

## Beyond Public/Private: Understanding Corporate Power

by John A. Powell & Stephen Menendian

Who inhabits the circle of human concern? Who counts as a person or a member of the community, and what rights accompany that status? In a democratic society, there is nothing more vital than membership. Those who inhabit the circle of human concern, who count as full members, may rightfully demand such concern and expect full regards. It is they who design and give meaning to that society's very structures and institutions; they have voice. This is the ideal of democracy. But there is an important question: Who inhabits this circle?

In our history, there have been varying answers to these questions. In *Dred Scott*, our nation's highest Court announced that persons of African descent were not and could never become members of the political community, and enjoyed "no rights which the white man was bound to respect." Yet the same Court carefully carved space in the circle for corporations, extending quasi-citizenship rights, and eventually full personhood. Consequently, corporations today enjoy never intended constitutional rights and protections. They exercise authority, power and influence that threaten not just democratic accountability, environmental safety and the rights of workers, but individual freedom, personal privacy, and civil and human rights.

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### Occupy Wall Street

The Occupy Wall Street Movement is a grassroots challenge to this power. The Movement harkens back to the 1870s Populist and farmers' rebellion against unchecked financial speculation which regularly set off Wall Street panics that sent families ever deeper into debt. The Occupy Movement highlights the contemporary predatory practices of companies like Goldman Sachs, one of the engineers of the great 2008 financial meltdown. On the

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other hand, the anti-statist Tea Party would insulate and secure corporate power, leaving individuals defenseless against unchecked corporate avarice. Its most basic tenets are market fundamentalism and governmental non-interference in the economy: Roll back regulations, reduce taxes and privatize government. These ideas are offered as the best, last defense of individual liberty in what is commonly perceived as an enduring contest between the public and private spheres.

Yet the debate over public versus private misses the point. In fact, it hides the real issue. The debate over public versus private, the size of government, the tax rate, the stimulus, the jobs bill, public worker benefits and so much more draws attention away from the behemoth in the boardroom: corporate power. By framing the issue as public versus private, government versus the individual, we blind ourselves to the ways in which corporations distort our democracy.

The Occupy Wall Street Movement senses this, but cannot name it as such.

The public/private distinction papers over meaningful differences between real human beings and corporations. Entrepreneurs, small business owners, farmers, workers and enormous corporations are all swept up into the "private" sphere. In turn, the public sphere is seen as a threat to the private, and any growth in government as harmful to all "private" persons. From this perspective, regulations intended to curb the excesses of corporate behavior seem equally hostile to the small business owner or homeowner. For example, the Dodd-Frank Wall Street Reform and Consumer Protection Act, which was designed to protect consumers and homeowners from the kind of predatory lending practices that resulted in the meltdown of 2008, is attacked as an unnecessary regulation that strangles local banks, small businesses and start-ups.

How have we gotten to the point where any regulation that constrains major corporations is viewed as an attack on individual liberty, small farmers and business owners? We must know that neither corporations nor markets can exist without enabling and constraining regulations. There never has been or will be an unregulated market. The architects of this nation and its citizens understood that concentrated power in either government or the economy may threaten freedom. But those on the right miss this reality in current debates, in large part because the public/private dichotomy uncomfortably sorts everyone into one of these two categories. The result is a blind spot in which corporations dwell as merely "private" persons like everyone else. In essence, the public/private distinction has grounded the expansion and protection of corporate power.

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## A Brief History of Corporate Power

Corporations were never intended to be persons or citizens. In our Republic's early years, corporations were public institutions, chartered to serve public purposes: build roads, facilitate commerce and educate the public. In exchange for the benefits of corporate form, including perpetual life, corporations were expected to serve the nation. Early Americans were as wary of concentrated economic power in corporate form as they were of concentrated political power in monarchical form. But 19<sup>th</sup> Century lawyers and judges, often in the service of corporate entities, began to free corporations from state control.

Corporations were traditionally understood to be creatures of the state—artificial entities that could enter into contracts, sue and be sued, and enjoy perpetual life. By the 1840s, the Taney Court decided that corporations counted as citizens under the Constitution for the purpose of suing in federal court. Passage of the 14<sup>th</sup> Amendment, designed to protect the rights of freed slaves after the Civil War, became an even firmer basis for protecting corporate prerogative. The equal protection and due process protections therein were quickly extended to corporations. And, in *Santa Clara v. Southern RR* (1886), the Court asserted, without argument or explanation, that corporations were considered “persons” under the Constitution that enjoyed many of the rights it afforded.

Just as the Court extended standing rights to corporations, it denied those rights to blacks. This inverse connection between limited rights for blacks and other marginalized groups and the concomitant expansion of corporate power persists. Between 1890 and 1910, just 19 cases brought under the 14<sup>th</sup> Amendment dealt with the rights of descendents of slaves, whereas 288 dealt with the rights of corporations. Justice Hugo Black pointed out that by 1938, of the cases

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that applied the 14<sup>th</sup> Amendment since the *Santa Clara* decision, “less than one-half of 1 per cent invoked in it protection of the Negro race, and more than 50 per cent asked that its benefits be extended to corporations.” This period is well-known as the Jim Crow era, and in legal circles as the

### **The case against corporations is not anti-capital.**

infamous *Lochner* era, named for Supreme Court decisions that struck down state labor and minimum wage laws, and economic regulations. The Tea Party's anti-statism is reminiscent of this era, which severely curtailed the power of the federal government and states to regulate the economy.

This period came to a crashing halt with the New Deal and FDR's Court-packing plan to stop the Court from overturning it. The Court reversed course on both race and economic regulations in a series of cases epitomized by *Carolene Products*. In that case, the Court announced a rule that economic regulations were presumptively constitutional rather than presumptively unconstitutional, and that courts would defer to legislatures to

fashion reasonable labor and wage laws in the public interest. At the same time, the Court announced that laws that reflect prejudice against “discrete and insular minorities” would be more carefully scrutinized by courts. As the law constrained corporate and economic prerogative, it conversely protected the rights of “minorities.”

Even as this approach helped spur the Civil Rights Movement, a massive resistance emerged in the South, followed by a backlash in the North. The country and courts again moved away from protecting, first minorities, then all people, in favor of expanding corporate discretion. It was Justice Powell, a former lawyer in the firm that opposed *Brown*, who secured renewed corporate power that had been limited by civil rights and labor. He simultaneously rejected the claim that the 14<sup>th</sup> Amendment protected “discrete and insular minorities,” and revived the spirit of corporations as deserving of protection as persons and citizens.

In the 1970s, Justice Powell authored a series of decisions arguing that commercial speech did not lose First Amendment protections because of the corporate actor. Even the conservative Justice Rehnquist foresaw the danger of protecting the

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free speech rights of entities that control vast amounts of economic power and enjoy the “blessings of potentially perpetual life and limited liability.” In particular, the dissenting Justices warned of the potentially distorting influence of corporate campaign contributions—protected as speech—in a democracy. These fears have now been realized and the full logic of corporate personhood exposed. In *Citizens United v. FEC* in 2010, the Court held that corporations enjoy unbridled First Amendment rights to spend independent money on political campaigns.

We are currently living out Powell’s dream, not Dr. King’s. It is Justice Powell’s vision which Chief Justice Roberts and his Court have embraced, along with the Tea Party. Speaking less in terms of the 14<sup>th</sup> Amendment and its purposes, they frame this dream in terms of “public” and “private,” with some acknowledgement that we may need to cut back on civil rights, unions and environmental protection in order to secure these liberties for corporations.

## Beyond Public/Private

We do not mean to suggest, however, that the exercise of excessive corporate power is simply a byproduct of errant Court decisions rendered over the past 125 years. While removing corporate personhood and limiting corporate speech rights within our jurisprudence would be a step in the right direction, the manifold bases of corporate power are much broader. It is the public/private distinction that distorts our legal and political culture into thinking that corporations are just like everyone else. The case against corporations is not anti-capital. Rather, it is an indictment of the pernicious influence of corporate power to influence our political system, manipulate our democracy and even reverse legislative decisions.

We suggest that a more appropriate schema for understanding corporate power and observing the dangers posed by it is to think in terms of four

domains rather than two: public, private, non-public/non-private, and corporate. The conflation of the corporate and private spheres confuses small business owners and ordinary citizens with powerful corporate actors. It also makes any legislative act that curbs corporate power appear to infringe the liberties of ordinary people. Critical legal scholars have long criticized the public/private dichotomy as a meaningless and misleading legal distinction. Historically, corporations were both quasi-public and quasi-private entities, but the conflation of corporations and their confirmed personhood with private space became a source of corporate

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## **Corporations are neither people nor citizens.**

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power, and continues to generate unintended corporate constitutional protections, rights, powers and authority.

The idea of public or private spheres is also misleading for certain marginalized groups that enjoy, historically and today, neither the rights and freedoms of the public in public space, nor those of individuals in private space. The public/private distinction not only makes it more difficult to appreciate how corporations threaten individual freedom and privacy, but to understand the exclusion of marginalized groups from both public benefits and private rights. Historically, women and slaves inhabited the non-public/non-private sphere. Today, immigrants, the incarcerated and formerly incarcerated, and to some extent the disabled, also inhabit this space, which is sometimes abusive.

## **Privatization as Corporatization**

The expansion of corporate power represents a threat, not only to the public, but to the private and non-public/non-private spheres as well. In

*Kelo v. City of New London*, the Supreme Court upheld the condemnation of a stretch of riverfront homes when the sole purpose of the taking was to enable private redevelopment by pharmaceutical giant Pfizer, Inc. Although not a privatization case, this decision suggests the true function of privatization. The privatization of public entities or property is not simply a shift from public to private control; it is a shift from public to corporate. As a heuristic, the public/private dichotomy fails to capture these shifts in power or account for the consequences.

Not only may corporations collect and store personal information (Google’s “street view project” being one example), individual privacy and speech rights are often sharply circumscribed in corporate space. Consider the context of a commercial shopping mall. We may think of that space as public space, but it is not. Not only are there limited privacy rights free from surveillance, but First Amendment rights are limited, and there is virtually no right to organize or petition.

Meanwhile, the Tea Party would shield and protect the discretion of corporate prerogatives from the government under the banner of free markets, while remaining silent regarding the exclusion and oppression of the “private sector.” The unbridled exercise of corporate rights and prerogatives threatens our democratic process as well as “discrete and insular minorities.” It is our view that the market, banks and corporations should exist to serve people, as they were originally intended to do, not the other way around. Neither Adam Smith nor the founders of the nation subscribed to a faith in the intrinsic beneficence of corporate interests for the nation. Quite the contrary, they feared the concentration of economic power just as they feared the concentration of political power.

Who inhabits the circle of human concern? Some might argue that the poor, unemployed, gays, immigrants or Muslims do not belong as full mem-

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bers of our democracy. On the other hand, many, such as those in the Tea Party movement or jurists like Chief Justice Taney, would argue that corporations do belong, and enjoy constitutional privileges and rights. Along with the Occupy Wall Street Movement, we reject this position. We could draw the circle of inclusion and belonging liberally, but it would not include corporations. The public/private dichotomy is a false one that obscures what is at stake and blinds us to the separate corporate sphere. Despite the position of the Court and well-known politicians, corporations are neither people nor citizens. They do not belong in either the traditional public or private space, but rather inhabit their own space. Our position is not anti-corporate. Rather, we call for a proper alignment of corporations in a liberal democracy. Corporations make good servants, but bad masters. To realize this realignment will require a transformative wave of individual, judicial and legislative actors. Our goal is not to eliminate corporations, but to build an inclusive democracy with a sustainable economy of shared responsibility and prosperity. This is the unfinished dream of America. □

(MUSEUM: Continued from page 4)

The “Making a Way...” gallery will feature themed stories that will show how African Americans crafted possibilities in a world that denied them opportunities.

I recently hired Ralph Appelbaum Associates, planners, designers and producers of award-winning museum exhibitions, visitor centers and educational environments, to design the galleries.

So far, the Museum has acquired roughly 11,000 objects, including art, photographs, costumes and fashion accessories, musical instruments, sports-related objects and many others. Among objects recently acquired are *The Mothership*—the iconic stage prop made famous by legendary funk

## PRRAC Update

- **Xavier de Souza Briggs** has returned to MIT (and to PRRAC’s Social Science Advisory Board) after 3 years in Washington as Associate Director of OMB—welcome back, Xav.

- PRRAC Board member **John Powell** will shortly relocate to the Bay Area, where he will be Director of Univ. of California-Berkeley’s new Haas Center for Diversity and Inclusion as well as occupant of the endowed Robert D. Haas Chair in Equity and Inclusion.

- PRRAC Social Science Advisory Board member **Gregory Squires** has received the Helen and Robert Lynd Lifetime Achievement Award from the Community & Urban Sociology Section of the American Sociological Assn.

- We are pleased to welcome **Ebony Gayles** as PRRAC’s new Law & Policy Fellow. She is a 2011 graduate of the Washington Univ. School of Law, with a strong background in fair housing law.

- PRRAC Dir. of Research **Chester Hartman** has co-edited with **Edward Blakely** (former “re-

construction czar” for New Orleans) a special issue of *Housing Policy Debate* (Jan. 2012 release) on “Recovery After Hurricane Katrina.”

- *Putting the Movement Back Into Civil Rights Teaching*, the resource book PRRAC co-published with Teaching for Change, was selected by Teaching Tolerance (the project of the Southern Poverty Law Center) as one of the top 20 titles from the last two decades that is “an enduring classic.”

- As is my custom, and pleasure, at the end of each year, I want to thank the various folks who assist in getting *P&R* out: our numerous short-term policy and law interns, but especially **Angela Parker** of the Center for Law & Policy staff, who devotes a portion of her time to PRRAC and is particularly helpful in putting together our Resources Sections, **Michelle Vinson**, who tirelessly updates our mailing list, and **Teri Grimwood**, who for lots and lots of years has assisted me with all kinds of projects—in this instance, creating the layout for each issue. - CH

collective Parliament-Funkadelic; the set from Soul Train, the longest running syndicated program in American history; and we will soon accept delivery of a PT-13 Stearman bi-plane used to train the Tuskegee Airmen.

One of my favorite objects in the collection is a beautifully engraved powder horn with a stopper, with the inscription: “Prince Simbo his horn made at Glastenbury November 17th AD 1777.” This powder horn was used during the American Revolution by a black soldier and former slave, Prince Simbo, a resident of Glastenbury, Connecticut. Simbo served as a private in the Seventh Regiment, Connecticut Line of the Continental Army.

Related documents include a payment note to Prince Simbo; a manuscript document listing the cost of supplies for eleven soldiers, including Prince Simbo; and a manuscript document providing blankets for two black soldiers, Sampson Freeman and Prince Simbo. With this and other compelling material, the Museum will present the rich history of African Americans who served in the U.S. military.

For some, the year 2015 may seem far away. But not for me and my staff at the National Museum of African American History and Culture. We still have a lot of work to do. We are in a race with time, and we can see the finish line in the distance. □