Agreement to Usurp the People's Sovereignty: Contracts *Über Alles*

Chief Justice John Marshall, of *Dartmouth* fame, is said to have held that in the absence of royal rule, contracts rule. The Constitution's framers evidently believed that in ridding themselves of the king, Americans had also rid themselves of a sovereign ruler. This contradicts the opinion of revolutionaries like Paine and Jefferson, who believed that sovereignty passed to the people as a whole with separation from the British Empire.

Charles Beard noted a significant and wealth-empowering omission in the Constitution. "*None of the powers conferred by the Constitution on Congress permits a direct attack on property. The federal government is given no general authority to define property.*"²⁵ In fact, the Constitution methodically defines the prerogatives and privileges of wealth not by specifying what kind of property can turn the wheels of government, but by positing a system obedient to levels of wealth that exceed the assets of most citizens.

To further limit the authority of the states to interfere with commercial and financial transactions, the Federalists included the *Contract Clause* in the Constitution, which reads: "*No state shall pass any law impairing the obligation of contracts.*"²⁶

Like the *Commerce Clause*, this language seems innocuous and simple to modern Americans. We are conditioned to accept it as a given that bilateral business and financial agreements are outside the scope of general governing authority. But together the *Commerce* and *Contract Clauses* have the effect of elevating wealth into the pantheon of unalienable rights protected from meddling by an unsympathetic mob.

In Boulder County, Colorado, the City of Broomfield was embroiled in a contest of wills and rights between a *private* corporation, a municipal *public corporation*, and the people of the City. Local officials had signed a memorandum of understanding (MOU) with the oil and gas corporation Sovereign, without the consent or participation of the people. Even though they had no part in the agreement, which would have allowed the corporation to extract hydrocarbons within Broomfield using the controversial process of hydraulic fracturing ("fracking"), residents would be held to the terms of the contract and would live with the resulting health and environmental damage.

In 2013 the residents exercised their right to direct democratic lawmaking. They drafted a five-year moratorium on fracking and petitioned the measure, following existing legal procedures, onto the ballot for a vote. The ordinance was adopted with majority support.

²⁵ Beard, p. 176

²⁶ Article I, section 10, clause 1 of the U.S. Constitution.

Corporate attorneys claimed that the ordinance illegally blocked them from drilling and violated its contract with the City. According to the Daily Camera, “*Sovereign also claims the fracking ban violates state law, that Broomfield does not have the authority to ban fracking, that the ban is a breach of contract and that the company is potentially entitled to damages in the tens of millions of dollars.*”²⁷

Local officials met with corporate representatives and agreed to allow a judge to decide if the local legislation adopted by the people could block drilling from going forward. In the end, a lawsuit from the oil and gas industry let the state court decide the outcome. The decision went against the community, nullified the law enacted by the voting majority, and cleared the way for investors to reap profits from natural gas mining in suburban neighborhoods.

The Broomfield community was initially left out of the negotiations around the MOU, but will have to live with the results of the contract being carried out.

Where *public law* reigns, policy is open to community modification through democratic processes. Where the *private law* of contracts controls, community priorities can be mooted by the courts. *Private* contractual business agreements aren’t bound by the *public* Bill of Rights. Supposedly unalienable rights can be forfeited, confiscated, and “voluntarily” surrendered to the power of *private law* in contracts. It’s a clear demonstration of constitutional deference to the rights vested in property and indifference to the rights of people.

Contractual arrangements are often a ploy for wealthy parties to impair the obligations of the social contract agreed to by every American who submits to the rule of law. Through non-disclosure agreements, first amendment rights are privatized. Through out-of-court settlement agreements, the right to a jury trial is forfeited. What is lost when the jury is kept out is the people, the commoners, and the community. The same goes for mandatory arbitration.

Non-disclosure agreements and intellectual property rights waivers as conditions of employment force commoners to barter their First and Fifth Amendment rights for the privilege of earning a wage. The immunity of contracts from *public law* makes it possible for *private law* to serve the rights vested in property while the rights of people go unprotected.

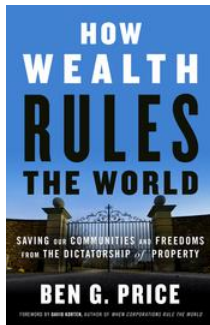
Meanwhile, the Court’s unchecked power to interpret the Constitution and law in consistently wealth-advantaging ways has grown exponentially. The Supreme Court retooled the *Contract Clause* in 1819 to destroy any remnant of local autonomy and self-government even more intentionally, in order to protect the rights vested in property from democracy. It’s to that story that we will turn in Part Five.

²⁷ Megan Quinn, “Oil and gas firm Sovereign to sue Broomfield over fracking ban,” The Daily Camera, April 22, 2014

NEXT MONTH

**HOW WEALTH RULES
PART FIVE**

**THE EMANCIPATION OF PROPERTY
FROM DEMOCRACY**



Purchase a copy of *How Wealth Rules the World: Saving Our Communities and Freedoms from the Dictatorship of Property*, by CELDF's Ben G. Price from publisher Berrett-Koehler here: [BK Bookstore | Shop Books for Businesses and Company Events \(bkconnection.com\)](https://www.bkconnection.com)