

# By What Authority

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## A U.S. Constitution with **DEMOCRACY IN MIND**

by Virginia Rasmussen and Greg Coleridge

*"...it may be proved that no society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. ...Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right."*

*--Thomas Jefferson in a letter to James Madison, 1789*

The focus of POCLAD's vision is democracy. The work required to move toward a democratic society is about *us* – our learning, rethinking and claiming the power to self-govern. That power is largely expressed and experienced through law and in the mutual obligation law, in part, engenders. In many would-be democracies, the nature and spirit of that law are captured in a Constitution.

**If constitutional ground rules are weighted against people and in favor of property, against life and for the material, our capacity to achieve a just and democratic society is doomed unless we critique and change that defining law.**

Constitutional change by the people of the U.S. is near impossible. It has occurred through the amendment process, a demanding exercise in

social movement-building over generations. We can opt to argue and organize on behalf of more democratic judicial interpretations of the Constitution, a noble if plodding single-issue approach that will leave any *real* democracy constitutionally-impaired for centuries. Can we do better? Should we try?

At this time we're not calling for a Second Constitutional Convention, but extending an invitation to reflect on a variety of questions *were* we to call such a gathering. Let's start at the beginning. Who would be there and how would they be chosen? What elements would be included and who would set the agenda? What processes of facilitation, discussion, deliberation, conflict resolution, and decision-making would be used? What rights and protections would be guaranteed



**Editor's note:** We received a generous number of responses to our request for feedback on last issue's article, "The U.S. Constitution: Pull the Curtain." The point most frequently made cautioned us on haste, on We the People being "up to such a task." Were we not "opening a can of worms?" One correspondent suggested that "current 'oilgarchs' would like nothing better than for the people themselves to delegitimize the one document they can't... totally erase."

We in POCLAD respect the warnings and recognize the danger of leaping onto unprepared ground. Nonetheless, the Constitution seeps its way into current realities for both good and ill. If more deeply understood it can serve us well in our work toward a worthier "founding" document and democracy. At this time we might see this exploration as a learning tool, an exercise. And isn't it a juicy one?

for people and for nature's many life forms? How would powers be delegated in a Constitution that allowed democracy to flourish and be sustained over time?

Jamin Raskin, a teacher of constitutional law at American University,

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**By What Authority** (ISSN: 524-1106) is published two times a year by the Program on Corporations, Law & Democracy. The title is English for *quo warranto*, a legal phrase that questions illegitimate exercise of privilege and power. We the people and our federal and state officials have long been giving giant business corporations illegitimate authority. Today, a minority directing giant corporations and backed by police, courts, and the military, define our culture, govern our nation, and plunder the earth. **By What Authority** reflects an unabashed assertion of the right of the sovereign people to govern themselves.

POCLAD is a group of eleven people instigating democratic conversations and actions that contest the authority of corporations to govern. Our analysis evolves through historical and legal research, writing, public speaking, and working with organizations to develop new strategies that assert people's rights over property interests.

**BWA** is a tool for democracy proponents to rethink and reframe their work. To that end we encourage readers to engage us with comments, questions, and suggestions.

POCLAD  
P.O. Box 246  
South Yarmouth, MA 02664-0246  
508-398-1145; 508-398-1552 (fax)  
people@poclاد.org; www.poclاد.org

POCLAD is a project of the nonprofit Council on International and Public Affairs.

David Cobb, CA  
Karen Coulter, OR  
Greg Coleridge,\* OH  
Mike Ferner, OH  
Dave Henson, CA  
Ward Morehouse, MA  
Lewis Pitts, NC  
Jim Price, AL  
Virginia Rasmussen,\*† NY  
Kaitlin Sopoci-Belknap, CA  
Mary Zepernick,\* MA

\*BWA editorial board  
†BWA editor

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## Democracy in Mind

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claims that the Constitution "remains deeply compromised by its historical concessions to the political institutions of white supremacy and the interests of elite rule." For Raskin, "defending the Constitution requires changing it." There will be "a lot more constitutional growth" if we are to make of ourselves a democratic people.

This imagining and reframing in fundamental, holistic ways can clarify our vision and show us the smarter, truer path to change. It can help us make of the Constitution the "living document" of Jefferson's imagination.

### The Preamble

The Constitution's opening holds the possibility, if not the promise, of democracy. It can serve as tether and guide to later passages.

"We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America."

With the rights of sovereignty come the responsibilities of sovereignty. Can we find a way to express these responsibilities and obligations in a constitutional document? Should we? **Placing our lives and governance in the hands of our neighbors and country-mates raises serious doubt today. It can only be done if each of us has sufficient trust in the other—admittedly, a tall order. What does such confidence entail?** What should our educations include to build that confidence? What kind of democratic skills must become part of our every day, thus shaping assumptions about who each

of us is and can be trusted to be? What do the earth's sustaining processes have to tell us? Is it appropriate that any new Constitution address the provision of the time and venues for tending this participatory democratic work?

### Rights Due the People

One of the central tenets of the Declaration of Independence is the right of the people to alter or abolish any government that no longer serves them. Nowhere is this critical feature found in the Constitution. Adapting the Declaration's language slightly, we might include:

*"We hold these truths to be self evident, that all people are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, Justice and the pursuit of Happiness. That to secure these Rights, Governments are instituted among people, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. ...But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security."*

Our First Amendment provides people with valued protections from government intrusion. It has served important aspects of democratic participation and dissent. But neither the Bill of Rights nor the original Constitution

grants the people the powers *to* govern in direct and defining ways. Access to those rights and powers is held by a propertied and corporate elite in league with an economic system designed to keep the governing few relentlessly safe and separate from the many.

Were we to have a convention for a constitutional rewrite, **what rights would be guaranteed in order to make freedom, justice and democracy real for all, children included? How would we assure that the right to self-governance, to shape both the political and economic decisions that define our lives, rest with the people?** We can learn from the grassroots work of Democracy Unlimited of Humboldt County (DUHC, [www.duhc.org](http://www.duhc.org)) and include in our drafting process the denial of personhood designation or constitutional rights and powers to any other than natural persons. Corporations do not qualify! See the Winter 2007 issue of *By What Authority* for more information on this work.

And how would we write into our founding law civilian control over military institutions and so-called “intelligence” establishments, both of them now far beyond the reach of and accountability to We the People? When military solutions are preferred over attention to policy and political engagement, the least democratic of our institutions are empowered, soaking up resources needed for people’s needs and enabling ideologues to set national priorities.

**The 1948 Universal Declaration of Human Rights, never ratified by the U.S. Senate, addresses a magnificent array of rights in seven categories: civil, economic, cultural, political, social, gender, and developmental.** The articles are simply stated. Could we do better than to draw from this work of Eleanor Roosevelt and her U.N. colleagues nearly sixty years ago?

Here is a selection of those rights that we have yet to take for ourselves in this country, including the right to

Many of our state constitutions contain decisive language on behalf of a sovereign people and the prohibition of any kind of corporate governing rights. We have this valuable history to draw upon.

“All political power is inherent in the people, and governments derive their just powers from the consent of the governed” (Arizona Constitution).

“The people of this Commonwealth have the sole and exclusive right of governing themselves... Government is instituted for the common good, for the protection, safety, prosperity and happiness of the people, and not for the profit, honor, or private interest of any one man, family, or class of men...” (Massachusetts Constitution).

define and control our political process, the right to majority rule in presidential elections, along with the right to equally funded public education, to health care, housing, meaningful work and a living wage:

- Everyone, as a member of society, has the right to social security and is entitled to... the economic, social and cultural rights indispensable for their dignity and the free development of their personality.
- Everyone has the right to work, to free choice of employment, to just and favorable conditions of work...
- Everyone, without discrimination, has the right to equal pay for equal work.
- Everyone has the right to form and to join trade unions for the protection of their interests.
- Everyone has the right to a standard of living adequate for the health and

well-being of themselves and their family, including food, clothing, housing, medical care and necessary social services...

- Everyone has the right to education... technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
- Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms...
- Everyone has duties to the community in which alone the free and full development of their personality is possible.

Additionally, we’d want to consider the people’s power to recall elected leaders. Would these go beyond the current requirements for impeachment? Would they be measures more directly accessible to the people?

### **The Rights of Nature, Property and the Commons**

“The right of citizens of the United States to use and enjoy air, water, wildlife, and other renewable resources determined by the Congress to be common property shall not be impaired, nor shall such use impair their availability for the use of future generations.”

—*Indigenous People’s Seventh Generation Amendment*

How do we, as participants in a diverse global community of communities, establish the limits essential to a sustainable functioning of the parts and the whole? No longer can we see ourselves as safe and apart from the limits imposed by a finite planet or the stress and deficiencies “of less happier lands,” to quote the Bard.

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## Democracy in Mind

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As the legitimate source of all governing authority, it is the people's right to draw inspiration from nature and our diverse human communities in creating a Constitution and a new kind of jurisprudence. We can, with sufficient courage, create a *people-earth law* rather than allowing the "judges" to impose a kind of law that flows from the patriarchal, aristocratic, empire seeking, slave-owning, corporate structures of the past. The future, if there is to be one, must evolve from a democratic and earth-connecting framework that reveres all of life.

Christopher Stone, in his classic essay, "Should Trees Have Standing?", asks what kind of public authority would be required to "give some amount of review to actions that are colorably inconsistent" with the legal rights we grant to members of the environmental community?

How will our new Constitution define property that can be held in private such as clothing, the tools of one's trade, home and furnishings, and that which shall be held in common? In what ways can we grant protections to both the natural and the social commons – water, land, language, works of creativity, the airwaves and media?

The Community Environmental Legal Defense Fund (CELDF, [www.celdf.org](http://www.celdf.org)) is a resource for our constitutional writing process. It has assisted communities in Pennsylvania to write ordinances that acknowledge the rights of "natural communities and ecosystems" and establish a "system to enforce and protect those rights against corporations and other business entities."

### Delegation of Powers and Amendment Process

The structure of government and the jurisdictions to which we delegate decision-making over the political, social,

"...with all human processes: undisciplined expansion and self-inflation led only to destruction. Apart from the well-being of earth, no subordinate life system can survive. So it is with economics and politics: any particular activity must find its place within the larger pattern, or it will die and perhaps bring down the larger life system itself. This change of scale is one of the most significant aspects in the change of consciousness that is needed."

—Thomas Berry,  
*The Dream of the Earth*

cultural, economic and environmental firmament require fresh thinking. Scale is critical to effective governance, whether in relation to the place-based, contextual knowledge necessary for earth-stewardship or to correct failing political and social systems.

**How can we draw boundaries within the country so that people's learning and experience best serve the resiliency of human and earth systems? Decentralizing decision-making units and harmonizing them with bioregional systems may draw wider contemplation** as awareness grows of human-caused climate change and looming environmental threats.

"The survival of our species and health of the Earth family depends on our ability to transform governance systems so that humans become part of the ecological matrix of biological and cultural diversity."

—Vandana Shiva

What processes might we establish to allow for revisiting and amending this new Constitution? Should we heed Jefferson's conviction that Constitution and law need a rewrite every generation?

Lastly, constitutional rethinking largely concerns matters of rights and protections. But such matters are inadequate to the fair, democratic, sustainable conduct of national and global life. As referenced at the outset of this essay, "mutual obligations" play a central role within all communities, great and small. Should rights be gained, we'd face the threshold question, "What do we do now?" How do we hang on to hard won rights for ourselves, others, the flora and fauna?

Our obligations to one another are the consequence of growthful social learning that runs deeper than law and Constitutions. If we fail to develop obligation's necessary role in the coming century, we will fail the best intentions written into any new U.S. Constitution.

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# Corporations, Law & Democracy... and Children



by Lewis Pitts

Those who wield the power and wealth of corporations rule every institution of our economy, electoral system and culture, and shape each critical issue we face: war and catastrophic climate change; the gap between rich and poor; privatized and cash-starved social welfare services and health care. These challenges and more affect everyone to some degree, but none more than the country's children.

In *The Great Turning*, David Korten puts it this way: "The struggle for the health and well-being of our children is potentially the unifying political issue of our time and an obvious rallying point for building an Earth Community political majority."

A telling indication that our society is not even close to being there is the fact that the United States is the only government that has not ratified the U.N. Convention on the Rights of the Child, opened for signature in 1989 (nor for that matter, has it ratified the Social and Economic Covenant of the U.N. Declaration of Human Rights).

It has been said that we eventually grasp the subtle; the obvious takes a bit longer! So it is with the need to understand the institutional pathology denying children their birthright of developmentally appropriate services and care.

The obvious includes: 1) children are our future; 2) children are inherently "truly needy"; 3) by helping children we help families and stabilize a core unit of our society; 4) the test of the morality of a society is what it does for its children; 5) a rallying cry to fight for children is likely to

reach the broadest majority of people and cut through partisan allegiance; and, 6) entry into the struggle for children's rights instantly brings to the fore questions of why essential services for children are drastically underfunded, who is taxed, what impact on children do policy decisions have, and the overarching question in a supposed democracy: **Who decides?**

When we struggle on behalf of children's right to have their voices heard and their needs met, we heighten the chance that adult voices will be heard as they demand public policy that serves the common good and not merely people of means. **That is democracy.**

## The State of Our Nation's Children

Horrible statistics abound. One only need go to the Children's Defense Fund web page (<http://www.childrensdefense.org>; May 2005) to see the revolting data on the well-being of U.S. children. For example: every second a public school student is suspended; every 11 seconds a public school student drops out; every 20 seconds a child is arrested; every 36 seconds a child is born into poverty; every 36 seconds a child is confirmed abused or neglected; every four hours a child or teen commits suicide; every six hours a child is killed by abuse or neglect; nine million children are without health insurance.

It is clear that the well-being of children is directly tied to federal policy decisions on taxation and spending. The outcome of administrative efforts to "shrink

government" can be seen in the report, "Homeland Insecurity... American's Children at Risk," downloadable from [www.everychildmatters.org](http://www.everychildmatters.org). **Charts and graphs show the U.S., the richest country in the world, with the second-worst child poverty rate (Mexico is just behind us) among 26 well-off countries. Further, "the highest child poverty rate in the U.S. -30%- exists in the metropolitan area with the second-highest income, Washington, D.C. In the world's most powerful capital, wretched poverty begins a few blocks from the Capitol where Congress, from 2001 to 2006, bestowed trillions in tax breaks on the wealthiest Americans."**

The problem is not that child development specialists, educators, physicians, psychiatrists, and psychologists have failed to tell us what children need. The research is voluminous and clear. In fact, legal authority to provide essential educational and developmental services to *eligible* children has long existed in state constitutional provisions and federal and state statutes.

Under current law: 1) The Medicaid Act promises early and periodic screening, diagnosis and treatment for children's medical and mental health needs; 2) The Individuals with Disabilities Education Act (IDEA) promises a free, appropriate, public education to children with disabilities, including emotional and behavioral disabilities so often present in children involved in the foster care system; and, 3)

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## Rights of Children

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The Adoption and Safe Families Act (ASFA) promises, among other things, the speedy and permanent placement of children who become involved in the foster care system.

Yet only very poor children *qualify* for Medicaid services and other supports, while the working poor receive virtually nothing. Essential services are important for all children, but for court-involved children (delinquency court and foster care court), they are “make or break” needs. However, children’s services cost money to implement fully – lots of money – and are perpetually underfunded.

There is no federal constitutional right to education but most states have a promise of public education in their constitutions. Yet at least 23 states are now in school finance litigation or are under court orders to fairly and adequately fund their school systems. Meanwhile, children are force-fed a curriculum based on teaching-to-the-test. They are sorted, suspended, segregated or otherwise *degraded* in the name of “accountability.” The program, “No Child Left Behind,” was designed with care to leave “no corporation behind” or predatory military recruiter outside a school’s doorway.

### Whose Model for Education and Health Care is This?

Not surprisingly, the push for public education designed to serve corporate interests in the global economic era came from corporate CEOs, united in the national Business Roundtable (BRT). They sounded the alarm: the nation is at risk; we must fix the schools or else the Chinese, or other global boogymen will overtake the world economy. The BRT and other corporate entities saturated the culture using their think tanks, academic spokespeople, media, and compliant public officials. They engineered high-stakes testing, curriculum and textbook content, and experiments in for-profit schools. The result has been toxic to the potential for our children and a democratic society.

As education professor David Purpel puts it, by focusing on the “problems in the schools,” corporate leaders “distracted us into believing that our social and economic problems are rooted in our schools rather than in our social and economic policies and institutions... [thus providing] a convenient justification to impose more control, uniformity, and orthodoxy in a culture very unsure and uneasy about dissent, difference and pluralism.”

### Money Matters

Real children suffer real pain when doctors and dentists are not reimbursed fairly and choose not to participate in the Medicaid program, or when the spiraling costs of corporate for-profit health insurance or HMOs are beyond the reach of millions of families.

When parents do not have access to early and necessary intervention, or an opportunity to earn a living wage, they are less likely to become successful parents. When children do not receive special education services tailored to their actual needs, or fair hearings before suspensions or expulsions, they lose the chance to explore their potential and to become successful, independent adults. When foster parents receive inadequate payments and support services, they are less able to meet a child’s many needs. When child-protection social workers are overburdened and underpaid, they are unable to identify all the children entitled to their help.

These many systems, and the children who depend upon them, are in crisis due to skewed priorities and budgets devoted to Empire-building, war, tax breaks for the privileged, and a host of policies that serve the few while ignoring the many.

### The Much-touted “Rule of Law”

The Preamble to the United States Constitution says: “We the People of the United States, in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United State of America.”

*Failing to put our money where our mouth is regarding children is now common and tolerated, as exhibited by jokes we’ve long heard about politicians “kissing babies” during campaigns and ignoring them thereafter. This is no joking matter.*

While this rhetoric doesn’t have the force of law, some believe it should. In any case, **surely We the People intend that justice, domestic tranquility, general welfare, and our posterity apply to our children and their needs.** To give meaning and reality to these words, we cannot rely on “the courts” or “experts” to define our sovereign power around issues as obvious as decent care for our children. Yet access to *justice* through the legal system is at times a central ingredient in this care.

To ensure such access, it is necessary that children be recognized as “persons,” with the right to vigorous legal representation when they have significant interests at stake. Simply put, when children are being abused, neglected or abandoned, or when their safety, liberty, education, or health care rights are denied, they have a right to be heard through a qualified attorney.

The U.S. Supreme Court has said that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone”<sup>1</sup>, and that “[u]nder our Constitution, the condition of being a boy [or girl] does not justify a kangaroo court.”<sup>2</sup> While the Court did not define “kangaroo court,” it occurs regularly when children are treated as *objects* of the proceedings rather than as *participants* with the right to be heard through counsel.

### Reasonable Rights for Children

The call for rights for children often conjures up fears and misconceptions. For instance, parents of a teenager may have concerns that such a call is open-ended. **Thus, sorting out enforceable rights for children from areas appropriate for parental discretion is essential to building support for children’s legal personhood status. Some advocates have identified a child’s inalienable rights as those of being heard and of court access.**

***On a date two days after his death, Martin Luther King was scheduled to deliver the already prepared sermon, "Why America May Go to Hell." Here are excerpts from that text:***

"Even when pressed by the demands of inner truth, men (sic) do not easily assume the task of opposing their government's policy, especially in time of war. Nor does the human spirit move without great difficulty against all the apathy of conformist thought within one's own bosom and in the surrounding world... we are always on the verge of being mesmerized by uncertainty... We must speak with all the humility that is appropriate to our limited vision, but we must speak..."

A few years ago... it seemed as if there was a real promise of hope for the poor, both black and white, through the poverty programs. There were experiments, hopes, new beginnings. Then came the buildup in Vietnam, and I watched this program be broken and eviscerated as if it were some idle political plaything of a society gone mad on war. And I knew America would never invest the necessary funds or energies in rehabilitation of its poor so long as adventures like Vietnam continued to draw men and skills and money like some demonic destructive suction tube... I knew that I could never again raise my voice against the violence of the oppressed in the ghettos without having first spoken clearly to the greatest purveyor of violence in the world today: my own government... we as a nation must undergo a radical revolution of values.

We must rapidly begin the shift from a thing-oriented society to a person-oriented society. When machines and computers, profit motives and property rights, are considered more important than people, the giant triplets of racism, extreme materialism, and militarism are incapable of being conquered... True compassion is more than flinging a coin to a beggar. It becomes necessary to see that an edifice which produces beggars needs restructuring... A nation that continues year after year to spend more money on military defense than on programs of social uplift is approaching spiritual death... We are now faced with the fact, my friends, that tomorrow is today. We are confronted with the fierce urgency of now... We must move past indecision to action."

University of Florida law professor Barbara Bennett Woodhouse has written:

"The current discourse, in which children's mere 'interests' are easily overwhelmed by parents' powerful 'rights,' entails... problematic choices about allocating power over children and when action or inaction constitutes state 'intervention' or 'oppression.' Perhaps children, as the least powerful members of both the family and the political community, are also the least dangerous of rights-bearers and the most in need of an affirmative rights rhetoric in order to be heard. By defining children's rights as flowing from their needs, we can affirm rather than undermine an ethic

of care for others. By listening to children's voices and experiences as evidence of their needs, and by trying to come to terms with children's reality, we can confront our own adult ambivalence and conflicts of interest regarding children's rights."<sup>3</sup>

First stage protective rights, premised on the ethic of care for others, does not contend that a child has the right to decide the issues, rather the right to have his or her basic interests presented to a court and recognized as relevant.

#### **Law as a Tool for Social Change**

While the law and lawyers, courts and judges are more often seen in popular culture as instruments for individuals and cor-

porations to resolve disputes among themselves, at their best they can expose and redress systemic wrongs and injustices. In 1963 the U.S. Supreme Court in *NAACP v. Button* stated:

"In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local institutions, for the members of the Negro community in this country. It is thus a form of political expression... And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances."<sup>4</sup>

Children make up another minority needing the "practicable avenue" of litigation to achieve their rightful equality of treatment. A nationally shared agenda *for the children's sake* would help create a mighty democracy movement indeed.

**As Captain Kangaroo would ask, "Who's for kids and who's just kidding?"**

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Lewis Pitts, a POCLAD principal, heads Advocates for Children's Services of Legal Aid of North Carolina, in Durham.

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# The Rule of Property

## by Karen Coulter

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Coulter is a forest activist and Director of the Blue Mountains Biodiversity Project in eastern Oregon. She works against corporate takeover of the public domain: forests, water, government-owned property and all resources that compose the commons. Her pamphlet is an easily accessible introduction to the history and current situation regarding corporate takings of our common heritage. It is illustrated with historical and contemporary cartoons and drawings.

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