THE MYTH OF COMMUNITY RIGHTS

Why recent community victories in New York, Pennsylvania, Texas, and Kentucky over fracking haven't changed the fundamental relationship between corporations and communities

Even as hydraulic fracturing ("fracking") has spread rapidly in communities across the United States, there's a sense that communities are gaining traction to stem this tide. But the reality on the ground – despite news headlines – says otherwise.

For example, in **New York** in 2014, the state's highest court ruled that communities could use local zoning ordinances to ban hydraulic fracturing for shale gas. Six months earlier, the **Pennsylvania** Supreme Court overturned a state law that stripped zoning authority away from communities regarding the siting of gas wells. And in **Kentucky**, the state Supreme Court ruled that a pipeline corporation couldn't use eminent domain authority to take private property for a pipeline carrying frack gas liquids through the state.

While on the surface, it may look like the courts are finally beginning to fix the power imbalance between energy corporations and communities, **the basic relationship between corporations and communities remains untouched by these rulings**.

Fracking in New York

In New York, beginning several years ago, towns began adopting zoning ordinances which banned fracking as part of more expansive bans on heavy industrial activity. These ordinances were instituted to protect the rural character of those towns.

Several fracking corporations challenged the ordinances, asserting that the state had the exclusive right to regulate oil and gas drilling, and that the municipalities therefore lacked the authority to adopt the local laws.

While the courts dismissed the corporate lawsuits, they did not, however, do so on the basis that the people of those towns possessed a *right* to protect themselves from fracking. Instead, the courts merely held that "banning" wasn't the same thing as "regulating," and that while the state legislature had prohibited additional oil and gas *regulation*, it hadn't decided to explicitly prohibit municipalities from using zoning ordinances to *ban* fracking.

Dispensing with any doubt about where the real power lay, **the courts explicitly recognized the right of the state – at any time – to nullify the town zoning bans**, declaring that "there is no dispute that the State Legislature has the right [to override local oil and gas laws] if it chooses to exercise it."

Oil and Gas Drilling in Pennsylvania

In Pennsylvania, in an effort to clear the playing field for oil and gas corporations, **the state legislature adopted Act 13 – which exempted oil and gas drilling from most municipal zoning laws**.

Several municipal governments filed suit against the state. The courts struck down portions of the state law – but *not* on the basis that people within Pennsylvania communities possess the right to protect their water and well-being. Rather, the courts found that existing state law had already bestowed authority on municipalities to adopt protective zoning laws – authority which the state's passage of Act 13 interfered with.

Thus, in Pennsylvania, **the courts did *not* find that people have the right to local, community self-government** – and thus the power to protect their communities over the state power used to advance the interests of energy corporations – rather, as in New York, the court chose to sidestep the issue.

These courts – while assuming that the state has the unbridled authority to override any community laws – are left to examine the sole question of whether the state has explicitly wielded that power, and whether its use of that power conflicts with other state-granted authority.

Fracking in Texas

In November 2014, the people of Denton, Texas, passed the state's first local ban on fracking. Within twenty-four hours, the community was sued by both the state and the oil and gas industry. Within several months, the Texas legislature adopted a preemption bill nullifying the local ban. In June 2015, Denton's City Council, under pressure from the combined forces of the state and industry, repealed the law.

As with the confrontations in New York and Pennsylvania, the situation in Denton has revealed that ***community rights are a myth* – that we do not have any right to govern our own communities which cannot be taken away by either corporations asserting corporate "rights" in the courts, or by corporations using state government to directly override our communities**.

Pipelines in Kentucky

In 2015, in a confrontation in Kentucky between the Kinder Morgan corporation's Bluegrass Pipeline and landowners in its thirteen-county path, a Kentucky court held that the corporation lacked the authority to seize land for the pipeline.

Known as the **power of eminent domain**, the authority to directly take land for projects has been conferred upon railroad corporations, public utility corporations, and energy corporations by most state legislatures over the past two centuries. Instead of recognizing community rights or even the rights of landowners in its ruling, the court instead declared that the pipeline's proposed delivery of frack gas liquids to destinations outside of Kentucky – and not to the general public of Kentucky – dictated that it was not a "public utility" under state law, and thus, the corporation couldn't exercise the power of eminent domain.

As recognized by its ruling, however, the **state legislature has the option – at any time – to expand the category of corporations that possess eminent domain authority, and thus *expand the power that corporations have over communities*.** The court's ruling thus didn't question the ability of the state to delegate that power to corporations, it simply said that it hadn't happened yet.

Corporate "Rights" and State Preemption

These happenings in New York, Pennsylvania, Texas, and Kentucky, while certainly buying a reprieve for the affected communities in the short-run, unfortunately have done nothing to change the basic power that can be wielded by corporations against communities.

In many ways, the current system of law views local laws as unenforceable unless affected corporations *agree* to abide by them. **If a corporation should decide that it does not want to abide by a local law, there are two primary ways it can nullify it.** First, the corporation could sue the community – and thus use the courts – to rule that the law violates the corporation's constitutional "rights." Or, the corporation could choose to use the state legislature to draft and adopt new state laws which preempt local ones.

Because corporations possess certain constitutional "rights" of their own, **the rulings in New York, for example, do not insulate communities from lawsuits by corporations**. Thus, corporations owning oil and gas leases, which they are now prevented from enforcing, can sue communities for monetary damages equal to the value of those leases. Thus, they could file a lawsuit claiming that their 5th Amendment constitutional "rights," against "takings" of their property, were violated by the communities.

The courts in New York found that the local laws – which prevent heavy industrial activity such as oil and gas fracking – do not violate current state oil and gas law. But, they did not touch the question of whether oil and gas corporations could sue communities for lost profits as a result of being unable to access oil and gas reserves.

For community rights to become real – that is, for the right of people to determine the future and fate of their communities – people must possess law making authority *that is immune from state and corporate control*. They must be recognized as the final decision makers in their own communities when they choose to adopt measures more protective of their communities than what is afforded by state and federal law.

Reliving the Past: Sidestepping the Civil Rights Movement

It's not the first time, of course, that the courts have delivered ephemeral victories while endorsing a rule of law that respects corporate property more than people's rights.

In 1961, a Delaware coffee shop refused service to Bill Burton, an African-American. Burton sued, contending that service of whites, but not blacks, was a violation of his constitutional right to equal protection of the laws under the 14th Amendment. The corporation that owned the coffee shop contended – as corporations continue to argue to this day – that it was free to discriminate because constitutional rights could only be enforced against governmental actors, and it was not part of government.

Instead of vindicating civil rights by holding that corporations could be liable for violating them – and openly dismantling the **"state actor" rule (which is still used today to shield corporations from constitutional violations)** – the U.S. Supreme Court instead applied a tortured argument which found that the coffee shop was dependent upon the parking garage next door, which was owned by a governmental authority. Thus, the justices held, the coffee shop's actions were governmental actions, due to the close relationship with the governmentally-operated parking garage next door. Such was the basis of one of the "seminal" civil rights decisions of that era, *Burton v. Wilmington Parking Authority*.

Dismantling the Corporate State

The truth is that the **courts – as institutions that have expanded corporate power by creating both state preemption and corporate "rights**" – are the least likely to reverse themselves on these issues. That is, if we are looking to the courts to "save" us – through some silver bullet court case – we'll be waiting a long time.

Rather, for community rights to become a reality, we must nullify and then overturn the legal doctrines which currently allow a relatively small number of people who control corporate decision making to override our communities.

This will require millions of people and thousands of communities across this country to openly disobey those key legal doctrines – including corporate "rights" and state preemption – in the name of their constitutional right to local, community self-government. It will require communities – such as those in Texas and Pennsylvania and New York – to *override the courts* by joining together to change their state constitutions to recognize the authority of communities to write their own rules for energy corporations and others.

It's something that **close to two hundred communities in ten states have begun to do already** – harnessing their municipal governments to adopt local laws that not only seek to stop fracking and other threats, but that repudiate state preemption and corporate "rights" within their own towns, villages, and cities. To the people doing this work, it's not merely a choice to confront these doctrines, but a necessary step toward actually enforcing their own local laws.

It's the only way that movements begin – by beginning to solve real problems which have been inflicted on real people and communities. Most importantly, it is that process of problem-solving that is giving birth to a new army of community leaders – who understand that **dismantling the corporate state is a prerequisite towards being able to protect their own communities**.

Nothing less than a mass movement of people, out from under the spell woven by the unholy alliance of a corporate few and their legislative lackeys, will be able to change the basic elements of a system that stands today in stark contrast to the governmental system imagined by the American Revolutionaries.

It's time to imagine that system once again, and to pick the fights that will make it real.