

# By What Authority

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## THE BIRTH OF THE WHITE CORPORATION

By Jeffrey Kaplan

James Baldwin once compared white Americans' view of their own history to a factory within whose walls they have barricaded themselves. They remain trapped in that factory which "at an unbelievable human expense, produces unnamable objects."<sup>1</sup> Those objects are unnamable because they exist deep within our world of shared cultural beliefs. But we do have names for their outward manifestations: environmental degradation, class oppression, and racism, to name a few. Such a list must also include the legal fiction that the corporation is a person.

The primary engine of white United States history has been the use of property, the ownership of things, as a means of domination over people — and the use of people as property, for slavery was the original basis for wealth in white America. But there are other ways besides slavery in which notions of property and race have become fused. For example, W.E.B. Du Bois noted that whiteness yields a "public and psychological wage"<sup>2</sup> to all white workers, which is expressed in the freedom to mingle across social classes, preferential treatment by police, eligibility for government jobs, and simply a greater sense of well-being than blacks.

Du Bois well understood that most of the wages of whiteness accrue not to poor whites, who receive only a pittance, but to the dominant classes. But what even he may not have been aware of is how, at the

time of its birth, the modern corporation received as its patrimony the wealth and privileges accumulated during slavery. In 1883, the very same year that the US Supreme Court heard arguments in favor of declaring that a corporation is a natural person, the Court also invalidated the enforcement of civil rights for African Americans.<sup>3</sup> This was the first of a series of decisions that led to the Court's approval of racial segregation. The Court eventually held that both corporate personification and racial segregation were justifiable under the Fourteenth Amendment,<sup>4</sup> which was passed with the explicit purpose of protecting the rights of former slaves after the Civil War. This connection is more than a mere oddity of US legal history. **These court decisions are part of a common social structure in which the exercise of social power through property rights continues to mask the concomitant disempowerment of people of color. In effect, what the courts decided is that corporations are people while African Americans are not; and that, while property could no longer be held in the form of black skins, it could still be invested in white ones.**

### WHITENESS AS PROPERTY

In a long article in the *Harvard Law Review* called "Whiteness as Property," African American legal scholar Cheryl Harris provides an analytical framework we can use to clarify some of the ways in which white skin privilege has been gen-

erally conjoined with property. Her paper "investigates the relationships between concepts of race and property and reflects on how rights in property are contingent on, intertwined with, and conflated with race. Through this entangled relationship between race and property, historical forms of domination have evolved to reproduce subordination in the present....

**Whiteness and property share a common premise — a conceptual nucleus — of the right to exclude.**"<sup>5</sup> [bolding added] The essence of property in the Anglo-American legal tradition is that its owner can exclude others from using it. The essence of white skin in the US is that those who do not possess it are excluded from certain rights and privileges, including that of being treated as a full human being.

Property is not restricted to those things that we can sell that are separable from ourselves. For example, a college degree has market value. The courts have held that in the event of a divorce, a spouse who supported her husband while he earned a medical or law degree has an interest in that degree and is entitled to compensation for her efforts in helping him earn it.<sup>6</sup> In a sense every Caucasian in the US is born with a "masters" degree.

The financial interest white people have in race was recognized by the justices who legitimized racial segregation in *Plessy v. Ferguson* in 1896. The case was a carefully staged challenge to a Louisiana law requiring segregation on railroads. The lawyers challenging the law purposefully chose a well-educated African American who could pass as white. One of the arguments the lawyers then made was that by publicly labeling Plessy as "colored," the railroad had deprived him of the reputation of being white "which has an actual pecuniary value."<sup>7</sup> The Court conceded that if such a thing were done to a white man he

*continued on page 2*



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## *White Corporation* (continued from page 1)

would have grounds for a lawsuit but evaded the issue in its decision to uphold the state law. As recently as 1957 a white person could sue for defamation if she was called "black" but a black person could not sue if she was called "white."<sup>8</sup>

### THE PERSONIFICATION OF THE CORPORATION

The corporate person is a white person. It was given its invisible, but nonetheless valuable, color because of the conjoint exclusionary privileges of whiteness and property. The reasons why men of means saw fit to create such a legal fiction can only be understood in the context of the rise of large-scale capital in the period before the Civil War. **That war was fought not because the majority of the citizens of the North found slavery to be repugnant, but to determine which group would be the senior partner in the capitalist state: the old power elite of the Southern slave holders or their challengers, the Northern industrialists.** The Emancipation Proclamation was issued during the war not simply to free the slaves of the Confederacy but in large part because the Northerners feared they might lose unless they found a new source of recruits for their army. They hoped the slaves would fight for their freedom and some 180,000 of them did — so well, in fact, that during the Reconstruction period after the war, the newly freed slaves briefly enjoyed the status of war heroes in the Northern newspapers.<sup>9</sup> This complicated the problem for Northern capitalists who were trying to figure out how to consolidate their victory over the Southern planters. The politics of race in the years after the Civil War presented the Northern capitalists with both a threat to their newly enhanced position and an opportunity to achieve that consolidation. They moved quickly to eliminate the threat and take full advantage of the opportunity.

The war had not broken the power of the Southern elite. They still owned the plantations and thus controlled the only source of employment for the overwhelming majority of the newly freed slaves. If the Southern states were simply re-admitted to the Union without any other changes, the planters could have

easily resumed the control of Congress they had held before the war. Enfranchising the freed slaves with the vote seemed to be the way to break the power of the planters. But to be effective, enfranchising blacks would also require that they have the means to support themselves. There would have to be a massive redistribution of land not only to blacks but also to poor whites. This was the program favored by the Radical Republicans who, as W.E.B. Du Bois put it, wanted to "make the slaves free with land, education and the ballot, and then let the South return to its place."<sup>10</sup>

The Northern capitalists saw this possibility as a threat to their interests, first because it would have broken down the racial split between blacks and Southern whites that the elites of both the North and the South had long exploited. This would have likely spilled over to the white Northern wage workers as well. Second, it would have destroyed the capital base of Southern agriculture and turned the South into a producer-controlled society of independent farmers. The Northerners didn't want to eliminate Southern capital; they wanted to dominate it. Finally, it would be enormously expensive, requiring the long-term presence of federal troops in the South and draining away resources the Northerners wished to devote to expanding the industrial system. For these reasons, their congressional allies opposed the proposals of the Radical Republicans. **For the Northern capitalists the newly won human rights of former slaves were of interest only insofar as black voters served as a check on the political power of the old Southern planter elite.** That check was needed as long as the Northerners had not yet established economic control over the states of the former Confederacy. As Du Bois described it, the Northern capitalists' plan was to "guard property and industry; when their position is impregnable, let the South return; we will then hold it with black votes, until we capture it with white capital."<sup>11</sup>

The capture was complete by 1877 when the capitalists brokered a deal over a contested presidential election whereby the federal troops were withdrawn from the South in return for a promise by the Southerners to become junior partners to

the Northern capitalists.<sup>12</sup> This event marked the end of Reconstruction and the beginning of the post-Civil War oppression of African Americans in the South. The Supreme Court gave its approval to the new social order in 1883 when it declared the Reconstruction-era Civil Rights Act unconstitutional. Frederick Douglass declared that this decision by the Court “inflicted a heavy calamity upon seven millions of the people of this country, and left them naked and defenseless against the action of a malignant, vulgar, and pitiless prejudice.” He yearned for “a Supreme Court of the United States which shall be as true to the claims of humanity as the Supreme Court formerly was to the demands of slavery!”<sup>13</sup>

### THE BIRTH OF THE WHITE CORPORATION

After consolidating its political power over the South, the industrialists were hampered by the fact that the US legal system was heavily oriented toward the rights of individuals and, as such, did not fully support the kind of organization that was needed for the consolidation of control over the rapidly emerging industrial system. The personification of the corporation was their solution to this problem.

The legal argument made before the Supreme Court on behalf of corporate personification began with a lie that was perpetrated in December of 1882 in the case of *San Mateo v. Southern Pacific Railroad*. The lawyer who lied was Roscoe Conkling, a former United States Senator and one of the politicians DuBois identified as a principal architect of capital’s strategy during Reconstruction. Conkling had served on the congressional committee that drafted the Fourteenth Amendment. He claimed that, according to his copy of the committee journal, the original intention was that the amendment should apply to corporations as well as to human beings. The journal had not been published at the time the case was being heard and the justices did not question his account. Some decades later the journal was published. It showed that Conkling’s claim was, as a modern authority on the history of the Fourteenth Amendment put it, “a deliberate, brazen forgery.”<sup>14</sup>

The railroad’s lawyers did not let their case rest on a simple lie. Their concluding argument, made in 1883 by Silas W. Sanderson, leaves no doubt that they also made a blatant appeal to white racial solidarity:

It is very clear, if we look back over the history of the past twenty years, that this country has done a great deal for [members of] the negro race. . . . It has made them free men . . . it has placed them on a par and equality with the white man. But that is none too much; we do not complain of that. We only say that something should now be done for the poor white man. We ask that he . . . be lifted up and put upon a level with the negro. We ask that this fourteenth amendment be so construed as to concede to the white man equal rights under the Constitution of the United States with the black man. Our claim is for universal equality before the law. . . . [M]y friends upon the other side, by their construction of this amendment, would create a privileged class. They have demonstrated . . . that the negro race . . . stands higher upon the plane of legal rights than the white man; that whenever his rights are invaded he finds a shield and a protection in the fourteenth amendment . . . but whenever the white man’s rights are invaded, whenever he is outraged by unjust State legislation, we are told . . . that there is no shield for him to be found in the fourteenth amendment; that the white man is without protection in cases where the black man is protected. . . . I understand, then, that we may consider, for the purpose of this case . . . that there are not two Constitutions in this country — one for the black man and one for the white man — and that the white man is at last on an equality with the negro.<sup>15</sup>

**Clearly, the modern corporation was not to be just any kind of person; it was to be — it had to be — a white person, a white person created by the corporations, of the corporations, and for the corporations in direct opposition to the aspirations of African Americans to live their lives as human beings.** But not only did the corporation have to be a white person, Sanderson also said he was arguing on behalf of the “poor white man.” Of course he was not working at the behest of struggling white

farmers and workers. Sanderson’s client was Colis Huntington, one of the most powerful railroad barons in the nation. Sanderson sought corporate personification by claiming that the state was violating the railroad’s civil rights when it wrote tax laws that made a distinction between individual human beings and corporations. However, there was a place for the poor white man in the worldview of men such as Huntington and Sanderson. It was described nicely by an Alabama journalist in 1886: “The white laboring classes here are separated from Negroes . . . by an innate consciousness of race superiority which excites a sentiment of sympathy and equality on their part with classes above them, and in this way becomes a wholesome social leaven.”<sup>16</sup>

The Court never issued an opinion in *San Mateo* because the parties settled out of court. But the railroad barons had already instigated another case, this one involving the neighboring county of Santa Clara. In 1886, in *Santa Clara County v. Southern Pacific Railroad*, the Court declared it would not hear any further arguments on whether the Fourteenth Amendment applies to “these corporations. . . . We are all of the opinion that it does.”<sup>17</sup> Even at the time it was considered extraordinary that the Court did not state its reasoning for such an important statement. But then they would have had to expose to public scrutiny a blatant legal fabrication.

### THE WHITE CORPORATION COMES OF AGE

At the time of its birth the white corporation was a child of the railroads, which had long been the only truly large-scale enterprises in the US. But within a few years industrial and manufacturing firms also began to form massive conglomerates. Their leaders realized that the white corporation would serve them well as they sought to extend their industrial empires. The years from 1895 to 1907 saw what has been termed the great Corporate Revolution, at the end of which entire industries were controlled by one or two large firms. Of the 100 largest corporations in existence 50 years later, 20 were created by consolidation

*continued on page 4*

during this period. Eight more were created a few years later when the courts ordered the split-up of Standard Oil.<sup>18</sup>

This was also the period during which racial segregation and imperialism became accepted features of white America's national identity. Not only did the US Supreme Court approve of racial segregation during those years, blacks were attacked in race riots in cities all over the country: Atlanta; New Orleans; New York City; Akron, Ohio; and even Lincoln's hometown of Springfield, Illinois. In 1903 the African American novelist Charles W. Chestnutt noted that "the rights of the Negroes are at a lower ebb than at any time during the thirty-five years of their freedom, and the race prejudice more intense and uncompromising."<sup>19</sup> White America had replaced the system of slavery with one of caste.

Once the caste system was safely in place, the white corporations could concentrate on expanding the privileges that inhered in their invisible white skins. Until about 1960, the corporations' status as persons was used primarily to protect and expand corporate property rights against attempts by the states to impose economic controls. In 1938 Justice Hugo Black noted that of the cases in which the Supreme Court applied the Fourteenth Amendment during the first 50 years after *Santa Clara*, "less than one-half of one percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations."<sup>20</sup> As this statistic shows, the white corporation had usurped the rights of the people whom the Fourteenth Amendment was meant to protect. It was using those rights — which it had obtained through what amounts to a legally engineered fraud — to expand its own interests. At the same time, African Americans were deprived of their legal voice and forced to suffer a violent oppression in silence. **Thus we can look at each one of those actions on behalf of corporations as a transfer of both economic and human rights from black people to those who control large-scale capital.** In a sense, James Baldwin's unnamable objects found their physical expression in the innumerable products marketed by the giant corporations.

But the desire for freedom found its own expression in the civil rights move-



ment, the environmental movement, and the demands by women for a full role in social life. All of these attempts by real human beings to assert their rights threatened the prerogatives of the corporations. Corporate lawyers responded by seeking to expand the standing of corporate persons to include a number of protections under the Bill of Rights that previously had been granted only to human beings. Since 1960 the Supreme Court has granted to corporate persons the right of free speech — especially political speech — under the First Amendment, protection against double jeopardy under the Fifth Amendment, the right to counsel under the Sixth Amendment, and the right to a jury trial under the Seventh Amendment.<sup>21</sup> **In other words, the Court has endorsed a counter-attack by property against the assertion of human rights by the public in general, and people of color and women in particular.**

Of course the white skin possessed by real human beings of European descent is no guarantee of protection against the artificial white person. Recently a well-to-do white community challenged a federal law that allows telecommunications companies to ignore local zoning ordinances when putting up microwave towers. The community lost when their corporate opponents cited a civil rights statute whose language originated in a Reconstruction-era attempt to protect the rights of African Americans against the Ku Klux Klan.<sup>22</sup> Such an irony would not have been lost on Baldwin: "People who imagine that history flatters them (as it does, indeed, since they wrote it) are impaled on their history like a butterfly on a pin and become incapable of seeing or changing themselves, or the world."<sup>23</sup>

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## ENDNOTES

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21. "Personalizing the Impersonal: Corporations and the Bill of Rights," by Carl J. Mayer, *The Hastings Law Journal*, Vol. 4, March 1990, pages 629-636.
22. *Omnipoint Communications Enterprises L.P. v. Zoning Hearing Board of Chadds Ford Township, PA*, UCS Bi, 98-2295, November 1998. The corporation was awarded attorneys' fees under section 1983 of the 1964 Civil Rights Act.
23. Baldwin, page 723.



# When Silence Is Not Golden

NEGATIVE FREE SPEECH AND HUMAN RIGHTS FOR CORPORATIONS

by Dean Ritz

**W**hen is silence not golden? When it supplants people's authority by allowing corporations to remain silent on factual information, protected by the doctrine of *negative free speech*. Negative free speech is a Supreme Court expansion of the free speech provision of the First Amendment; it is a right to be free from forced association with a particular expression of speech. This legal existence has significant implications for social justice activists and serves to illustrate how the law is used to promote a narrow conception of democracy and human self-governance.

We find the origins of negative free speech in court battles over state laws intended to promote a diversity of views on issues of public concern. Two laws and the subsequent court battles over their constitutionality are worth noting. The first is a 1973 Florida state law that granted political candidates the right to equal newspaper space to respond to criticism of their record by a newspaper, often called "right of reply" statutes. The second is a 1980 administrative law passed by the California Public Utilities Commission that mandated access to the billing envelopes of the Pacific Gas & Electric Company for use by a ratepayer's organization; if the utility company took a stance on an issue of ratepayer concern and distributed that stance in billing envelopes, then ratepayers should have equal access to voice their divergent opinion. The Miami Herald Publishing Company successfully challenged the Florida law in the US Supreme Court,<sup>1</sup> and the Pacific Gas & Electric Company successfully challenged the Commission's administrative law.<sup>2</sup> Both corporate victories helped establish the *right not to speak* — negative free speech — as a First Amendment protection.

In numerous cases, US courts at all levels affirm informational diversity as one of the intentions of the First Amendment — the more voices, the better it is for a democracy. These good intentions have led to some decisions

antithetical to democracy, such as the equation of money with speech (thus granting constitutional protection to corporate spending for political purposes)<sup>3</sup> and the doctrine of negative free speech — particularly when it causes the withholding of factual information of public interest.<sup>4</sup>

The federal courts permit some legislation to infringe upon constitutional liberties, inventing the doctrine of *strict scrutiny* as a tool to determine whether or not a particular piece of legislation will be "allowed" to do so, or whether it should be struck down. Strict scrutiny requires that the government prove a compelling public interest is being served. For example, a law that prevents people from falsely yelling "Fire!" in a crowded theater is allowed to restrict freedom of speech because that particular expression of speech poses an imminent threat to public safety (e.g., a human stampede can cause injury and death), and public safety is a compelling state interest. The second prong of the test asks whether or not the legislation implements a "narrowly tailored means" to satisfy the compelling state interest. To continue with our "Fire!" example, a law that forbids all speaking inside a theater may be applauded by those bothered by others who talk during performances, but it is far too broad to meet the compelling interest of public safety. Outlawing a falsely shouted "Fire!" is suitably narrow. Legislation is deemed unconstitutional if it fails either part of this test of strict scrutiny.<sup>5</sup>

The Supreme Court applied strict scrutiny to both the Florida and California laws, decided that they failed the test, and overturned them. The Court noted the laws in question depended upon the content of speech; it was only in those cases where there was opposition to corporate speech that citizen access to the corporate-controlled communication channels was required. In Florida, this was space in the same newspaper that had printed criticism of a political candidate. In California, this was in the billing

envelopes the corporation sent out to utility customers. In both cases the corporations claimed their free speech rights were violated because they were being forced to associate with speech the corporations did not endorse. The Supreme Court hypothesized that if these laws remained on the books, the only way for the corporations to avoid the association with disagreeable speech would be for them not to publish any controversial speech at all. Thus the Court concluded that these laws impeded the informational diversity that the First Amendment seeks to foster and placed an undue burden upon corporate speakers. The Court thereby decided these laws infringed upon the fundamental liberty of free speech. Applying the test of strict scrutiny, the Court saw neither a compelling state interest being served nor a suitably narrow means of achieving whatever interests that state did possess. Thus both the Florida and California laws were revoked, and **negative free speech became a new tool in the corporate fight against the potential for human self-governance.**

There are two other assumptions of note in these Supreme Court decisions. First, the Court made no distinction based on who was speaking; that is, corporate speech and that of humans were considered equal before the law. Second, even a highly regulated company like a public utility warrants the same speech protections as a less or lightly regulated company. **These assumptions magnify the impact of negative free speech because they remove from citizen authority the ability to distinguish between speakers, thereby creating the circumstances for conflicting claims over rights.** This particular point is well illustrated by the 1996 federal Court of Appeals case of *International Dairy Foods Association v. Amestoy*.<sup>6</sup>

**A**t the heart of this case were conflicting claims to the human right of free speech by humans and corporations. As readers of constitutional cases know, **the framing of a case substantially determines whose rights, and thus whose interests, shall triumph:** the right of human beings to be informed of factual information or the corporate claims to negative free speech? Current Supreme Court doctrine holds that both reside in the First Amendment protection

of freedom of speech. *International Dairy Foods* concerns a Vermont labeling law that sought to provide factual information to consumers, enhancing their ability to make informed purchasing decisions.

The law required that dairy products produced by cows treated with genetically engineered recombinant growth hormone (rBST) be labeled as such.<sup>7,8</sup> The labeling technique detailed in the law was simple: either producers of affected products would add a blue rectangle to their packaging or retailers would affix a blue dot to the package. The Vermont merchant would also post a sign in their store defining what that blue symbol meant to the purchaser:

THE PRODUCTS IN THIS CASE . . . CONTAIN OR MAY CONTAIN MILK FROM rBST TREATED COWS. . . . The United States Food and Drug Administration has determined that there is no significant difference between milk from treated and untreated cows. It is the law of Vermont that products made from the milk of rBST-treated cows be labeled to help consumers make informed shopping decisions. [caps in original]

A closely related collection of dairy industry corporations appealed the law.<sup>9</sup> The Monsanto Company, the producer of the only FDA-approved rBST product, filed an amicus brief. Their lawyers claimed the statute violated the corporations' negative free speech rights of the First Amendment.<sup>10</sup> But the court recognized that the human beings who were to be the beneficiaries of this factual information were also making claims upon the First Amendment — specifically the right to be well informed.<sup>11</sup>

The court decided on behalf of the dairy corporations, agreeing with their lawyers' claims that the statute required them to make involuntary statements in violation of their First Amendment rights. The court then failed to see any substantial state interest as being served by the labeling law. Unlike food additives, rBST is not directly added to food but rather added to dairy cows. "[T]he state itself has not adopted the concerns of the consumers; it has only adopted that the consumers are concerned. Unfortunately, here consumer concern is not, in itself, a substantial [state] interest."<sup>12</sup> Ideologically speaking, the court presumed that con-

sumers had no interests other than curiosity, which is inadequate justification to pass a law restricting corporate speech. **The court decided that the knowledge of how products are produced — including such unsavory production practices as child labor and environmental damage resulting from production process — is beyond the authority of its citizens' demands and not of legitimate concern for the purpose of labeling laws.**

The Court of Appeals recognized this power of law to influence ideology and thus public consciousness. If mere human concern alone were sufficient to compel corporations to label products with details on how a product was produced, then it is reasonable to infer that any and every request for informational disclosure could be justified. So the Court of Appeals used the law to temper such human expectations and ideals:

Although the Court is sympathetic to the Vermont consumers who wish to know which products may derive from rBST-treated herds, their desire is insufficient to permit the State of Vermont to compel the dairy manufacturers to speak against their will. Were consumer interest alone sufficient, there is no end to the information that states could require manufacturers to disclose about their production methods. For instance, with respect to cattle, consumers might reasonably evince an interest in knowing which grains herds were fed, with which medicines they were treated, or the age at which they were slaughtered. Absent, however, some indication that this information bears on a *reasonable concern for human health or safety or some other sufficiently substantial governmental concern*, the manufacturers cannot be compelled to disclose it. Instead, those consumers interested in such information should exercise the power of their purses by buying products from *manufacturers who voluntarily reveal it*.<sup>13</sup> [italics added]

The Court of Appeals, because of its limited definition of "safety," did not recognize any legitimate safety issue because the FDA had already determined there were no health or human safety issues related to the use of rBST in dairy cows. In the end, basing their opinion on "sound science" — i.e., that what the FDA does

not know (or tell us) cannot hurt us — the court struck down the Vermont labeling law.

*International Dairy Foods* decided that humans do not have the right to even know where rBST is used. And inconveniently for consumers, the Monsanto Company's filing of lawsuits against two Vermont dairy producers, and their threats of legal action against two thousand others, effectively prevent the public from knowing where rBST is *not* used.<sup>14</sup> This arrangement grants corporations the right to silence people's right to know, thwarts the concept of "enlighten[ing] public decision-making in a democracy,"<sup>15</sup> and denies citizens the ability to "exercise the power of their purses" as the Court of Appeals cynically suggested would be a viable alternative to the labeling law.

**T**he dissenting opinion of Justice Leval took a different tack on this case. He recognized that the labeling law dealt with factual information — not opinion. The judgment arising from facts comes from the reader — not the speaker of the facts. This factual information is exactly the kind of information that citizens have a right to request, and the government has the legal capacity to procure an answer. He wrote:

[T]he true objective of the milk producers is concealment. They do not wish consumers to know that their milk products were produced by use of rBST because there are consumers who, for various reasons, prefer to avoid rBST. . . . In my view, the interest of the milk producers has little entitlement to protection under the First Amendment. The case law that has developed under the doctrine of commercial speech has repeatedly emphasized that the primary function of the First Amendment in its application to commercial speech is to advance truthful disclosure — the very interest that the milk producers seek to undermine.<sup>16</sup>

In other words, consumers have a legitimate right to know factual information, and manufacturers do not have a legitimate grant of authority to remain silent. **Compared to the majority opinion, this dissent reflects a very different understanding of citizen sovereignty and self-governance, in particular that citizens possess an authority superior to those**



of their corporate creations. It also reflects an understanding that the case represents a conflict over authority, not a conflict over rights. This issue of authority deserves additional attention as it widens the scope of ethical investigation in thinking about the corporate claims to free speech rights in the specific context of this case, and claims to any human rights in general.

In theory a government should provide for the safety of its citizens and for keeping the peace. Towards fulfilling these responsibilities, citizens tacitly accept the need for an enforcement "branch" of government, populated by the police and military. Additionally, these state responsibilities are considered valid justification for laws that infringe on constitutional rights. The recurring questions for self-governing people are *whose* safety, *whose* peace, and *who* is being forced by police power to be peaceful? In *International Dairy Foods* we can see that it is safety for corporate markets and that citizens do not have the sovereignty to demand that police power instead be used to insure that self-governing people be well informed in order to be effective in their practice of self-governance. Here the police power was applied to keep people uninformed.

*International Dairy Foods* represents rivalrous claims upon the First Amendment: the corporate claim upon the right not to be associated with certain speech versus the human right to be informed. It calls attention to the immoral arrangement of granting human rights — those few recognized in the Constitution — to corporations. And this arrangement calls attention to a presumption that people and corporations have equal claims to rights, and thus are equal in the eyes of the law and of the courts. Ignoring this arrangement and its presumption perpetuates the ideology that conflicting claims upon the Constitution by human beings and corporations must be settled on the merits of individual conflicts of rights, whereas the whole conflict could be settled swiftly by conferring upon human beings sole claim to all constitutional and human rights.<sup>17, 18</sup> By this arrangement, conflicting rights claims by human beings and corporations would not be possible, and human beings would recover a sovereignty in practice now asserted only in US mythology.

As we can see, framing the *International Dairy Foods* case as one of conflicting claims to rights insures that many fundamental issues regarding democracy and self-governance will not be dealt with. Should commercial speech receive any constitutional protections? Is it rational to believe that corporations engage in any speech other than commercial speech (a crucial point to make regarding corporate claims to a "right to lie")? Why do states fail to grant legal force to citizen concerns not sanctioned by regulatory agencies like the FDA and EPA? The largest question is ignored as well: should corporations possess any constitutional rights at all?

*International Dairy Foods* failed to address any of these issues. The federal Court of Appeals instead framed this case as one of conflicting claims to the same right, and thus it only had to decide whose claim was superior and thus triumphant. The rule of law presumes that such conflicts can be impartially resolved but alas, that is a myth. The framing of this case imposes a distinct partiality, a bias perpetuating corporate ideology, and eliminating issues of legitimate concern for a self-governing people. Activists and lawyers should not shy away from these issues, as their public discussion will raise our standards and demands for democracy in the United States.

Dean Ritz is the editor of the *POCLAD* anthology, "Defying Corporations, Defining Democracy," and co-producer of the *Montana Public Radio* show "Ethically Speaking" ([ethicallyspeaking.org](http://ethicallyspeaking.org)).

## ENDNOTES

1. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).
2. *Pacific Gas & Electric Co. v. Public Utilities Commission*, 475 U.S. 1 (1988).
3. See *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978).
4. This raises the question of what is of legitimate public interest. For purposes of this article I minimally consider legitimate all factual information even obliquely pertaining to human and environmental safety or to human self-governance. The purpose of this information is empowerment to make informed decisions.
5. There is a third component of strict scrutiny that only arises when the legislation is directed at a "suspect class," such as African Americans. With this legislation the government must demonstrate that such a restriction to a suspect class serves a

compelling state interest and is itself as narrowly tailored as possible.

6. 92 F.3d 67.

7. Vermont Stat. Ann. tit. 66, § 2754(c).

8. rBST is also known as recombinant bovine growth hormone, or "rBGH." Recombinant Bovine Somatotropin (rBST) is a synthetic growth hormone approved in 1993 by the federal Food and Drug Administration (FDA) for use in dairy cows producing milk for human consumption (*International* at 69). Cows treated with rBST produce more milk, but also suffer from increased risk for "clinical mastitis [udder infections] (visibly abnormal milk), digestive disorders such as indigestion, bloat, and diarrhea, enlarged hocks and lesions, and swellings" (*International* at 78, bracketed material in original). Currently the Monsanto Company markets the only FDA-approved rBST formulation under the trade name "Posilac" (*International* at 75).

9. Readers are directed to: [www.idfa.org/about/mission.cfm#who](http://www.idfa.org/about/mission.cfm#who) and [www.nfpa-food.org/whowere.htm](http://www.nfpa-food.org/whowere.htm).

10. Actually, they also claimed that the statute violated the commerce clause. The Court of Appeals did not address this claim as they threw the law out based on the negative free speech.

11. See *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

12. *International* at 73.

13. *International* at 74.

14. "Critics charged that the [FDA labeling] guidelines [for dairy products procured from rBST/rBGH treated cows] contained language 'strikingly similar' to that found in a legal memorandum Monsanto previously distributed, which warned companies not to label their products as rBGH-free. In any event, following the publication of the guidelines, Monsanto proceeded to levy suit against two dairies, which did just that, and the company wrote to over two thousand other firms, threatening them with legal action if they dared to do the same." From "Pushing RBST: How the Law and the Political Process Were Used to Sell Recombinant Bovine Somatotropin to America," by D. Aboulafia, *Pace University Law Review*, 15 (Summer 1998), 604-653; cited material 617-619.

15. *Virginia* at 787.

16. *International* at 80, dissenting opinion.

17. Constitutional rights are minimally identified as those rights enumerated in the Constitution. Some people additionally include those rights identified by federal courts as being found within the scope of the enumerated rights. What is in the set of human rights — that is, those rights a person has by virtue of being a human being — and which exist regardless of the person's citizenship or lack thereof, are not universally agreed to. The Universal Declaration of Human Rights as advanced by the United Nations provides a starting point for discussion.

18. Patricia Werhane has written about this with regard to employee/employer relations. See *Persons, Rights, & Corporations*, Englewood Cliffs: Prentice-Hall (1985).

## More news from Pennsylvania . . .

On March 12, 2003, Licking Township in Pennsylvania became the second municipality in the US to declare that corporations do not have the constitutional rights of people. The purpose of the ordinance is "to eliminate the purported constitutional rights of corporations in order to remedy the harms that corporations may cause to the people of Licking Township by exercise of such rights." The ordinance states that corporations will not be considered "persons" protected by the Pennsylvania and US constitutions and that they will not be protected by the contracts and commerce clauses of the US Constitution. Passed unanimously, the ordinance reinforces earlier laws establishing the township's authority to monitor and regulate the use of sewage sludge as fertilizer.

For more information, contact POCLAD or the Community Environmental Legal Defense Fund at [www.celdf.org](http://www.celdf.org).

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