

Minority Rule Pervades Constitution and International Trade Agreements

by Jacqui Brown Miller

In the late 1800s, the Supreme Court began a trend of interpreting the U.S. Constitution as granting the propertied or corporate class the right to protect its property, yet denying average citizens the right to preserve a healthful environment and engage in community democracy.

The Court's treatment of the Constitution's Commerce Clause gives an example of this trend. This clause gives Congress exclusive and sweeping power to regulate interstate commerce. Conversely, states have "police powers" to protect health, safety, and welfare. But, the Court limits state police power under the so-called "dormant Commerce Clause," reasoning that congressional power over interstate commerce leaves no room for states to discriminate against or overly burden commerce.

Justice Clarence Thomas has dissented, reasoning that "the negative Commerce Clause has no basis in the text of the Constitution." Still, the Court routinely allows corporations to use the clause to invalidate state and local health and safety laws.

The dormant Commerce Clause is like "corporate personhood. It's made up by judges and used by corporations to strike down democratically enacted environmental laws, so wealthy corporate owners can

protect property and the ability to operate at a handsome profit, regardless of external costs to society. In this way, the Court favors the ability of those with money and property to enforce their rights to engage in commerce, unfettered by communities trying to protect their well being.

This trend is also now cemented into the documents governing the globalization of commerce. World Trade Organization rulemaking on trade issues is done away from local and national democratic decision-making in inaccessible international venues. The private sector makes the decisions. Yet, the public bears the social and environmental costs stemming from corporate practices allowed after local, state, and federal democratically enacted laws are struck down as "barriers to trade."

Similarly, the North American Free Trade Agreement (NAFTA) includes unprecedented corporate investment protections. NAFTA allows a corporation to sue a foreign government in a secret tribunal if a regulation adversely affects one of its investments. If it wins, foreign taxpayers pay. This is an extraordinary attack on governments' ability to regulate in the public interest.

This is a serious problem that we can fix if we understand its roots and fight back strategically. The root problem is a fundamental lack of democracy—decisions are made by wealthy minorities.

The Court has assisted wealthy minority rule by "reading into" the constitution (okay inventing) "provisions" like the dormant Commerce Clause and corporate personhood. Additionally, it invented the idea that money is protected free speech and that campaign finance laws must be invalidated if they diminish the "market place of ideas," regardless of how these laws would enhance the democratic conversation. These doctrines seem designed to deny regular citizens their ability to act as the source of decision making.

Creating authentic democracy is not easy. But we stand a fighting chance only if we aim to eradicate the things that actively deny us our right of self-governance.

Jacqui Brown Miller has been a government and environmental lawyer since 1996.



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Why use Commerce to Regulate the Environment?

Congress passes environmental laws to protect the environment from harm and, in turn, protect humans in the long-term. Yet, the powers exclusively enumerated to Congress in the Constitution do not include environmental protection. So, as sort of a contrivance, Congress reaches for its power to regulate interstate commerce.

While this power to regulate interstate commerce is sweeping, the Supreme Court has been pulling in the reins when it comes to the environment. Recently, the Court invalidated Clean Water Act regulations because the regulated isolated wetlands lacked sufficient connection with interstate commerce.

But wait a minute. Do we really want commerce as the contrived justification for protecting the environment? Doesn't this set up an argument that everything under the sun relates to interstate commerce? Isn't arguing that everything impacts commerce heading toward failure in lawsuits because corporations want to invalidate state and local law—under the dormant commerce clause—for impeding interstate commerce? If we want to be logical and consistent, what do we do?

Cormac Cullinan, in *Rights of Nature, a Manifesto for Earth Justice*, argues for constitutional rights of nature. This would provide a constitutional peg for environmental laws rooted in an understanding of our interconnectedness with and interdependence on nature. This also would impose on government a trust duty to use the precautionary principle and disallow actions that would threaten our sustained, healthy, and common future. Citizens would have the power to enforce this duty in the courts. Now wouldn't that be a nice change?