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Citizens Derided: Corporate Politics and Religion in the Roberts Court

The 2014 Jerry Wurf Memorial Fund Lecture at Harvard Law School

February 2014

By Professor Jamin Raskin¹

I can't quite express to you what an honor it is to be invited to give this lecture. It's not just that this is my alma mater, a law school that I love, a law school where I met my wife--and a law school, it is true, that tried to kick me out when I protested against Harvard's corporate investments in South Africa with my friends Jennifer Granholm and Michael Anderson. [SLIDE PHOTO 1] (I do see that there is a quote from Nelson Mandela here outside this beautiful new building which did not exist when I was a student here, and it's right across the foyer from a quote from Derek Bok, the Harvard president who refused to divest Harvard's endowment from corporations operating in the apartheid state, so I guess all is forgiven now. . .) Nor is the honor just that this Lecture was given by Vice-President Gore and Olaf Palme and Richard Trumka [SLIDE 2], but it's that Jerry Wurf was a hero in my home when I was a kid, and I met him several times at family events. He was a giant in my eyes, a larger-than-life progressive icon like Dr. King or Walter Reuther or George McGovern. My appreciation for his remarkable career has only grown more intense as I have grown up and gotten more engaged in public life. My favorite documentary is "At the River I Stand," which records the assassination of Dr. King through the prism of the Memphis sanitation workers strike, which was of course the occasion for King's trip to Memphis [SLIDE 3.]. The role of Jerry Wurf in that struggle never fails to startle and move me. [SLIDE 4.] He was initially reluctant to back the strike because there had been a failed sanitation strike two years prior, but when he got to Memphis, he was so moved by the determination of the workers, so appalled by the dangerous conditions and low pay that they endured, and so outraged by the racist contempt of Mayor Loeb [SLIDE 5] towards the union, that he vowed to stay and fight until justice was won. And that he did, even as Dr. King lost his life in the process. [SLIDE 6.] What I take from Jerry Wurf's life is that strong democracy requires a vibrant labor movement; that unions must be not only agents of the specific material demands of their members but prophetic catalysts for broader social justice and change; that in order to be instruments for change, unions themselves must be democratic, participatory, transparent, flexible and willing to lay everything on the line; and for unions to become the kinds of visionary institutions we need, we need tough-minded and large-hearted union leaders

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who can see converging strains of history coming together and then organize us into better social movements and coalitions to rise to the occasion.

The Corporatization of Our Constitution and our Politics

I hope everyone keeps in mind the image of Jerry Wurf and the member-driven, dues-paying AFSCME as we take up my topic, which is the Supreme Court's bulldozing of the wall of separation between corporate treasury wealth and democratic politics in the *Citizens United* decision of 2010.

My goal is to show how the Roberts Court went wrong in transforming corporations into rights-bearing citizens of the American campaign finance regime; how the majority decision is built on a pure fallacy and a category error; how the false but seductive equation of corporations and unions as political groups has worked to enlarge corporate power while the Court dismantles the rights of labor; how the toppling of the wall of separation between corporate treasuries and political treasuries now threatens the original Jeffersonian wall of separation, the one between church and state; and, finally, how we might, in 2014, fashion a popular constitutionalism which leaves corporations free to innovate, invest, accumulate and profit in the economic sphere, but walls them off from the political sphere, which properly belongs to the people and the voluntary political membership groups and associations that they choose to form.

Citizens United: Of the Corporations, By the Corporations, For the Corporations

Now, I wanted to start on a bipartisan note by invoking our last great Republican President—Abraham Lincoln—who spoke of government of the people, by the people, and for the people. This is the beautiful, tantalizing ideal of our history rendered poetic by Lincoln. It was embodied in the promise in the Declaration of Independence of “consent of the governed” and compressed into the first three words of the Constitution.

And, significantly, for our inquiry this afternoon, it was the animating purpose behind Jefferson's “wall of separation” between church and state. Before America, power was thought to flow not upward from the people but downward from God to the King to the Nobles and then perhaps a bit would drip down to the People. But our Constitution started, “We the People,” it never mentioned God, it banned religious tests for public office and Establishment of religion, protected Free Exercise, prohibited Titles of Nobility and led ultimately to Equal Protection for all. No kings, no nobles, no official priests, and, finally, no slaves.

The Framers feared the collusion of the church, which was the first great corporate body, with government power. They wanted to break from the long history of theocracy in Europe which involved the Holy Crusades, the inquisition, the religious wars between Catholics and Protestants, witchcraft trials, and constant oppression of

the people, both as human beings seeking their own spiritual understanding of the world and as citizens hoping that reason would govern in the public space. The merger of church and state meant the takeover of government by a corporate body committed both to its own theology and its own institutional privileges and powers.

The Founders wanted Government based on public reason, not corporate dogma, and they wanted religion based on voluntary individual faith, not public coercion. These were the commanding themes of Madison's Memorial and Remonstrance Against Religious Taxation and Virginia's Statute on Religious Freedom, as well as the First Amendment.

But the 18th century paradigm of separating corporations from the state has been undermined by the aggressively corporatist jurisprudence of the 21st century.

In 2010, in the 5-4 *Citizens United* decision, the conservative majority on the Roberts Court broke from government "of the people, by the people, and for the people," and gave us a constitutional blueprint for government of the corporations, by the corporations, and for the corporations. [SLIDE 1] It held that for-profit corporations have the right to spend unlimited sums—million or billions of dollars-- promoting or disparaging candidates for public office.

Now, I need not waste any time convincing a roomful of union leaders and labor law professors that a for-profit business corporation is, internally speaking, an undemocratic institution, one governed more often than not according to hierarchical and even authoritarian principles, an institution that insists on controlling everything said or done on its property by workers or consumers. You know far better than I that it is only the combination of Section 7 of the Wagner Act and union organizing that has secured even a modest measure of free speech and concerted action rights on corporate property.

And, yet, paradoxically, the Supreme Court in *Citizens United* defined business corporations as members of the broader democracy entitled to all of the political free speech rights of the people, and specifically the right to take unlimited amounts of money out of the corporate treasury and spend it on political campaigns.

Justice Kennedy's decision is built on the premise that corporations are, in essence, associations of citizens engaged in speech. The speaker, he wrote, is just "an association that has taken on the corporate form."

This premise is a fallacy that turns the history of American law on its head. For more than two centuries, both conservative and liberal justices have advanced the doctrine that corporations are neither citizens nor political membership groups but "artificial" entities chartered by the states for economic purposes and endowed with significant legal benefits to promote capital accumulation, investment and growth. Corporations were always seen as economic instrumentalities subordinate to public

regulatory power, and never as equal participants in the formation of the political will of the people.

Chief Justice John Marshall [SLIDE 2] wrote in the *Dartmouth College* case (1818) that, “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.” Any constitutional rights corporations have are totally derivative of the natural persons who are shareholders and if those rights are separately vindicated for the individuals—if, for example, the shareholders can spend whatever money they want on campaigns--then the corporation has no independent rights to assert.

In the 1978 *First National Bank of Boston v. Bellotti* decision, where the corporate play for political spending rights first took place, conservative Justice Byron White pointed out that we endow private corporations with extraordinary benefits and subsidies – “limited liability, perpetual life and the accumulation, distribution and taxation of assets” — all in order to “strengthen the economy generally.” But, he argued, a corporation has no constitutional right to convert its awesome state-enabled economic wealth into the purchase of political power. As he so cogently put it: “The state need not permit its own creation to consume it.”

Even that famous left-winger Chief Justice William Rehnquist agreed, arguing that business corporations, which are magnificent agents of capital accumulation and wealth maximization in the economic sphere, “pose special dangers in the political sphere.”

Thus, until *Citizens United*, it was standard First Amendment doctrine that corporations enjoy no “money speech” rights in political campaigns. The decision capsized four prior Court decisions, wiped out dozens of federal and state laws banning corporate political *expenditures*, and undermined the rationale for the federal ban on corporate *contributions* directly to candidates that began with the Tilman Act of 1907. The new doctrine is that the “identity of the speaker” is irrelevant, and corporations have a First Amendment right to spend freely in politics because the speech they purvey is intrinsically valuable to listeners.

Taken seriously, of course, this doctrine would wipe out not only the century-old ban on direct corporate *contributions* to candidates, but the ban on federal, state and local governments making campaign contributions and expenditures; the ban on foreign governments spending on our political campaigns; the ban on churches, universities and other 501c(3) tax exempt entities spending their treasury money on campaigns; the ban on drug money and other criminal proceeds being laundered into the political process; and so on. If political money as a vehicle for political speech is an unqualified right without regard to the identity of the speaker, all bets are off; or, perhaps I should say: all bets are on. If the identity of the speaker is irrelevant, on what basis do we keep any money out?

We can contrast the Court's assertion that the "identity of the speaker" is irrelevant to a series of cases where real natural-person speakers have had their rights diminished by the Court precisely because of their identity. For example, high school students (*HAZELWOOD V. KUHLMEIER*, *MORSE V. FREDERICK*), Independent and third-party candidates for office (*FORBES V. AETC*), government employees (*GARCETTI V. CEBALLOS*), family planning and abortion providers (*RUST v. SULLIVAN*), and workers (third-party boycotts) have all faced Supreme Court decisions that upheld a reduction of their free speech rights precisely because of their personal, political, or professional identities.

In the real world, the decision reflected the triumph of a conservative judicial activism that has been pushing for decades to make corporate power king. A key player in this drive was Richmond big tobacco lawyer Lewis, who wrote a memo to the Chamber of Commerce in August 1971, two months prior to his nomination by President Richard Nixon to the Supreme Court, bemoaning the rise of liberal civic movements and proposing a strategy for restoring corporate political dominance. Once on the Court, Justice Powell came to author the 5-4 majority opinion in the *Bellotti* decision from Massachusetts which gave banks and corporations the right to spend unlimited amounts of money in public initiative and referendum campaigns. Although the decision did not address candidate campaigns, it was *Bellotti* first floated the metaphysical concept that, when it comes to corporations seeking the right to be financial players in politics, the "identity of the speaker" is wholly irrelevant.

Demolishing the Wall of Separation Between Corporate Treasuries and Public Elections

To appreciate the radicalism of *Citizens United* requires an understanding of what the law was before 2010. Corporations spent billions lobbying and on so-called "issue ads." They conducted voter registration drives within the company. They created Political Action Committees (PACs) and solicited contributions from their CEOs, executives and directors, and the PACs contributed directly to candidates or spent independently. Meantime, the same CEOs, executives and directors—people whose income and wealth have soared over the last several decades in relation to the rest of America – contributed directly to candidates and could also spend freely. In other words, despite all of the whining by the plaintiffs in *Citizen United* about being silenced, the corporate perspective was replete in American politics.

But there was one crucial thing that CEOs could not do: they could not reach into their corporate treasuries to spend directly on behalf of (or against) candidates for Congress or President.

This is a big difference. Consider Exxon-Mobil, the nation's largest corporation, whose PAC in 2008 raised just under \$1 million from executives and board members, a healthy sum that it invested in races across America. In the same election cycle, Exxon-Mobil had profits of \$70 billion. Imagine that the company had the right to dip into the corporate treasury the way that it now does and had spent a modest 10% of its profits in 2008--\$7 billion—to elect

its friends and defeat its enemies. This would have been more than was spent by the Obama campaign, the McCain campaign, every U.S. House and Senate candidate and every state legislative candidate in the country *combined*. Of course, nothing like this amount ever needs to be spent; it's enough to invest, say, \$7 million dollars—or 1-hundredth of 1% of its annual profits, to defeat a few Senators or Congressmen who get out of line and dare to challenge the corporation. All of the other politicians will quickly fall into place once the corporation makes an example out of the bad apples.

That's *one corporation*. Imagine what the Fortune 500 could do to our politics. Will we ever have a prayer to win political battles on behalf of the public interest over the moneyed opposition of the pharmaceuticals, the insurance companies, Big Oil, or what President Eisenhower called the "military-industrial complex"?

The old prohibition on spending money from corporate treasuries on campaigns established a "wall of separation" between corporate treasury wealth and federal public elections. This wall was first erected by the Tillman Act of 1907 banning corporate contributions to candidates. This still-operative ban was a policy decision advocated by President Theodore Roosevelt and adopted after a series of scandalous raids conducted by insurance company executives on their own corporate treasuries--what Louis Brandeis [SHOW PHOTO OF LOUIS BRANDEIS] called "other people's money"--to finance political campaigns of their friends.

This wall of separation was fortified over the last century by progressively stronger bans on independent corporate expenditures enacted in both federal and state law. These bans were affirmed by the Supreme Court in *Austin v. Michigan Chamber of Commerce* (1990) and *McConnell v. FEC* (2003), decisions which recognized the necessity of maintaining sharp distance between corporate wealth and democratic politics to prevent what the *Austin* Court called "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."

2010 and 2012 Elections

With *Citizens United*, the wall of separation came tumbling down and, as President Obama stated, the "floodgates opened." That was the comment that provoked the Justice Alito's sneering rebuke of the President at the State of the Union.

The rush of billions of dollars into the political system has been well-documented, but too often we define the problem in quantitative terms. It's more important to translate what all of the money means to the quality of political discourse,

The 2010 election should have been defined by three recent corporate catastrophes--the BP Oil spill in the Gulf of Mexico, which wrecked an entire eco-system

and inflicted billions of dollars of damage on the economy; the Massey company's collapsing coal mines in West Virginia, which cost 29 people their lives and were made possible by the corporation's aggressive corruption of government; and the sub-prime mortgage meltdown brought to us by the misconduct and political machinations of AIG and Wall Street, which cost the American people trillions of dollars in lost home values (and lost homes), ravaged pension and retirement funds and destroyed stock equity.

But the massive infusion into the 2010 election campaign of hundreds of millions of dollars in corporate and personal wealth through secretive 501(c)4 and 501(c)6 organizations and the new super-PACs completely changed the subject away from these debacles. With 84 new special-interest super-PACs in action and unknown numbers of 501c4 and 501c6 organizations pumping in corporate “dark money,” the dominant theme of the election became—amazingly—the importance of *deregulating* corporations. The Republican Party, with the corporate-backed Tea Party in the driver's seat, captured control of the U.S. House and brought near paralysis to national government. The catastrophes experienced by the nation went unaddressed in the campaign and ignored by Congress.

In the 2012 presidential elections, more than a half-*billion* dollars was spent by outside groups. This money came from a combination of wealthy individuals, corporations, 501c4s and unions. The combination of *Citizens United* and the *Speech Now* decision from the D.C. Circuit, which wiped out any limits on individual giving to Super PACs, meant that the top 1% of donors accounted for $\frac{2}{3}$ of Super PAC funds in 2012. According to Demos, at least \$71.8M of Super PAC money came from business corporations, but this is actually a small fraction of how much corporations spent, because they are mostly giving directly to 501C4s and c6s which transfer the funds to Super PACs but have no obligation to disclose their donors. We know the pro-Romney Super PAC Restore our Future received hundreds of millions from for-profit businesses in pass-through contributions. What all of this money paid for was, by definition, a corporate agenda, regardless of which party won, witness the Affordable Care Act, a law hatched at the Heritage Foundation, defined by insurance companies, and nicknamed after the President who said he knew the “single payer” plan was right but could not figure out a way to dislodge the insurance-medical complex.

The False Symmetry of Corporations and Unions

As we survey the wreckage of the Court's campaign finance jurisprudence, we find a tissue of fallacies, each exacerbating the underlying dynamics of political inequality in American society: Money is treated as speech. Corporations are treated as political groups of people. Campaign contributions can be limited because they cause corruption, but campaign expenditures cannot be limited because they don't.

But another fallacy has sunk so deeply into public and legal consciousness-- and even the thinking of the U.S. labor movement--that it is rarely ever identified, much less challenged, even by the usual critics of the Court's jurisprudence. It is essential to analyze if we are to have any hope of decorporatizing our Constitution, our Courts, our politics, and our society.

This fallacy is the false equation of corporations and unions for the purposes of First Amendment political-speech analysis. The parallel prohibition on independent campaign spending by both corporations and unions goes back to the 1940s to the War Labor Disputes Act and the Taft-Hartley Act. It has informed federal and state campaign finance law ever since, including McCain-Feingold [the Bipartisan Campaign Reform Act (BCRA) of 2002]. The equation of corporations and unions has the obvious whiff of political compromise about it. But it has always been a strikingly false equation, based only on the fact that corporations and unions have been adversaries and sparring partners, and unions used to be what John Kenneth Galbraith called a "countervailing power" to big business. But, as a constitutional proposition, the equation cannot withstand serious analysis of what these two institutions are and how they function.

As we have seen, a corporation is an artificial legal entity created and defined by the state that functions as a capital stock ownership structure, a vehicle of investment, and a hierarchical network of contractual obligations. It is designed to make profit and it is governed by a Board and management in the fiduciary interests of the shareholders, whose voting power is determined not on a one-person-one vote basis but simply by the number of shares they own. Business corporations are a form of property; they are not organized for political purposes and they have never been political membership organizations.

A union, on the other hand, *is* a political membership organization. It is not a form of property controlled by shareholders based on the percentage of stock they own, but rather a democratically governed association that operates on a one member-one vote principle. Its purpose is to advance common political objectives—for example, workplace safety, expanded voting rights and political participation, strengthened Social Security benefits--and to increase the material compensation and participatory voice of workers. In other words, unions are voluntary political associations centered on the workplace and whatever money they have to spend comes directly from union dues and contributions paid by their members, who elect their leaders.

Thus, unions should enjoy First Amendment political expression rights because they really *are* associations of citizens and, if the spending of money on an independent basis is going to be defined as protected speech, well, then unions must have an equal right to engage in it.

However, corporations are a horse of a completely different color. It is what the philosophers call a category error for the Court to say that corporations are citizen associations.

The grand irony is that, in the wake of *Citizens United*, CEOs and corporate executives have won far *more* freedom to spend treasury money on politics than union leaders have to spend union treasury money. CEOs can take millions directly out of their corporate treasuries and pump it into political campaigns as independent expenditures or, where allowed, as direct candidate contributions, without any prior shareholder approval or even notice. They are governed only in the loosest sense by the lax corporate Business Judgment Rule and the directive that the political spending must ultimately redound to the benefit of the shareholders. Furthermore, individual shareholders have no right to a rebate or refund if they disagree with the company's political expenditure.

Unions, meantime, are sharply restricted in their political expenditures because individual employees have a Constitutionally based and statutorily guaranteed right to opt out of any union political spending that they disagree with and to receive a pro rata rebate of their union dues for any offending political disbursement. A sequence of Supreme Court rulings--***Intl Ass of Machinists v. Street***, ***Abood v. Detroit Board of Education***, and ***Communication Workers of America v. Beck***--has upheld "union security" clauses compelling workers in a collective bargaining unit to pay dues for the costs of bargaining representation by the union, but has found that the First Amendment gives objecting workers the right to "opt out" of any political expenditures or contributions that do not relate to representational bargaining and to get paid back for that portion of their dues. All of you are probably familiar with this "objectors' dues" system.

In a 2012 article published in the *Columbia Law Review*, Harvard Professor Benjamin Sachs discussed this imbalance in the legal structure and made the case for "symmetrical treatment of employees and shareholders when it comes to the political spending practices of unions and corporations." Although theoretically, the *Beck-Abood* line of authority could be reversed, giving union leaders the same free sway as CEOs to spend treasury money, we know that is extremely unlikely, and Sachs therefore argues instead that corporate shareholders should simply enjoy the same "opt out" and "rebate" rights as union members.

This is an essential point that American government must insist upon. The money that millions of Americans have invested in corporate stock is not there for political purposes as anyone understands politics in our country. If a corporation's executives choose to spend in politics, shareholders should have a free speech right to "opt out" of the political expenditure by receiving a proportionate rebate of their portion of corporate resources devoted to the campaign expenditure. The fact that dissenting shareholders can stage an exit from the company by selling their shares is no more convincing than the argument that dissenting employees can go find another job. Under Supreme Court doctrine, corporations and unions are just different manifestations of civic activism and political association.

Creating corporate shareholder objectors' rights makes perfect sense, of course, but there are major problems with implementing it. Given overwhelming corporate

influence in Congress, the states and the SEC, it seems exceedingly unlikely that the law would be changed voluntarily any time soon to effectuate this right. I proposed such a bill in the Maryland general Assembly in 2010 right after *Citizens United* was decided, and it was buried in a blizzard of criticism from the Chamber of Commerce and a tight band of corporate and political interests. Moreover, the Supreme Court would almost certainly reject a First Amendment claim by shareholders that they are constitutionally owed such a rebate. The Roberts Court would say that there is no state action coercion bearing down on the shareholders since they can take their money elsewhere if they don't like corporate political spending and so free speech is never implicated. (Of course, a worker who disagrees with the political goals of the union can also go get a job elsewhere, but this point is, politically and doctrinally speaking, water under the bridge.)

The deeper problem, of course, is that even with a shareholder rebate option, *Citizens United* has so transformed the political process that it would make little practical difference in the huge political power shift under way in society because of *Citizens United*. Corporations have trillions of dollars in the treasury—not from the generosity of individual political contributors but from business and investment activity completely apart from politics--and they can spend billions of dollars on political ventures quite effortlessly. The labor movement has shrunk in size, wealth, and power, and has only the dues of its embattled working-class members to contribute and spend. This is a sum measured today not in trillions or billions but in millions. Labor cannot enter a fair political fight on the terrain that has been defined by *Citizens United*. Indeed, it is hard to see how any group—environmentalists, consumers, or prescription drug users, for example--that dares to take on corporate opposition can ever compete on an equal or fair funding basis. This does not mean that corporations will always prevail over their adversaries in our politics, but it means that, over the long haul, they are *likely and increasingly likely* to prevail and that they will begin any political matchup with a set of huge structural advantages.

And these advantages are constantly growing. The same Supreme Court which justifies newly minted corporate rights is constantly undermining the already precarious hold of unions. Last year in *Knox v. SEIU*, Justice Alito wrote an opinion weakening the ability of unions to exact funds from nonmembers, and this Term in *Harris v. Quinn*, at least four Justices, and maybe Justice Scalia, may be poised to wipe out union security Clauses entirely and destroy the capacity of agency shop unions to collect administrative dues from nonmembers. In other words, while business corporations are being falsely treated like political membership groups, the real membership groups that are labor unions are facing the guillotine at the hands of a Court that used to accept union security clauses as a necessary corrective to the Free Rider Problem but now convenient may view them as an assault on associational freedom. The constitutional doctrine adjusts to enlarge corporate power and shrink the unions.

The Citizens United Shareholder Rights Act and the Democracy Amendment

So what to do?

Jerry Wurf taught us that labor must make common cause with progressive forces in civil society against the enemies of democracy and justice.

Today, this will require unions to break from the myth that corporations and unions share a common status under the Constitution and a common interest in allowing corporate political spending rights. It means that the legal brief that the AFLCIO, amazingly, filed on behalf of the petitioners in the *Citizens United* case should be the last time that the labor movement ever makes that egregious mistake again.

The groups most threatened by the constitutionalization of corporate political rights and the corporatization of our politics are, after labor, environmental groups, consumer groups, small business and shareholders.

These groups need to act quickly, in a nimble and focused way, to counter the deepening corporatization of our Constitution and politics. I want to offer two strategies, one that takes *Citizens United* on its own terms and tries to implement its premises through statute, the other that confronts it with an aggressive constitutional politics.

The Citizens United Shareholder Protection and Democracy Act of 2014

As we have seen, the *Citizens United* majority says that corporations have political rights because they are, in essence, associations of individual citizens. Justice Kennedy: **“the speaker is an association that has taken on the corporate form.”** *Citizens United*, 130 S. Ct, 876, 904. If shareholders dissent from the political expenditures made by management, Justice Kennedy says that shareholders will correct the situation “through the procedures of corporate democracy.” [Citizens United, 130 S. Ct. 876 at 911] He is confident of this because he assumes that all political spending will be thoroughly disclosed on-line: **“Shareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”**

Read as factual assertions, these claims are false because disclosure of corporate spending is basically nonexistent and it is impossible to find a case where the shareholders have been able to use procedures of corporate democracy to check the political activities of management. But these are precisely the legal preconditions that we need to establish for corporate political spending. What we need is statutory rules requiring rapid disclosure by corporations on their websites of all political spending, and we need strong “procedures of corporate democracy” to integrate effective shareholder input into political spending decisions.

Ideally, these rule changes would come from the national level, but Congress failed even to enact the first step of simple disclosure when it deadlocked on the Disclose Act. Similarly, the Securities and Exchange Commission received a petition for a rulemaking in 2011 to design new campaign spending disclosure rules for regulated corporations, but nothing has happened, and the SEC just announced that there would be no rulemaking procedure in response to this petition in calendar year 2014.

The burden of action thus falls on the states. I was able to get passed a new campaign finance disclosure requirement in Maryland for corporations engaged in political expenditures of \$10,000 or more in 2012—not perfect, but a good start. This year I am introducing a **Citizens United Shareholder Protection and Democracy Act which provides that (1) corporations that wish to engage in political spending must demonstrate that they have an internal mechanism and plan for determining the majority political views and will of the shareholders; and (2) if no majority political will can be formed in the shareholders because a majority of shares are owned by institutions forbidden by law or contract to take political positions, then the corporation is forbidden to make political expenditures or contributions.**

It is hard to overstate the importance of this latter provision. More than 70% of the shares at the nation's Fortune 1000 firms are owned by "giant institutional investors,"² like mutual funds, insurance companies, federal, state and local retirement and pension funds, universities, foundations, charities, and other not-for-profits. The vast majority are legally prevented from engaging in partisan political activity, either by their 501c(3) status, by other federal or state laws, or by contract. Furthermore, even on issues where the money managers for these institutions can vote on proxy resolutions, the actual human owners of the shares "have absolutely no voice" in them, and are overwhelmingly unaware that they are even taking place [, as Professor Jennifer Taub observes in her compelling article on the subject.]³

Thus, the obvious fiction that corporate spending simply registers the political will of an association of individuals is completely unsustainable today when it comes to the largest and most important corporations. The shareholders are an association not of individuals but of investing entities without any political ideas, values, voice, form, identity or role. If mega-corporations like Exxon/Mobil or Lockheed Martin engage in political spending, it has nothing to do with the expression of the political ideas of the shareholders. Its justification is rooted not in the First Amendment rights of millions of anonymous and passive shareholders but in the power that the CEO and executives want to have to purchase political influence and in the complementary desire of politicians to share in the wondrous bounty of corporate wealth. The expressive speech element drops out entirely, and the power element becomes exclusive and dominant.

² Jennifer Taub, Money Managers in the Middle: Seeing and Sanctioning Political Spending after Citizens United 106.

³ Taub, 143 ("The real people who own shares directly are in the minority, and lack power. And those who invest indirectly through mutual funds or defined contribution retirement plans . . . have absolutely no voice, and must depend upon money managers to act for them.")

So there is no constitutional justification for permitting corporations whose shares are dominated by non-political institutional investors to put the money of tens of millions of silent, passive and unknowing citizens into our electoral process.

Is there perhaps a *policy* justification for this kind of corporate spending? Often it is said that corporations have a deep interest in public policy. Exxon-Mobil wants to influence energy policy, and Lockheed Martin wants to influence the military budget and foreign policy. Why *shouldn't* they be able to spend tens or hundreds of millions of dollars, either directly or through intermediaries, to take out their opponents and propel the politicians who will loyally do their bidding?

Here, I find the best answer comes from the conservative classical economists who fear the process of political “rent seeking” operations in which corporate interests invest hundreds of *thousands* of dollars in campaigns in order to achieve returns of hundreds of *millions* of dollars in favorable public policy and special interest legislation. By allowing large parasitic groups dependent on state subsidy for their livelihood to participate with their money in the selection of political leaders, we promote reproduction of the financial *status quo* and deepening inequality; we favor extractive and parasitic industries over independent and entrepreneurial ones; and we replace the healthy dynamics of free market competition with bureaucratic state capitalism, entrenching corruption of both the economic and political spheres.

The best description of this process today comes from conservative economists like Raghuram Rajan and Luigi Zingales of the University Chicago Booth School of Business, whose book *Saving Capitalism from the Capitalists* is essential reading for the new age of “vulture capitalism,” as Mitt Romney’s opponents like Rick Santorum properly called it. The authors argue that incumbent corporate interests invested in “extractive” para-state industries, like the military-industrial complex, the energy sector, and pharmaceuticals, have come to dominate politics and government so effectively that they are able to leverage government regulation to reproduce and advance their own position by thwarting the free market and controlling the expenditure of public resources. According to Adam Smith, who believed strongly in governmental regulation to make the market fair and fluid, corporate conspiracies against the public interest were to be feared and prevented. **“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”** --Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations (Book 1, Chapter 10)* The worst corporate conspiracies, as our Founders knew, are the ones that involve the state itself.

Several million dollars invested by a corporation in political campaigns and lobbying can produce an astounding return of hundreds of millions or billions of dollars in tax breaks, corporate welfare, sweetheart contracts, bailouts, deregulation, and inside deals. This squalid form of “public policy” is splendid for the corporations involved but dismal for everyone else, especially the smaller businesses and industries that do not have the finance capital to invest in the political system. A plutocratic state thus denies

both political justice and a fair and competitive market economy in which businesses thrive by virtue of their creativity and initiative rather than the size of their campaign spending and their stable of lobbyists. The Court has helped to usher in an America in which success in politics depends on corporate money and success in business depends on political connections. The states need to act quickly to rebuild the wall of separation between corporate wealth and political power.

A DEMOCRACY AMENDMENT TO THE CONSTITUTION

But to do that will require, ultimately, a constitutional amendment.

This is because, even if we mounted a massive effort to pass comprehensive and effective disclosure laws, like the DISCLOSE Act, and laws compelling real human shareholder participation in corporate political spending decisions, even then, *Citizens United* would be a dagger pointing at the heart of democracy in this century simply because private corporate wealth exists for the purposes of increasing private corporate wealth and all of these laws would essentially formalize and institutionalize the awesome power of corporations to control and define the public agenda in its own interest.

I am, also, therefore introducing a Resolution in this Session of the legislature for a Constitutional Convention to enact a Democracy Amendment to the Constitution. (Senate Resolution 6.)

The purpose is to develop a constitutional Amendment (1) to establish a universal affirmative right to vote and to be represented in government, a freedom that is now currently denied to millions of American citizens; and (2) to reestablish the power of Congress and the states to ban political spending by business corporations and to regulate political campaign contributions and expenditures on a viewpoint-neutral basis to promote democratic political equality.

When *Citizens United* came down, I wrote a letter to our congressional delegation that was signed by a majority of the members of the Maryland General Assembly calling on Congress to pass such an Amendment. Although several Amendments have been introduced, no action has been taken.

Calls for a constitutional convention have prodded Congress in the past to act—this is how we got the 17th Amendment instituting direct election of U.S. Senators and 19th Amendment implementing woman suffrage. When enough states act, Congress sees the light and passes the Amendment rather than call a Convention.

A lot of people in academia are afraid of a constitutional convention actually coming to pass and of it becoming a runaway convention. But anything that a Convention does will have to be passed by three-fourths of the states, meaning that single legislative chambers in just 13 states

could block anything that emerges. The bottom line is I am a lot more afraid of a runaway Supreme Court than a runaway Convention. Progressives should reclaim the progressive legacy not just of the Bill of Rights but of the 17 Amendments that have passed since then because they are overwhelmingly suffrage-expanding, democracy-deepening Amendments: the 13th Amendment, 14th Amendment, 15th Amendment, 17th amendment, 19th Amendment, 23rd Amendment, 24th Amendment, and 26th Amendment.

The Democracy Amendment is the logical culmination of this process and supplies what was missing when the Constitution was rewritten: the definition of democracy as belonging to *all* the people but only to *the people* and their voluntary political associations.

Mr. Jefferson, Rebuild this Wall! *Hobby Lobby* and the Gospel of *Citizens United*

Amending the Constitution today to rebuild the wall of separation between corporate treasury wealth and political campaigns is an act not only of democratic self-respect but democratic self-defense because its corporatism is spreading in astonishing ways.

The Supreme Court recently heard arguments in the *Hobby Lobby v. Sebelius* case, which threatens to extend the gospel of *Citizens United* by declaring that large business corporations have not only political campaign spending rights but religious free exercise rights that they can use to deny their employees contraceptive coverage. The outlandish claims of the company involved would not have a prayer except for *Citizens United*. As Judge Tymkovitch put it for the U.S. Court of Appeals for the Tenth Circuit, “We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression. “

Hobby Lobby is a big business with more than 13,000 mostly female employees. The management wants to deny them access to certain contraceptives, like Plan B and certain IUDs, which are supposed to be available to everyone under Obamacare but which the company says it finds theologically objectionable. Ironically, Hobby Lobby’s private insurance plan fully funded these religiously incorrect forms of birth control for several years before the 2010 passage of the ACA [and the Department of Health and Human Services’ issuance of its “Preventive Services” Rule], which made coverage for them obligatory. So it was Obamacare which apparently gave Hobby Lobby its corporate epiphany that these forms of birth control were sinful. Amazingly, its challenge produced an off-the-rails decision by the Tenth Circuit that the company’s “religious” rights had been violated.

Hobby Lobby has been consolidated with *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377, 381, 384 (3d Cir., 2013), in which the U.S. Circuit Court of Appeals for the Third

Circuit rejected the same package of arguments, advanced by a company owned by Mennonites, concluding correctly that “for-profit, secular corporations cannot engage in religious exercise” and remarking that “we are not aware of any case . . . in which a for-profit, secular corporation was itself found to have free exercise rights.”

But it is a sign of the perilous path we are on that the Court now seems poised to take these claims seriously and to baptize business corporations as pious citizens, giving them the selective power to discriminate against employees who want nothing more than an equal right to comprehensive health care.

As the Third Circuit found, there is no history of courts providing free exercise rights to corporations, and the whole “purpose of the Free Exercise Clause ‘is to secure religious liberty *in the individual* by prohibiting any invasions thereof by civil authority.’” 724 F.3d at 385 (quoting *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (emphasis added)).

This is the crucial point. The author of the First Amendment, James Madison, argued that religious exercise was a freedom belonging to *individuals*, who have reason, conviction and a relationship with God, and this freedom cannot not be tampered with by the state, the church or any other institutional power. As he put it in his famous Memorial and Remonstrance, “we hold it for a fundamental and undeniable truth ‘that religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction . . .’ The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”

The campaign to treat business corporations like “persons” for religious purposes does not mean corporations will be able to pray or believe in God or fast or repent, for as Justice Stevens said in dissent in *Citizens United*, “[C]orporations have no consciences, no beliefs, no feelings, no thoughts, no desires.” The thought is absurd.

Classifying business corporations as persons with religious rights just gives management the power to *dominate* the religious lives of citizens in the same way that treating them like “persons” for political purposes gives them the power to dominate the political life of citizens. The real-world consequence of *Citizens United* is not to expand the political *freedom* of citizens but to reduce the political *power* of citizens vis-à-vis huge corporations with vast fortunes. And so it is here: the Court cannot give these artificial entities religious rights and beliefs, but it can give the people who run the corporations religious power over other people’s lives. Not *Citizens United*, *Citizens Derided*.

Hobby Lobby was decided by the Tenth Circuit in the name of Free Exercise of religion and free individual choice, but the decision makes a mockery of religion and destroys the free

individual religious and moral choices of women who are denied their rights to full contraceptive care. The claims are surely blasphemous to anyone who has a Madisonian conception of the relationship between a person and God. Yet, the *Citizens United* Court has made a religion out of business so it is only natural that enterprising lawyers will now want to make a business out of religion.

There is not much new in what I have said, and anyone who follows the Roberts Court knows of its pro-corporate bias. In the Term after *Citizens United*, the majority sided with pharmaceutical companies against doctors and patients with respect to patient privacy in *Sorrell v. IMS Health Inc.*; drug manufacturers against medical consumers and patients in *Pliva, Inc. v. Mensing* and *Bruesewitz v. Wyeth LLC*; large corporations using adhesion contracts against consumers in *AT&T Mobility LLC v. Concepcion*; Wal-Mart against millions of low-wage women workers in *Wal-Mart Stores v. Dukes* alleging sex discrimination; foreign multi-nationals against injured American workers in *J. McIntyre Machinery v. Nicastro*; CEOs and corporate executives against shareholders and investors in *Janus Capital Group v. First Derivative Traders*; and corporate wrongdoers against citizen whistle blowers in *Schindler Elevator Corporation v. United States*.

But if one case comes to stand for this whole debased moment in judicial history, surely it will be *Citizens United*, and future generations will probably come to call this the *Citizens United* era. It is a moment when the Court conflated the economic powers that the people have invested by statute in corporations with the constitutional rights that the people have reserved to themselves in politics. The function of this conflation is to merge corporate power with governmental power, which is the precise opposite of what our Founders did in building a wall of separation between church and state and what our democratic forebears intended to do in building a wall of separation between corporate treasury wealth and democratic election campaigns.

We should want all law-abiding private corporations to succeed, innovate, create, thrive and prosper, but never to control government and thereby thwart the will and political sovereignty of the people. In the struggle for democracy that defines democracy, we know what our task is in the new Century. And, here, in the shadow of Wurfs and Kings, what an awesome legacy we all have to live up to.

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