

TED NACE

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# GANGS OF AMERICA

THE RISE OF CORPORATE POWER  
AND THE DISABLING OF DEMOCRACY



An Excerpt From

*Gangs of America:  
The Rise of Corporate Power and the Disabling of Democracy*

by Ted Nace

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# Introduction

ON THE MORNING OF August 2, 2002, millions of Americans turned on their TVs to see an unusual spectacle: a high-level corporate executive in handcuffs, being paraded by law enforcement officials in front of the news media. The executive was Scott Sullivan, chief financial officer of the telecommunications firm WorldCom. Along with fellow executive David Myers, Sullivan was charged with hiding \$3.85 billion in company expenses, conspiring to commit securities fraud, and filing false information with the Securities and Exchange Commission. The combined maximum penalties from the charges were sixty-five years. In response to the arrests, Attorney General John Ashcroft told reporters, “Corporate executives who cheat investors, steal savings, and squander pensions will meet the judgment they fear and the punishment they deserve.”

Now consider a different crime, committed by the leadership of General Motors together with Standard Oil of California, Firestone Tire and Rubber Company, B. F. Phillips Petroleum, and Mac Manufacturing. In 1936, the five companies formed National City Lines, a holding company that proceeded to buy electric trolley lines and tear up the tracks in cities across the nation. Each time it destroyed a local trolley system, National City would license the rights to operate a new system to a local franchisee, under the stipulation that the system convert to diesel-powered General Motors buses.

By 1949, more than one hundred electric transit systems in forty-five cities had been torn up and converted. In April of that year, a federal jury convicted GM and the other firms of conspiracy to commit antitrust violations. But the penalty turned out to be negligible. The judge set the fine at \$5,000 for each company. H. C. Grossman, treasurer of General Motors and a key player in the scheme, was fined one dollar. After the conviction, the companies went back to purchasing transit systems, removing electric trolley lines, and replacing them with buses. By 1955, 88 percent of the country’s electric streetcar network was gone.

Both the Scott Sullivan case and the National City Lines case fit the traditional definition of crime: laws were broken, the legal system intervened. But the second case suggests that the larger the crime, the more the

boundaries between “crime” and “business as usual” begin to blur. As Atlanta mayor and former United Nations ambassador Andrew Young once said, “Nothing is illegal if one hundred businessmen decide to do it.”

Young may have overstated things a bit, but the observation encapsulates a basic truth about American society. Business does tend to get its way, acting by means of a nebulous force known as “corporate power” that drives much of what happens in both the public and private spheres. But there are a few details to work out. What is the nature of this power? Exactly how does it work? Does the law *instantly* conform to the needs and wants of those one hundred businessmen? What happens when corporate America finds its wishes thwarted by constitutional barriers? Who decides what is “public” and what is “private?” Who defines the nature of “crime” versus “business as usual?”

IN ORDER TO ANSWER such questions, one challenge is merely to begin seeing a phenomenon that surrounds us so completely and continuously. I’ve spent most of my working life in the corporate world, founding and running a company that publishes how-to books about computers. In that world the corporation is the air you breathe. There is no questioning whether it is a good thing or a bad thing. It just is. Nor is there any thought about where the corporation—this particular institutional form—comes from. You assume that corporations have always been a natural part of the American system of “democracy and free enterprise.” But even as I pursued my business, questions lurked in the back of my mind, some of which had been triggered as early as my high school years.

I grew up in southwestern North Dakota, and my first summer job was building trails in the Badlands for the U.S. Forest Service. One day, I learned that a large energy corporation had applied to strip-mine a spot called the Burning Coal Vein, a rugged area where at night deep fissures emitted a glow caused by smoldering veins of coal, ignited long ago by lightning strikes or prairie fires. Along the hillsides, columnar junipers reminiscent of the trees in Van Gogh’s “Starry Night” stood like silent watchers draped in tunics. Piles of scoria—brilliant red, orange, and purple ceramic shards—covered the ground, the metamorphosed products of shale baked by the intense underground heat. It was like being in an immortal potter’s workshop, where every footstep made a tinkling sound as the scoria broke under your feet. That someone could dare propose

destroying a place of such beauty in exchange for a few thousand tons of low-grade coal stunned me. But, of course, the entity planning the mine wasn't a *someone* but a *something*—a corporation. Although people in the company may well have cared, the corporation itself didn't.

After college, I started working as a community organizer for a group of farmers and ranchers in North Dakota who were opposed to a vast expansion of strip-mining being proposed by a number of large companies. The shadow cast by these corporations across farms and ranches was not just a metaphorical one. The machines used in strip mines are quite literally of an awesome physical scale. When I saw *Jurassic Park* I experienced a feeling of *déjà vu*—it reminded me of being in a strip mine. To extract the coal underneath millions of acres of productive farmland and rangeland, the mining companies have to peel away the overlying layers of plant-nurturing soil, water-bearing aquifers, and rock. The peeling is done by immense, crane-like earth-eaters called draglines, which soar into the air the length of a football field. Like long-necked dinosaurs, the draglines make their way slowly amid ridges of rubble. Using tooth-edged buckets large enough to hold three Greyhound buses, they perform a drop-drag-lift-swivel maneuver, dropping the giant bucket, dragging it until it overflows, then suddenly jerking tons of dirt and rock high into the air, swiveling with surprising grace, and finally dumping the load onto the spoil piles. Especially at night, when intense lights illuminate the machinery and the rubble, the impression is hair-raising—a specter of monsters feeding upon the earth. And then you remember that the rubble being moved and dumped had been someone's pasture, favorite hillside, or alfalfa field. Reclamation? The companies promised that they would restore the land, but given the semiarid conditions, the fragility of the soil, and the complexities of such critical factors as hydrology and salinity, such assurances rang hollow.

You couldn't help but be affected by the courage of the families who carried on a daily existence next to the mines. I recall sitting in the kitchen of a wheat farmer named Werner Benfit and his elderly mother Anna, looking out at the advancing edge of North American Coal Company's Indian Head Mine near Zap, an ordinary town except for its Dr. Seussian name. Even though the towering spoil piles of the mine had come literally to the edge of the Benfits' property, chain-smoking Werner never lost his sense of humor. Anna brought out a plate of cookies and Werner told about the "suit" from North American Coal who had recently paid

a visit. The executive had told Anna that she could name any price in the world for her land. “I don’t know about that,” replied Anna, “but do you think you could move your spoil pile back a little ways so the rocks stop rolling onto my lawn?”

My boss was a genial Norwegian-American rancher named Randolph Nodland. Randolph had spent years fighting a company called Nokota, which had surreptitiously acquired the mining rights to thousands of acres of land and now threatened a number of farms and ranches with the possibility of an immense strip mine and an accompanying synthetic fuels plant.

One summer evening, as Randolph and I passed the time over pitchers of beer in the Shamrock Bar downstairs from our small office, he told me about a funeral he had attended the previous week at his local country church, Vang Lutheran. Flowers had been brought by the family of the deceased, but as Randolph took his place in the pews, a particularly large bouquet caught his eye. On a card the inscription read: “With deepest sympathies, Nokota, Inc.”

The memory of the funeral raised a mixture of emotions, which passed like prairie clouds across Randolph’s weathered face—disgust, anger, amusement. The funeral bouquet was just one of a variety of “personal” gestures by the company, including congratulatory cards sent to graduating high school seniors, booths at local fairs, and sponsorship of sports teams, all designed to ingratiate Nokota Inc. with the local community.

This particular gesture, though, crossed the line, and I knew Randolph would make sure the story of the grotesque social miscue made the rounds. In relating the encounter with the bouquet, the mere raising of an eyebrow would be enough to define and convey the insult—and having delivered that cue himself, Randolph could be assured that the message would pass from person to person. Such is the nature of a rural community.

But it occurred to me that Nokota’s weird social gesture also stood for something else. In a curious way, the ineptness of the funeral bouquet dramatized the mindless persistence that only a corporation can sustain. Randolph’s own energies, along with the combined energies of all his neighbors, were ultimately limited. In contrast, the energies of the corporation had no clear bottom. Maybe all the public relations activities of the company weren’t really about making Nokota popular.



Maybe they were simply a way of saying, “We’re here, we won’t go away, get used to it.” You can laugh at or hate a corporation, you can turn it into an object of contempt. You may experience it as a tenacious foe, you can get mad at it one day and ignore it the next. Nothing you may feel or do really matters, because in the end there is no getting around the fact that you are not fighting a normal opponent—your opponent is simply *nobody*. As Baron Thurlow said some three centuries ago, “Did you ever expect a corporation to have a conscience, when it has no soul to be damned, and no body to be kicked?”

From the inside, the view is different. I’ve repeatedly been struck by the paradox that even the most destructive corporations are populated by friendly, caring people. Sure, there are exceptions to that—corrupt companies, companies with poisonous internal cultures, even companies that ought to be classified as instances of organized crime. But in general, far more harm is caused by corporations acting in ways that are utterly legal and that seem, from the perspective of those inside the corporation, to be perfectly appropriate. Quite obviously, if corporations do harm, it is not because the people inside them lack souls. Rather, it’s because the company as a whole, like any organization, is a complex entity that acts according to its own autonomous set of motives and dynamics.

I was to learn that basic fact firsthand after I moved from North Dakota to California and started my computer book publishing business on the outskirts of Silicon Valley. The company started on my kitchen table with a single book that I had painstakingly written and printed on a first-generation laser printer. At that point the farthest thought from my mind was that I might be giving birth to an impersonal, monstrous entity, another Nokota. Indeed, nothing could have been more personal than this funky little company, Peachpit Press. For the first five years the business was in our house, with marketing meetings in the kitchen and kids’ toys under the desks. In the early days there were just a handful of us. I would write my how-to books in an office next to the bedroom. I would also answer the phones, and my wife would do the accounting. A friend would come in every few days and help ship books to people who had ordered them.

Over time, the company grew, and as it grew it subtly changed. Gradually our revenues advanced into the millions of dollars. In airports I picked up magazines like *Inc.* and *Business Week*. I opened my laptop computer on the plane and made cash-flow projections. I thoroughly

bought into the “win-win” notion of the self-made entrepreneur, providing useful things to help people solve their problems—and of course making money in the process.

Occasionally my company enclosed software with our books. I dealt with my production manager, who worked through an independent contractor with an assembly company that inserts floppy disks into vinyl envelopes that are stuck into the backs of books. After a while, I rarely thought much about the physical aspects of these various stages, or about the people who performed the tedious manual labor involved in assembling our book-and-software packages.

One particular day stands out in my memory, a day when things had gone slightly awry and I needed to step into an aspect of the business that I rarely got involved with. My production manager was on vacation, there had been a miscommunication of instructions, the warehouse staff called to say that the assembly company was applying our floppy disk labels in the wrong way, and someone needed to straighten things out.

I drove over to the assembly company in South San Francisco and met an account manager, who walked me through a warehouse with towering metal shelves. I saw clerks behind glass walls, line managers, workers lined up along the steel rollers of assembly lines.

Suddenly it dawned on me. All the clerks in the offices and all the foremen on the floor had white faces. All the workers on the assembly had brown faces. I speculated that they were Filipino immigrants. I had no idea how much they were paid, whether they were unionized, what sort of benefits they received, or what their hours were. So many aspects of the world economy became illuminated at once: the division of labor between haves and have-nots; the distancing of those who benefit from that division by means of “independent contractors”; my own personal involvement, which I had so conveniently compartmentalized and not thought about as long as it remained abstract.

“So this is how it works,” I thought, realizing that somewhere along the line, my little company’s operations had changed quite profoundly. But I had no time to let my thoughts go deeper. The pace was simply too fast to dwell on it. The thought passed quickly, vanishing into a crazy day embedded in a crazy month.

I had promised several key people that they would receive ownership shares of the company, and so one day my accountant called, saying, “Time to incorporate.” Until this point we had been operating as a sole

proprietorship, meaning simply that in the eyes of the state of California my wife and I were operating the business merely as individuals.

“What’s involved?” I asked. “What does it give us?”

“You go to a lawyer. He’ll give you some paperwork, register you with the state, and charge you a couple thousand. In theory it gives you a bit of protection from lawsuits, and it means that if the company goes bankrupt you won’t lose your personal assets. The company now will be owned by its shareholders, and your family will have more security because the company is now immortal—if you get run over by a bus, it will go on without you.”

“That’s it?”

“Yeah, that’s it—pretty much.”

Fair enough, I thought, adding “call lawyer re: incorp” to my to-do list. A week later, I made the call.

As I jumped through the hoops of the incorporation process, meeting with the lawyer and signing forms, I saw little significance in the whole exercise. I knew that our company could now put “Inc.” after its name and that the several people to whom I had promised shares could receive certificates documenting their ownership. But it struck me as little more than a necessary formality—like putting on a necktie when you go to ask for a loan. When the certificate of incorporation arrived one day, I stuck it in a file and got back to work. Still, an idea had begun to form in my mind, something like this: “Here I am, building a company. I enjoyed it when it was seven people, and I enjoyed it when it was twenty. But in struggling to survive, we inevitably keep growing. The larger the company gets, the more I feel that it is becoming something strange and separate—something that is taking on a life of its own.”

**F**OUNDING A COMPANY is a deeply personal act. After all, you invest years of your life and all of your creative energies in bringing that company into existence. Ironically, if you do your work well, you build something that gains momentum and eventually becomes capable of functioning without you—or any other single individual. Seemingly by magic, the company develops an existence of its own.

As the father of children both grown-up and on-the-way-to-being-grown-up, the sensation was familiar for me. As your children become capable of functioning on their own two feet, there’s always a slight feel-

ing of sadness: childhood is fading away. But that sadness is more than compensated for by a feeling of exhilaration, a sense of discovery and possibility.

With a corporation growing into maturity, you definitely feel a sense of creative pride, but alongside that pride you also feel a chill. Something complex and even alive has come into existence, but it is no longer governed by intuitively familiar human motives and values. Instead, it is a sophisticated, complex, adaptive, continually evolving system—a sort of mindless yet intelligent being—governed by an array of internal and external programming.

Is this really a problem? It all depends on your assumptions about the behavior of the complex systems we call institutions. Economists, for example, tend to see the profit-maximizing orientation of the corporation as a healthy thing. The interaction of numerous such actors, left to their own devices, produces an efficient allocation of resources. But economists, in their myopic fascination with the workings of markets, have little to say about the tendency of corporations, like all institutions, to seek goals beyond simple profit maximization, including that of gaining political power.

Much of what determines the behavior of such a system is internal, starting of course with the ethics, personality, and style of the leadership, in addition to innumerable other elements that make up the ineffable thing we called “corporate culture.” But a significant portion of a corporation’s programming is actually external to the corporation, embedded in the framework of laws that define the corporation’s powers and proscribe certain behaviors. For example, a city ordinance that excludes giant chain retailers or a statute that allows farmers to sue a nearby polluting facility for reducing their crop yields are both ways in which society attempts to program corporate behavior. So what happens when a corporation is able to interject itself into the political process and successfully undermine such controls? This question has been a persistent one in America for a long time—beginning even in the colonial era. But I’m getting ahead of myself. . . .

Eleven years after starting my company, I knew the time had come for a change. Business was booming, and one month I counted seven of our books on the computer-book best-seller lists. Yet I had the feeling I was living on borrowed time. I knew that unpredictability is the only constant in the tech industry, and that a small company like ours might well

be capsized by whatever round of unforeseeable craziness would present itself next. So I did what countless other nervous entrepreneurs have done—I sought out a business broker, who began quietly approaching potential buyers. Eventually a deal was done on terms that seemed as good as could reasonably be expected: a guarantee of two years of employment as well as a sizable bonus for each person on our staff, and a promise of autonomy for our company within the larger organization.

But my inner gyroscope forced me to call it what it was: a sellout. There was no getting around the fact that Peachpit Press was no longer an independent company. Instead it was now the colony of an immense empire—Pearson, Ltd., a multinational corporation with over ten thousand employees. On my last day I put a rose on each person’s desk, thanked them all for our time together, and walked away.

ONE OF THE DISABILITIES of being an American is that when we try to talk—or even think—about the workings of power, we often find ourselves strangely hobbled, swinging wildly between naiveté and cynicism. We live in a world of complex and finely tuned institutions and legal structures, yet our outlook is often formed through incoherent images, shallow concepts, and simplistic ideologies. We easily lapse into false dichotomies: if you’re not gung ho for capitalism, you must be against it. I understand fully why most Americans, although well aware of the reality of corporate power, tend to accept it as a given. There seems to be an attitude that inquiring into the substantive aspects of corporate capitalism is vaguely unpatriotic—a holdover, perhaps, from the fears and witch hunts of the Cold War.

The story of American government is familiar to all of us: the backdrop of colonial settlement under a monarchical system of rule, the rebellion against that rule, the crafting of a constitutional system, the national crisis over slavery, the extension of suffrage to women, and so on. In contrast, the story of how the central institution of our economic system—the corporation—developed is not part of our culture. In my own life, I had experienced the corporation from two drastically different angles: first, from the outside perspective of watching giant energy corporations assault a rural community; second, from the inside perspective of creating a business from scratch. Still, I knew next to nothing about the origins and evolution of the corporation as an institution. It certainly

wasn't something I had learned in school, even though I had studied American history in high school and majored in economics in college.

After the sale of Peachpit Press I took a vacation, and then I went back to work—this time alone, probing the questions that had slowly been forming in my mind: *What is a corporation? How did corporations get so much power? Where did corporations come from? How did this particular institution develop?* I began haunting the libraries at the nearby college campus. I fired up Google to see what people out in the world were saying about corporations. Not surprisingly, the story seemed scattered. Sociologists, political scientists, historians, legal scholars, economists, political activists, and even philosophers have taken up the question of corporate power, each within the confines of a particular discipline. But little has been done to reconcile these varying accounts and weld them into a coherent story. This book represents my effort to fill the gap.

# How Did Corporations Get So Much Power?

*In which the author reads a poll, feels provoked and befuddled, and organizes his investigation*

*As corporations gain in autonomous institutional power and become more detached from people and place, the human interest and the corporate interest increasingly diverge. It is almost as though we were being invaded by alien beings intent on colonizing our planet, reducing us to serfs, and then excluding as many of us as possible. —David Korten, *When Corporations Rule the World**

IT'S NOT OFTEN that Americans get asked by pollsters what they think about corporate power. Usually the questions are on issues like abortion and gun control. But in September 2000, *Business Week* published the results of a series of polls about how people felt about the power wielded by large corporations in American society. These polls were conducted more than a year before the corporate scandals involving Enron, Tyco, WorldCom, and other large companies emerged.

The polls suggested a massive cultural stomachache: too much corporate power, too much corporate *everything*. When the Harris pollsters commissioned by *Business Week* asked people what they thought of the statement “Business has too much power over too many aspects of our lives,” 52 percent said they agreed “strongly” and an additional 30 percent said they agreed “somewhat.”

Two months after doing its first poll, Harris asked a more specific question: “How would you rate the power of different business groups in influencing government policy, politicians, and policymakers in Washington?” Only 5 percent said that big companies had “too little” power; 74 percent said “too much.”

Why do large corporations have so much power? The *Business Week* polls didn't include that question. But one can perhaps imagine what people would have said if they had been asked. They would certainly have mentioned the power that large corporations derive from their political action committees, their lobbyists, their lawyers, their control over millions of jobs. They might have also mentioned the "revolving door" that moves corporate people in and out of government agencies, the corporate ownership of media conglomerates, and so forth.

All those factors are well known. Others are less so. As I began my research on the rise of the large corporation, I saw repeated references to aspects of corporate power whose roots lie buried in history, especially in obscure Supreme Court decisions that "discovered" corporate rights hidden in the language of the Constitution.

How do these corporate constitutional rights translate into political power? The answer is that they complement the other political resources available to corporations (especially large ones), providing a trump card to be played when more direct political tactics fail. When threatened by an unwanted regulation or a pesky piece of legislation, corporations have plenty of tools to draw on: lobbyists, publicity campaigns, threats to transfer factories overseas, and so forth. Even so, laws opposed by corporate interests do get enacted, regardless of conventional corporate clout, especially in times of heightened public mobilization. And this is when having a few constitutional rights comes in handy. The CEO or the vice president for legal affairs directs the corporation's lawyers to challenge the nefarious legislation in court. The court then finds the law "unconstitutional" and invalidates it.

I had heard and read repeatedly that the case in which the Supreme Court declared corporations to be persons for constitutional purposes was the 1886 ruling in *Santa Clara County v. Southern Pacific Railroad*. I figured that if *Santa Clara* was the key case in this century-long process of corporate rights decisions, then the text of the decision must be worth reading. I was curious how the Supreme Court had been able to justify declaring corporations to be persons. Typing "Santa Clara County v. Southern Pacific Railroad" into Google, I quickly found the decision online at [www.tourolaw.edu/patch/SupremeCourtcases.html](http://www.tourolaw.edu/patch/SupremeCourtcases.html).

The very first sentence of the online version reads as follows: "The defendant Corporations are persons within the intent of the clause of



section I of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.”

“All right,” I thought. “Let’s see how they justify this.” The idea that corporations should be considered “persons” seemed to be quite a radical metaphysical assertion, and I wanted to find out how the Court had backed it up. But rather than an explanation, I soon came upon a rather curious paragraph. Chief Justice Waite, it seems, was in an exceedingly crabby mood on January 26, the first day of oral arguments by the lawyers:

One of the points made and discussed at length in the brief of counsel for defendants in error was that “Corporations are persons within the meaning of the Fourteenth Amendment to the Constitution of the United States.” Before argument, Mr. Chief Justice Waite said: The Court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.

Wow! I thought. “The Court does not wish to hear argument.” How injudicious. Was the chief justice experiencing a bout of dyspepsia? Gout perhaps? (I’d read somewhere that King George III suffered greatly from this.) Or was this simply a glimpse into that whisky-soaked, hard-living era of railroad barons, alcoholic ex-generals, and their cronies? Maybe he had a hangover.

I read on, until I got to another sentence: “Mr. Justice Harlan delivered the opinion of the Court.”

Hmmm. Perhaps this would be the explanation I had been waiting for. So I read and read and read until my eyes glazed over—thirty-six exceedingly dry paragraphs about roadbeds, rails, rolling stock, fences, and rights of way. I went back and checked. Nope, nothing about corporate personhood. And finally I got to a passage where Justice Harlan declares the railroad to be the winner of the case, but not on “personhood” grounds. Instead, he awards the Southern Pacific a thumbs-up on highly technical grounds having to do with how the assessors categorized the

fences attached to the railroad's property. Indeed, Justice Harlan declares that the Court doesn't need to invoke any weighty principles to solve the case; the technical issues are sufficient.

Now I felt doubly provoked, first, by the idea that corporations should be treated on the same legal and moral plane as human beings, and second, by the absence of any discussion of *why*, and in fact, a disavowal that any constitutional issue had been decided by the case at all!

All this left me more than a bit befuddled. If those involved in the case itself did not believe they had decided a constitutional issue, then why had this case been heralded in the years since as doing exactly that? Furthermore, the whole notion of corporate personhood struck me as preposterously, intuitively wrong. I reflected on the common observation that there is something impersonal, alien, soulless, even Frankenstein-like about corporations, especially when they become extremely large. "If anything," I ruminated, "it is the people inside the corporation who need to have rights, not the corporation."

As I continued researching the *Santa Clara* decision, I found out that I wasn't the only person to find it confusing. The case is surrounded with complexities and even intrigue. As chapters 9 to 11 of this volume explain, researchers into this case over the decades have discovered schemers with hidden agendas, handwritten notes of untold consequence, false clues, deliberate obfuscation, even a "secret journal." Studying it is like peeling an onion. Beneath one layer of myth is another, and then another. The whole thicket of complications makes the *Santa Clara* decision interesting—perhaps a bit *too* interesting. Because of all the intrigue and complexity, this case tends to distract attention from other things, especially aspects of corporate empowerment that are hidden even further back in history. *Santa Clara* has become its own myth—leading to the mistaken idea that the entire octopus of corporate power stems from that one Supreme Court decision.

One tip-off that there is more to the story of corporate power than *Santa Clara* is the date of the decision: 1886. Yet something was surely going on earlier, because beginning in the mid-1860s a number of prominent Americans began issuing a stream of near-hysterical alarms about corporate power. For example, in 1864 Abraham Lincoln wrote the following in a letter to his friend William Elkins:

We may congratulate ourselves that this cruel war is nearing its end. It has cost a vast amount of treasure and blood. . . . It has indeed been a trying hour for the Republic; but I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war. God grant that my suspicions may prove groundless.

Similarly, in 1870, Henry Adams, grandson and great-grandson of presidents, wrote:

The belief is common in America that the day is at hand when corporations . . . after having created a system of quiet but irresistible corruption—will ultimately succeed in directing government itself. Under the American form of society, there is no authority capable of effective resistance. . . . Nor is this danger confined to America alone. The corporation is in its nature a threat against the popular institutions which are spreading so rapidly over the whole world, . . . and unless some satisfactory solution of the problem can be reached, popular institutions may yet find their very existence endangered.

Clearly, the process by which corporations accumulated the political and legal power they enjoy today neither started nor ended with *Santa Clara* in 1886. Although that case is important, it represents a single gene on the entire chromosome of corporate empowerment. To map this chromosome, we need to consider three overlapping phases of empowerment, summarized in Table 1.1 on the following two pages.

- ❖ *Legislative creation of corporate quasi-rights:* After the United States gained its independence, the various states constructed a highly restrictive system for regulating corporations. Over time, that system was undermined and dismantled through a series of legislative and judicial actions that can be fairly characterized as creating a growing body of *quasi-rights*. These new corporate

**Table 1.1**  
**Three Phases in the Development of Corporate Rights**

PHASE I: 1820–1900		
LEGISLATIVE CREATION OF CORPORATE QUASI-RIGHTS		
QUASI-RIGHT	AVAILABLE TO PEOPLE?	AVAILABLE TO CORPORATIONS?
Limited liability for shareholders	No	Gradual statutory revision by states (1820–1900)
Perpetual existence	No	Switch by states from custom charters to general incorporation (late 1800s)
Virtual location	No	New Jersey general incorporation law (1889)
Indefinite entity or “shape shifting”	No	New Jersey general incorporation law (1889)
PHASE II: 1886–1986		
JUDICIAL CREATION OF CORPORATE CONSTITUTIONAL RIGHTS		
RIGHT	AVAILABLE TO PEOPLE?	AVAILABLE TO CORPORATIONS?
Equal protection (state legislation)	Fourteenth Amendment	<i>Santa Clara v. Southern Pacific</i> (1886)
Due process (state legislation)	Fourteenth Amendment	<i>Chicago, Milwaukee and St. Paul Railway v. Minnesota</i> (1890)
Due process (federal legislation)	Fifth Amendment	<i>Noble v. Union River Logging Railroad Company</i> (1893)
Freedom from unreasonable searches	Fourth Amendment	<i>Hale v. Henkel</i> (1906)
Jury trial in a criminal case	Sixth Amendment	<i>Armour Packing Company v. U.S.</i> (1908)
Compensation for government takings	Fifth Amendment	<i>Pennsylvania Coal Company v. Mahon</i> (1922)

RIGHT	AVAILABLE TO PEOPLE?	AVAILABLE TO CORPORATIONS?
Freedom from double jeopardy	Fifth Amendment	<i>Fong Foo v. U.S.</i> (1962)
Jury trial in a civil case	Seventh Amendment	<i>Ross v. Bernhard</i> (1970)
Commercial speech	First Amendment	<i>Virginia Board of Pharmacy v. Virginia Citizens Consumer Council</i> (1976)
Political speech	First Amendment	<i>First National Bank of Boston v. Bellotti</i> (1978)
Negative speech (the right to abstain from association with the speech of others)	First Amendment	<i>Pacific Gas &amp; Electric Co. v. Public Utilities Commission</i> (1986)

PHASE III: 1987–PRESENT

TRADE AGREEMENT CREATION OF CORPORATE GLOBAL RIGHTS

RIGHT	AVAILABLE TO PEOPLE?	AVAILABLE TO CORPORATIONS?
Minimum standard of treatment	No	U.S.–Canada Free Trade Agreement (1987)
National treatment	No	U.S.–Canada Free Trade Agreement (1987)
Compensation for regulatory takings	No	North American Free Trade Agreement (1993)

Source: Phase I, see chapters 6 and 7. Phase II “Corporate Bill of Rights” follows a list compiled by Carl J. Mayer, “Personalizing the Impersonal: Corporations and the Bill of Rights,” *Hastings Law Journal*, 1990, 41, 664–667. Phase III, see chapter 16.

privileges included features such as limited liability and perpetual existence. This process continues today with new legislation such as tort reform laws that exempt particular industries from lawsuits. (The story is told in chapters 6 and 7.)

- ❖ *Judicial creation of corporate constitutional rights:* As shown in the table, corporations have gained at least eleven distinct constitutional rights as a result of a string of Supreme Court decisions over the course of a century. The first decisions granted corporations Fourteenth Amendment protections, which mainly became shields against attempts by states to enact taxes and workplace regulations. The most recent decisions have created a body of First Amendment protections, whose most significant effect is to impede campaign finance reform. (The creation of corporate constitutional rights is described in chapters 8 through 14.)
- ❖ *Trade agreement creation of corporate global rights:* The most recent phase of corporate empowerment began with the enactment of the U.S.–Canada Free Trade Agreement in 1987. International agreements have the effect of producing new rights that corporations can use to overturn the environmental, labor, consumer, and other laws enacted by sovereign states. (This process is described in chapter 16.)

Together, these three phases of corporate empowerment account for much of the embedded institutional power of the corporation today. But to fully understand the roots of corporate power, we need to look even further back—to the evolutionary antecedents of the modern corporation, which, as we will see in the next chapter, lie in the craft guilds of late medieval London.

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