

## FURTHER BACKGROUND READING

## WHY EXISTING LAW WON'T STOP CORPORATIONS FROM HARMING YOUR COMMUNITY

## SOME HISTORICAL CONTEXT

***“There is no unalienable right to local self-government.”***

That’s what Pennsylvania attorney general Thomas Corbett<sup>1</sup> said to the Commonwealth Court as he tried to overturn a municipal ordinance banning the dumping of urban sewage sludge on farm land.<sup>2</sup>

Was he right?

When the Declaration of Independence was signed on July 4, 1776, it was the work of many hands. Thomas Jefferson gets the credit, but the people of more than 90 towns and counties throughout the colonies had sent instructions to the Continental Congress calling for separation from England and enumerating a list of grievances to justify independence from the empire. Among the 30 or so listed complaints, the very first mentioned in Jefferson’s Declaration of Independence is the preemption of local laws:

“HE [the king as symbol of the empire] has refused his Assent to Laws, the most wholesome and necessary for the public Good....”

One thing we know for sure: The revolutionaries were not talking about state or federal laws. There were no “states” and there was no nation. It was the usurpation of the people’s right to enact and enforce local community laws that had them up in arms.

Today we find ourselves in a situation at least as dire as what the American Revolutionaries faced. State agencies routinely issue charters and licenses to wealthy corporations and then “permit” to legalize industrial damage to our communities. The permit is necessary because the “regulated” activity is self-evidently harmful to communities and nature, and the corporations need a legal shield against liability for the damage. In this way, the state makes it legal for corporations to violate unalienable rights. What it cannot do directly, it does indirectly through the corporate actor.

None of this is accidental or unintended, nor to be remedied by a quick fix, an enlightened court decision, or better regulations. It’s taken time and clever manipulation of the law for the privileged minority controlling corporate property to pin unalienable rights to the mat. To understand how the right to local community self-government has been disrespected, cordoned-off by procedural barriers, subordinated to the privileges of wealth, and nullified by judicial fiat, we need to look into the hidden history of the United States of America.

James Madison, author of the blueprint for our current U.S. Constitution, distrusted

local governing authority and democracy in general. He worked with a minority of state delegates to snip the people’s right to community self-government out of the federal system they were assembling. Madison had this to say at the secret convention in Philadelphia on June 26, 1787:

“The landed interest, at present, is prevalent; but...will not the landed interest be overbalanced in future elections, and unless wisely provided against, what will become of your government? If the elections were open to all classes of people, the property of the landed proprietors would be insecure. An agrarian law would soon take place. 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.”

We see the federalists’ and Madison’s attitude of condescension toward the self-governing rights of the less affluent a century later in the disdain for general local self-governing rights expressed by corporate industrialists. According to Martin J. Schiesel, in his book *The Politics of Efficiency: Municipal Administration and Reform in America: 1880-1920*:

“Simon Sterne, a reform lawyer and member of the Tilden commission [formed in 1875 to investigate the Tweed ring in New York], argued in 1877 that the ‘principle of universal manhood suffrage’ only applied to ‘a very limited degree’ in municipal administration because the city was ‘not a government, but a corporate administration of property interests in which property should have the leading voice.’ In the same vein, Francis Parkman saw the notion of ‘unalienable rights’ as an ‘outrage of justice...when it hands over great municipal corporations... to the keeping of greedy and irresponsible crowds.’ E.I. Godkin, founder-editor of *The Nation*, one of the country’s most influential organs of political criticism, pointed to unrestricted suffrage as the main source of misgovernment in major cities.”<sup>3</sup>

It was the expansion of voting rights to white men who were not property-holders that began the retraction of local self-governing authority as a national and state policy. Historian J. Allen Smith wrote of the times:

“The attitude of the well-to-do classes toward local self-government was profoundly influenced by the extension of the

suffrage...the removal of property qualifications tended to divest the old ruling class of its control in local affairs. Thereafter, property owners regarded with distrust local government, in which they were outnumbered by the newly enfranchised voters. The fact that they may have believed in a large measure of local self-government when there were suitable restrictions on the right to vote and to hold public office, did not prevent them from advocating an increase in state control after the adoption of manhood suffrage.”<sup>4</sup>

As the suffrage was extended further to black males and then to women, the ruling class of wealthy citizens focused more purposefully on disenfranchising from meaningful local self-government those newly attaining the suffrage. And as corporate-controlled policy makers supported an unparalleled influx of immigrants during the period of rapid industrialization, farmstead divestiture, and relocation of the dispossessed to the cities and larger municipal communities,<sup>5</sup> this trend was accelerated.

Iowa Supreme Court Justice John Dillon ably Americanized the English hierarchical tradition of condescension toward community self-governance. Before taking his place on the state bench, and later on the U.S. circuit court, he represented railroad interests against the claims of municipalities.

“Dillon’s Rule,” not a law but an opinion that bears its inventor’s name, maintains that each county, city, borough, town, and all political subdivisions of a state are connected to the state as a child is connected to a parent. Under this usurping concept, community governments are administrative extensions of the state, rather than elective bodies representing the right of the people to local self-governance. It is derived from one of Dillon’s decisions (*Clinton v. Cedar Rapids and Missouri River R. R.*, 24 Iowa 455), handed down in 1868, and expanded upon in his 1872 book, *A Treatise on the Law of Municipal Corporations*.

Dillon wrote: “It must be conceded that the great weight of authority denies in total the existence, in the absence of special constitutional provisions, of any inherent right of local self-government which is beyond legislative control.”<sup>6</sup>

Dillon’s Rule was adopted years later without discussion or argument, by the U.S. Supreme Court, to define the legal relationship between all American municipal and state governments.<sup>7</sup>

It is from this legal theory that the power of state preemption over local laws has

been concocted. To the continued chagrin of the friends of democracy, the legal establishment at the same time rejected the opinion of Michigan Supreme Court Judge Thomas Cooley (one of the era's leading scholars of constitutional law), who argued that cities received power directly from the people and thus they had a kind of limited autonomy:

"The sovereign people had delegated only part of their sovereignty to the states. They preserved the remainder for themselves in written and unwritten constitutional limitations on governmental actions. One important limitation was the people's right to local self-government."<sup>8</sup>

For the people to create the legislature and then subordinate themselves to its dictates, contradicts the principle espoused in the Declaration of Independence, which says, "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."

European immigration to the U. S. was integral to the transformation of American communities into corporate colonies. Between 1820 and 1860, approximately five million people entered the country. Between 1860 and 1890, 13.5 million arrived, and between 1900 and 1930, almost 19 million crossed the Atlantic, for a total of 37.5 million people between 1820 and 1930.<sup>9</sup>

With the growth of the immigrant population, efforts to disenfranchise minority voters and to strip property-less people of authority to use their municipal governments to make decisions of consequence became the political project of the age.

Following the dismantling of the slave-labor plantation system, upon which the U.S. economy was built, the meteoric rise of wage-slavery fueled corporate wealth. So did the transfer of more than 180 million acres of federal lands to the banks and railroads, as payment for Civil War debt. When corporate lawyers were likewise sent to occupy Congress and the U.S. Supreme Court, part of the corporate settling of accounts with the federal government was that they managed to deliver the Constitution's Bill of Rights to legally birthed "corporate persons" in 1886. A cascade of court decisions followed, with one right after another handed over without precedent to corporations. These were topped off most recently with the Citizens United and the Hobby Lobby decisions.

The effect has been to empower a wealthy minority. This minority hides behind the corporate shield of limited liability and personal immunity from prosecution. They wield the U.S. Bill of Rights against people who, using local law in attempts to govern corporate behavior when the industrialists and their lawyers came to town, find that their rights have been subordinated to these privileges.

Progressive era "reforms" at the end of the nineteenth and beginning of the twentieth century attempted to placate those who organized and complained about the corporate monopoly of people's lives and livelihoods. Among the measures adopted to deal with this criticism was "the regulatory system."

You only need to peek into the development of the first federal regulatory agency, the Interstate Commerce Commission (ICC), to gain a sense of the intent and effect on local self-governing authority of such agencies. In 1893, when this first of many regulatory agencies was established, then Attorney General Richard Olney assured the president of the Burlington Railroad that there was nothing for those protective of corporate prerogatives 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."<sup>10</sup>

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 corporations from local democracy and against being governed directly by the people with laws that would clearly subordinate the powerful minorities, commanding them to community majorities. The regulatory system has, in fact, erected a nearly impenetrable barrier between the people and their legal creations, the mighty corporations of today, which are chartered by state legislatures in their name. And it has guaranteed that so long as citizens play along and seek relief from corporate assaults in their communities by turning to regulatory agencies, the privileges conferred on the corporate class will continue to go unchallenged.

Not everyone was immediately conned by this bait and switch. In 1930, J. Allen Smith wrote:

"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. It may be regarded as a well established principle of political science that to ensure a satisfactory and efficient exercise of a given power, it should be lodged in some governmental agency directly responsible to the constituency affected."<sup>11</sup>

If the average community activist understood that removing community control over corporate behavior is the basis on which the corporate state has built its regulatory structure of law and silences the rights of people, they would begin to organize differently.

And so it is that people have begun adopting Community Bills of Rights using their municipal and county governments, which are the phantom limbs of the American Revolutionaries' cherished right to local self-government. The task has fallen to us or to our children if we shrink from it, to directly confront the legal protection of the special privileges of wealth against the fundamental rights of people, communities, and nature.

#### Sources and Notes

1. Elected Pennsylvania governor in 2010.
2. Legal brief filed by the Attorney General in response to a CELDF motion to dismiss in *Corbett vs. East Brunswick Township*, January 31, 2008.
3. Schiesl, Martin J., *The Politics of Efficiency: Municipal Administration and Reform in America: 1880-1920*, University of California Press, 1977, p. 9.
4. Smith, J. Allen, *The Growth and Decadence of Constitutional Government*, Henry Holt and Company, New York, 1930, p. 190.
5. "Expectant immigrants arrived with aspirations for democratic participation, and found that they were the least welcome of Americans except in as much as their bodies could become extensions of corporate industry." Trachtenberg, Alan, *The Incorporation of America: Culture & Society in the Gilded Age*, Hill and Wang, 1982, p. 169.
6. Dillon, John F., *A Treatise on the Law of Municipal Corporations*, New York, 1872, p. 156.
7. The rule was fully adopted for nationwide application to local governments by the U.S. Supreme Court, by reference to Dillon's book, in *Merrill v. Monticello*, 138 U.S. 673 (1891), and reaffirmed in *Hunter v. Pittsburgh*, 207 U.S. 161 (1907), in which the latter case upheld the power of Pennsylvania to consolidate two cities into one, against the wishes of the majority of the residents in the smaller city.
8. Burns, Nancy, *The Formation of American Local Governments: Private Values in Public Institutions*, Oxford University Press, 1994, p. 52.
9. Hays, Samuel P., *The Response to Industrialism 1885-1914*, The University of Chicago Press, 1957, p. 95.
10. Kazis, Richard and Grossman, Richard, *Fear at Work: Job Blackmail, Labor and the Environment*, New Society Publishers, 1991, p. 76.
11. Smith, J. Allen, *The Growth and Decadence of Constitutional Government*, Henry Holt and Company, 1930, p. 195.