

Avoiding Corporate Liability

By [Ralph Nader](#)

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Theme: [Global Economy](#)

Once upon a time early in the 19th century, corporations came into existence by state legislatures approving charters, which were granted for a limited period of time and for limited purposes. These corporations – producing textiles and other products in New England – raised capital in part because their investors had limited liability. That meant they could not lose any more than their investment if things went wrong.

Since corporations were artificial legal entities and not human, these lawmakers feared that without some strong leashes, they could be creating Frankensteins.

Over the following two hundred years, these ever larger corporations and their attorneys have been driving relentlessly, dynamically to erect systems of privileges and immunities that give the corporations themselves limited liability.

Their first big move was to take the chartering authority from the state legislature and place it inside an executive agency where chartering became automatic, shorn of the conditions the lawmakers once imposed.

Once chartering became automatic, perpetual and open-ended, corporate lawyers moved to have the courts – not the legislatures – turn corporations into “persons” for purposes of constitutional rights.

Their big breakthrough came with the Santa Clara case in 1886 when the U.S. Supreme Court allowed its summary headnotes to declare that the railroad in the case was a “person” for purposes of the 14th amendment. Through elaborations in later Supreme Court decisions, that meant that companies like Aetna, General Electric, Exxon and Lockheed had most of the same constitutional rights as real people like you.

Soon it was off to the races and the promised land of no-fault corporate behavior. Early in the 20th century, companies erected “no-fault” workers compensation schemes limiting damages for the horrors of worker injuries and workplace diseases in those mines, factories, and foundries.

Then came the steady erosion of shareholder rights and power, notwithstanding the securities acts of 1933 and 1934 which emphasized disclosure and anti-fraud rules. As owners, the shareholders have had little control over the corporations they “own”. The split between ownership by the stockholders and control by the corporate bosses, and their rubber stamp boards of directors, is now wider than the Grand Canyon.

With the limitless “business judgment rule” and the permissive corporate chartering goliath ensconced in the state of Delaware, shareholders don’t even have a vote as to whether their

hired bosses should dissolve their company into bankruptcy.

These investors cannot even determine the limits on the runaway pay packages by and for their supreme executives. Investors cannot even propose their names for election to the boards of directors in these Kremlin-style corporate board elections. Investors are told-if you don't like what we your bosses are doing, you're free to sell your shares. And, of course, that exit leaves the rascals more in charge.

Anytime the law is activated on behalf of the "little people", corporate lobbyists move in to weaken or delete these instruments of accountability. For example, tort law giving wrongfully injured Americans their day in court against manufacturers of defective cars, hazardous chemicals or drugs and other products has been weakened by business-backed state and federal laws. More immunity for corporate wrongdoing.

When the early atomic power industry got underway in the nineteen fifties, insurance companies would not insure the potentially massive damages a breach of containment disaster might produce. No problem. The industry pushed Congress to pass the Price-Anderson Act in 1957, which greatly limited the utilities' and manufacturers' liability for the human devastation arising from a class nine meltdown.

How about the contracts you sign with credit card, auto dealer, insurance company, bank and other vendors? Over the years by using fine print contracts to avoid many obligations, sellers have disadvantaged consumers who have to sign on the dotted line. Corporate lawyers have turned contract law upside down. And if you don't want to sign, you can't go to a competitor company because the contracts are just as one-sided, taking away your rights page after page, including your right to go to court.

Well, suppose a corporation, like General Motors, is so mismanaged that it is losing sales, profits, creditworthiness and heading toward abject failure. No problem. There is always chapter 11 voluntary bankruptcy to terminate obligations to creditors, dealers, litigants, and other claimants with pennies on the dollar.

Here is how bankruptcy attorney Laurence H. Kallen described the process in his book, Corporate Welfare: "...in chapter 11 the megacorporations almost all succeed famously. They dominate the committees and bully the judges. They stay ten steps ahead of any feeble attempts at supervision. They use the bankruptcy laws to force plans of reorganization down creditors' throats. And then the executives of those corporations laugh all the way to the bank."

Speaking of banks, wouldn't you like to have the power to mutate yourself like six large insurance companies did last November to get billions of your tax dollars under the TARP rescue program?

Mired in their risky, reckless investments, including derivatives, these insurance companies qualified for the money simply by a paper restructuring of themselves as bank holding companies. Voilà! The U.S. Treasury declared they qualify as financial firms and will soon be receiving your money. The New York Times reports that "hundreds" of other such companies "are still in the pipeline for review."

Whether it is equal justice under the law, equal protection under the law, equal access to the law, or the power to make laws, there is no contest between the corporate entity and

the real human being.

What Supreme Court Justice Louis Brandeis feared in an opinion he wrote during the nineteen thirties is happening. These megacorporations have become Frankensteins-moving to own our genes, the plant seeds of life and taking control of computerized artificial intelligence. Their final conquest is far along-the control of government which is then turned against its own people.

As Paul Harvey used to say: "Good day."

Ralph Nader is a consumer advocate, lawyer, and author. His most recent book is The Seventeen Traditions.

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About the author:

Ralph Nader is a consumer advocate, lawyer, and author. He has founded many organizations including the Center for Study of Responsive Law, the Public Interest Research Group (PIRG), the Center for Auto Safety, Public Citizen, Clean Water Action Project, the Disability Rights Center, the Pension Rights Center, the Project for Corporate Responsibility and The Multinational Monitor. Visit his website at <http://nader.org/>

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