SECOND EDITION • REVISED & EXPANDED

UNEQUAL PROTECTION

HOW CORPORATIONS BECAME "PEOPLE"— AND HOW YOU CAN FIGHT BACK

THOM HARTMANN

An Excerpt From

Unequal Protection: How Corporations Became "People" – And How You Can Fight Back

by Thom Hartmann

Published by Berrett-Koehler Publishers

Contents

Introduction: The Battle to Save Democracy

It's really a wonder that I haven't dropped all my ideals, because they seem so absurd and impossible to carry out. Yet I keep them, because in spite of everything I still believe people are really good at heart.

—Anne Frank, from her diary, July 15, 1944

On September 2, 2009, the transnational pharmaceutical giant Pfizer pled guilty to multiple criminal felonies. It had been marketing drugs in a way that may well have led to the deaths of people and that definitely led physicians to prescribe and patients to use pharmaceuticals in ways they were not intended.

Because Pfizer is a corporation—a legal abstraction, really—it couldn't go to jail like fraudster Bernie Madoff or killer John Dillinger; instead it paid a $1.2 billion "criminal" fine to the U.S. government—the biggest in history—as well as an additional $1 billion in civil penalties. The total settlement was more than $2.3 billion—another record. None of its executives, decision-makers, stockholders/owners, or employees saw even five minutes of the inside of a police station or jail cell.

Most Americans don't even know about this huge and massive crime. Nor do they know that the "criminal" never spent a day in jail.

But they do know that in the autumn of 2004, Martha Stewart was convicted of lying to investigators about her sale of stock in another pharmaceutical company. Her crime cost nobody their life, but she famously was escorted off to a women's prison. Had she been a corporation instead of a human being, odds are there never would have even been an investigation.

Yet over the past century—and particularly the past forty years—corporations have repeatedly asserted that they are, in fact, "persons" and therefore eligible for the human rights protections of the Bill of Rights.

In 2009 the right-wing advocacy group Citizens United argued before the Supreme Court that they had the First Amendment right to "free speech"

and to influence elections through the production and the distribution of a slasher "documentary" designed to destroy Hillary Clinton's ability to win the Democratic nomination. (Some political observers assert that they did this in part because they believed that a Black man whose first name sounded like "Osama" and whose middle name was Hussein could never, ever, possibly win against a Republican, no matter how poor a candidate they put up.)

In that, they were following on a 2003 case before the Supreme Court in which Nike claimed that it had the First Amendment right to lie in its corporate marketing, a variation on the First Amendment right of free speech. (Except in certain contract and law enforcement/court situations, it's perfectly legal for human persons to lie in the United States. Nobody ever went to jail for saying, "No, of course you don't look fat in those pants!")

Corporations haven't limited their grasp to the First Amendment; pretty much any and virtually every amendment that could be used to further corporate interests has been fair game. (They haven't yet argued the Third Amendment—you can't force citizens to quarter soldiers in their homes—although Blackwater's activities in New Orleans during the aftermath of Hurricane Katrina could have provided an interesting test.)

As you'll learn in this book, in previous decades a chemical company took to the Supreme Court a case asserting its Fourth Amendment "right to privacy" from the Environmental Protection Agency's snooping into its illegal chemical discharges. Other corporations have asserted Fifth Amendment rights against self-incrimination as well as asserted that the Fourteenth Amendment—passed after the Civil War to strip slavery from the Constitution—protects their right "against discrimination" by a local community that doesn't want them building a toxic waste incinerator, commercial hog operation, or superstore.

If this trend continues, it's probably just a matter of time before a corporation (maybe one of the many mercenary forces that emerged out of George W. Bush's Iraq War?) claims the Second Amendment right to bear arms anywhere, anytime, and your credit card company's bill collector shows up at your home with a sidearm.

This legal situation is not only bizarre but also quite the opposite of the vision for this country held by the Founders of the nation and the Framers of the Constitution. They were sufficiently worried about corporate power that they didn't even include in the Constitution the word *corporation,* intending

instead that the states tightly regulate corporate behavior (which the states did quite well until just after the Civil War).

The American Revolution, you'll learn in this book, was in fact provoked by the misbehavior of a British corporation; our nation was founded in an anti-corporate-power fury.

Corporate Personhood in the Making

The most significant and oft-quoted precedent to the turning point of corporate power in America began just after the Civil War. It rested on a Constitutional Amendment successfully written and passed by a group of "Radical Republicans" after the Civil War to take slavery out of the Constitution.

Given that today's Republican Party has—largely since the Robber Baron Era of the 1880s—been the party of big business and the very rich, it's a bit difficult for some people to get their minds around the possibility that the Republican Party started out as a reform party that for nearly seventy years (from before Abraham Lincoln until just after Theodore Roosevelt left the party to start a third party) had a strong progressive wing. But it did.

Although Lincoln was by today's standards a "moderate" Republican, he was still anti-slavery, pro–middle class, and pro-labor (he famously said, "Labor is superior to capital because it precedes capital"—nobody was wealthy until somebody made something—and was the first president both to use the word "strike" and to actually stop police and private armies from killing and beating strikers).

And just like in today's mainstream Democratic Party, where there's a progressive minority that always seems to be pushing the edges, in the Republican Party of the 1800s there was a very—even by today's standards—progressive faction.

The Radical Republicans were a splinter group that emerged in a big way from the Republican Party at its founding in 1854; and just after the Civil War, in 1866, they gained a majority among Republicans in the House of Representatives, where they had a powerful influence until the faction disintegrated in the 1870s during the presidency of Republican Ulysses S. Grant. They supported the absolute right of freed slaves to vote and participate in all aspects of government and society, and they pushed hard for the punishment of former Confederates (and Democrats in the South) and fought with the more moderate mainstream Republicans.

After Lincoln's assassination they had so much power in the House that they were able to push through the Civil Rights Act of 1866 and override President Andrew Johnson's veto of it (and a dozen other bills). They drove the impeachment of Johnson and missed by a single vote.

They also realized that if they wanted to really free Blacks, it wasn't enough to just pass a law. They had to get the implicit approval of slavery out of the Constitution itself, so they proposed three Constitutional amendments—what we now call the Thirteenth, Fourteenth, and Fifteenth Amendments, or the Reconstruction Amendments.

The Thirteenth Amendment explicitly abolishes slavery, saying, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The Fifteenth Amendment explicitly forbids any government within the United States to prevent Blacks from voting, saying, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Both of these changed the face of America, but the Fourteenth Amendment has proved the most radical—just not in the way its authors intended.

The main goal of the Fourteenth Amendment was to reverse the 1857 *Dred Scott v. Sanford* decision of the U.S. Supreme Court, which had excluded African Americans from access to the protections of the Constitution and the Bill of Rights (the first ten amendments to the Constitution).

Section 1 explicitly made them citizens (assuming they were born or naturalized here) and explicitly entitled them to the same "equal protections" under the law that White citizens enjoyed.

Sections 2 through 4 also made sure that Black Americans were counted as a full person (and not three-fifths of a person) for the purpose of determining congressional districts, and it took a swipe at the former Confederates and their sympathizers by, in Section 3, excluding them from participation in holding public office. The language was quite straightforward, reflecting the Radical Republican agenda:

The Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.

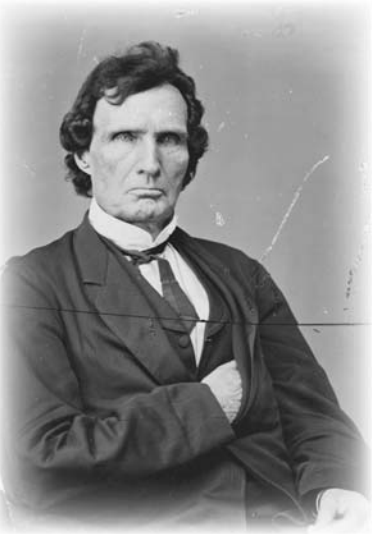
Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

As revolutionary as this amendment was, many Radical Republicans—who deeply opposed tyranny of all kinds—felt that it didn't sufficiently protect human beings from oppression. When the Fourteenth Amendment was first introduced to the House of Representatives on June 13, 1866, that body's Republican floor leader, Radical Republican Thaddeus Stevens, expressed reluctance at endorsing "so imperfect a proposition." Like many of his colleagues, he



Radical Republican
Thaddeus Stevens
(April 4, 1792–August 11, 1868)

thought the Reconstruction Amendments didn't go far enough in solidifying the rights of African Americans and poor Whites and in punishing the southern Democrats and Ku Klux Klansmen who still held sympathy with the vanquished Confederacy. In the end, however, Stevens urged his colleagues to endorse the bill on the grounds that he and they both "live among men and not among angels; among men as intelligent, as determined and as independent as myself, who, not agreeing with me, do not choose to yield up their opinions to mine. Mutual concessions is our only resort, or mutual hostilities."*[1]

---

*Here's the part of Stevens's speech that precedes the quote above:

> In my youth, in my manhood, in my old age, I had fondly dreamed that when any fortunate chance should have broken up for awhile the foundation of our institutions, and released us from obligations the most tyrannical that ever man imposed in the name of freedom, that the intelligent, pure and just men of this Republic, true to their professions and their consciences, would have so remodeled all our institutions as to have freed them from every vestige of human oppression, of inequality of rights, of the recognized degradation of the poor, and the superior caste of the rich.
>
> This bright dream has vanished "like the baseless fabric of a vision."
>
> Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition?

Given all this context and history, a reasonable person would probably conclude that the Reconstruction Amendments—particularly the Fourteenth Amendment—were designed to grant rights exclusively to human beings. There's no discussion at all of corporations in the Amendment itself, and nobody in that day would have dared propose that the Civil War was fought to "free" corporations. (If anything, many residents of the southern states to this day believe that it was corporate power in New England—particularly the bankers and the commodity traders in New York—who triggered the Civil War by asserting their economic power to bring the White plantation owners and agricultural commodity traders in the South into servitude to the northern banks.) And when it comes to the intentions of the authors of the Amendment, that reasonable person would be right.

But here's the problem: the particular choice of words used in the Fourteenth Amendment created a loophole that corporations continue to exploit to this day—to our collective detriment as a democracy.

American constitutional law is, in many ways, grounded in British common law, which goes back to the sixth century. In common law there are two types of "persons": "natural persons," like you and me, and "artificial persons," which include governments, churches, and corporations. The creation of a category for governments, churches (and other nonprofits), and for-profit corporations was necessary so that the law (and taxes) could reach them.

Without some sort of category, they couldn't enter into contracts, be held accountable to the law, or be assessed and made to pay taxes, among other things. Knowing this, most laws having to do with just human beings used the phrase "natural persons"; and those laws that were designed to reach only governments, churches, or corporations would specify them or their type by name or refer to "artificial persons."

The Fourteenth Amendment, however, does not draw any distinction between "natural" and "artificial" personhood, and twenty years later corporate lawyers would seize upon that to turn corporations from mere ways of organizing a business into the transnational superpersons that they are today.

Of course, such sweeping ramifications never occurred to Thaddeus Stevens or his colleagues who drafted the Fourteenth Amendment. The clause that grants all "persons" equal protection under the law, in context, seems to apply pretty clearly only to human beings "born or naturalized" in the United States of America.

But fate and time and the conspiracies of great wealth and power often have a way of turning common sense and logic on its head, as you'll learn in just a few pages.

What Is a "Person"?

In today's America when a new human is born, the child is given a Social Security number and is instantly protected by the full weight and power of the U.S. Constitution and the Bill of Rights. Those rights, which have been fought for and paid for with the blood of our young men and women in uniform, grace the child from the moment of birth.

This is the way we designed it; it's how we all agreed it should be. Humans are born with human rights. Those human rights are *inherent*—part of the natural order to deists like Thomas Jefferson, given to us by God in the minds of the more religious of the Founders. And those rights are not to be lightly infringed upon by government in any way. They're explicitly protected by the Constitution *from* the government. We are, after all, fragile living things that can be suppressed and abused by the powerful.

For example, in 2001 then–state senator Barack Obama said in a radio interview on Chicago's WBEZ,[2] speaking of the charges that the Supreme Court under Chief Justice Earl Warren had been a radical or activist court, pointed out that the Constitution was designed not to give us rights but to prevent government from taking our rights. He noted:

> To that extent, as radical as I think people try to characterize the Warren Court, it wasn't that radical. It didn't break free from the essential constraints that were placed by the Founding Fathers in the Constitution, at least as it's been interpreted, and the Warren Court interpreted in the same way, that generally *the Constitution is a charter of negative liberties.* [It] says what the states *can't* do to you. [It] says what the federal government *can't* do to you, but doesn't say what the federal government or state government must do on your behalf. [Italics added.]

His 2001 reference to the Constitution as a "charter of negative liberties" was loudly criticized by his political opponents in 2008 when the tape of the radio interview was publicized, but as a constitutional law professor and scholar he was right. The Constitution doesn't give us rights: it restrains government from infringing on rights we acquire at birth by virtue of being human beings, "natural rights" that are held by "natural persons." The Consti-

tution holds back (restraining government) rather than gives forward (granting rights to people).

While Thomas Jefferson felt it important to add a Bill of Rights to the Constitution (he wrote its first outline in a letter to James Madison), Alexander Hamilton spoke and wrote strongly against it, for exactly the same reasons President Obama had mentioned.

"The truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS"[3] (capitals Hamilton's), he wrote in the Federalist Papers (No. 84). His concern was that if there were a few rights specified in the Constitution, future generations may forget that those are just examples and that the Constitution itself protects *all* human rights.

Those few examples may become the only rights to survive into future times, an outcome the reverse of the intention of the Framers of the Constitution. Instead of defining a few rights, Hamilton wrote in Federalist No. 84, "Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations."

Hamilton pointed out that England needed a Bill of Rights because the king had absolute power, but in the United States that power was reserved to the people themselves. Thus, he said, "I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous."

An example he gave, particularly relevant today in the light of the recent *Citizens United v. Federal Election Commission* Supreme Court case, was the freedom of the press written into the First Amendment. "What is the liberty of the press?" Hamilton demanded. "Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable"[4] to try to define it or any right narrowly in a Bill of Rights.

But Hamilton lost the day, Jefferson won, and we have a Bill of Rights built into our Constitution that, as Hamilton feared, has increasingly been used to limit, rather than expand, the range of human rights American citizens can claim. And because it's in our Constitution, the only way other than a Supreme Court decision to make explicit "new" rights (such as a right to health care) is through the process of amending that document.

And in American democracy, like most modern democracies, our system is set up so that it takes a lot of work to change the Constitution, making it very

difficult to deny its protections to the humans it first protected against King George III and numerous other threats—internal and external—since then.

Similarly, when papers called articles of incorporation are submitted to state governments in America, another type of new "person" is brought forth into the nation. Just like a human, that new "person" gets a government-assigned number. (Instead of a Social Security number, it's called a federal employer identification number, or EIN.)

Thanks to a century and a half of truly bizarre Supreme Court decisions (never bills passed by the elected legislature), however, today's new corporate "person" is instantly endowed with many of the rights and protections of human beings.

The modern corporation is neither male nor female, doesn't breathe or eat, can't be enslaved, can't give birth, can live forever, doesn't fear prison, and can't be executed if found guilty of misdoings. It can cut off parts of itself and turn them into new "persons," can change its identity in a day, and can have simultaneous residences in many different nations. It is not a human but a creation of humans. Nonetheless, today a corporation gets many of the constitutional protections America's Founders gave humans in the Bill of Rights to protect them against governments or other potential oppressors:

- Free speech, including freedom to influence legislation
- Protection from searches, as if their belongings were intensely personal
- Fifth Amendment protections against double jeopardy and self-incrimination, even when a clear crime has been committed
- The shield of the nation's due process and anti-discrimination laws
- The benefit of the constitutional amendments that freed the slaves and gave them equal protection under the law

Even more, although they now have many of the same "rights" as you and I—and a few more—they don't have the same fragilities or responsibilities, under both the law and the realities of biology.

What most people don't realize is that this is a fairly recent agreement, a new cultural story, and it hasn't always been this way. Traditional English, Dutch, French, and Spanish law didn't say that corporations are people. The U.S. Constitution wasn't written with that idea; corporations aren't mentioned anywhere in the document or its Amendments. For America's first century,

courts all the way up to the Supreme Court repeatedly said, "No, corporations do not have the same rights as humans."

In fact, the Founders were quite clear (as you can see from Hamilton's debate earlier) that *only humans* inherently have *rights.* Every other institution created by humans—from governments to churches to corporations—has only *privileges,* explicitly granted by government on behalf of the people with the rights.

In the Founders' and the Framers' views, rights are human and inherent; privileges are granted conditionally. For example, deducting the cost of a business lunch from corporate income taxes is not a right; it's a privilege granted by laws that create and regulate the corporate form. Not being imprisoned without due process of law is a right with which every human is born. Even the "right" to incorporate is actually a privilege, since at its core it's simply a petition for a specific set of rules to do business by, which limits liabilities and changes tax consequences of certain activities.

But the Supreme Court has gradually—since the first decade of the nineteenth century in the *Trustees of Dartmouth College v. Woodward* case—been granting corporations *privileges* that looked more and more like *rights.* And, particularly since 1886, the Bill of Rights has been explicitly applied to corporations.

Perhaps most astoundingly, no branch of the U.S. government ever formally enacted corporate personhood "rights":

- The public never voted on it.
- It was never enacted into law by any legislature.
- It was never even stated by a decision after arguments before the Supreme Court.

This last point will raise some eyebrows because for one hundred years people have believed that the 1886 case *Santa Clara County v. Southern Pacific Railroad* did in fact conclude that "corporations are persons." But this book will show that the Court never stated this: it was added by the court reporter who wrote the introduction to the decision, a commentary called a headnote. And as any law student knows, headnotes have no legal standing.

It's fashionable in America right now—as it was during the Gilded Age—to equate unrestrained, "free market" laissez faire capitalism with

democracy, even going so far as to suggest that democracy can't exist without unrestrained capitalism.

China, Singapore, and other free-market capitalist dictatorships give the lie to this notion: their markets are among the most robust and vibrant in the world—and in Singapore's case has been so for more than half a century. And this myth, promulgated by "free market" think tanks funded by big corporations and individuals who got rich using the corporate form, even goes so far as to suggest that democratic socialism—a regulated marketplace, a strong social safety net, and democratic institutions of governance—will inevitably lead to the loss of "freedom." Democratic socialist states like Sweden, Norway, and Denmark give the obvious lie to that, although most Americans are blissfully ignorant of it.

But far more interesting is the inverse: Is it possible that what's *really* incompatible with democracy isn't socialism or a regulated marketplace but, instead, is the ultimate manifestation of corporate power—*corporate personhood?* And, if so—a case I'll build in this book—how do We the People take back our democratic institutions like the Congress from their current corporate masters?

this material has been excerpted from

Unequal Protection:
How Corporations Became "People" –
And How You Can Fight Back

by Thom Hartmann
Published by Berrett-Koehler Publishers

For more information, or to purchase the book,
please visit our website
www.bkconnection.com