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**“Citizens Derided:
Corporate Politics
and Religion in the
Roberts Court”**

The 2014 Jerry Wurf
Memorial Lecture



The Labor and Worklife Program
Harvard Law School

JERRY WURF MEMORIAL FUND (1982)
Harvard Trade Union Program, Harvard Law School

The Jerry Wurf Memorial Fund was established in memory of Jerry Wurf, the late President of the American Federation of State, County and Municipal Employees (AFSCME). Its income is used to initiate programs and activities that “reflect Jerry Wurf’s belief in the dignity of work, and his commitment to improving the quality of lives of working people, to free open thought and debate about public policy issues, to informed political action...and to reflect his interests in the quality of management in public service, especially as it assures the ability of workers to do their jobs with maximum effect and efficiency in environments sensitive to their needs and activities.”

Jerry Wurf Memorial Lecture

February 6, 2014

Jamin Raskin

“Citizens Derided: Corporate Politics and Religion in the Roberts Court”

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Darrin Spann

**Darrin Spann,
Assistant Director of AFSCME Council 13 in
Pennsylvania**

I am Darrin Spann, Assistant Director of AFSCME Council 13 in Pennsylvania. I want to bring a welcome to you this afternoon on behalf of the Jerry Wurf Memorial Fund Advisory Committee. I would like to welcome all of you at Harvard and to the annual Jerry Wurf Memorial Lecture.

I would also be remiss if I did not bring a welcome from AFSCME President Lee Saunders and Secretary-Treasurer Laura Reyes. Lee Saunders and Laura Reyes were elected at our 2012 Convention. Lee is the first African American president of our union. And Laura is the first female elected to national office.

I want to take a second to say thank you to Elaine Bernard. Your hard work and vision for the Labor and Worklife Program here at Harvard has made it second to none. So thank you.

Also I would like everyone to stand for a second. Face that way. We want to say a special thanks to Mildred Wurf.

Mildred is the wife of the late Jerry Wurf. Mildred's commitment and dedication has continued to make the Fund what it is today. Mildred, on behalf of all of us who have benefitted from Jerry's vision, I just wanted to say thank you.

Jerry Wurf became president of AFSCME in 1964. At the time, AFSCME had probably around 250,000 members. Through collective bargaining wins and Jerry's tremendous organizing skills, the union grew to more than a million members by 1978. Under his leadership, AFSCME became one of the most powerful unions in the labor movement. And it continues to be one of the most powerful unions in the labor movement today. The Jerry Wurf Memorial Fund supports a number of programs here at Harvard. One of those programs is the Union Scholars program, which puts college students into AFSCME organizing campaigns in the summer. Then they come here to be further educated at Harvard.

I had the honor in 2006 to be sitting in the place where some of you are as participants in the Harvard Trade Union Program. It was a sometimes overwhelming experience. The thing I learned most about, what I liked most about the program, was meeting folks just like you, folks from across the world who were in the labor movement and doing different things I had never thought about. I got to see the labor movement through a different prism through this program. You have met with each other, this is a lifelong thing, and you will see these people in different aspects in labor wanting to have these conversations you are continuing to have.

One of the stories I wanted to tell.... A quick story. I got to campus on a Sunday, the program started Monday. I met Jack Trumpbour. Jack took me

to my apartment. All of you know Jack. Before he left, he stopped. Let me give this to you. He handed me this bag with all of these books in it. I said, is this for me and my roommate? He said, that is just some of the material you will need. I knew I was in a bit of trouble at that point! It turned out rewarding.... A lot of reading as you all know, but it was fun.

So I have the honor to introduce Nicholas Worth, son of Jerry Wurf ...

Nicholas Worth

Good afternoon. It is nice to see all of you, and thank you for the kind words for my mother who was so much a part of making this happen a long time ago. It is good to see it thriving so many years later. I am particularly pleased to be here not just because Jamie Raskin is such a distinguished man, but also because we are very old friends. It is a friendship that started actually because my father and Jamie's father Marcus were friends, colleagues, collaborators I guess you would say, back in D.C., back in the day. My father I think more than anything was someone who believed in the power of ideas and of intellectual ferment, and of the dialectic in trying to get to the right answer. But not stopping there. Trying to figure out how you take a great idea and how to turn it into a great action. And that every great idea must have a great action to be a great idea. Marcus Raskin, Jamie's dad, was one of the idea guys who collaborated with my dad not only on opposition to war in Viet Nam, the nuclear freeze movement,

and any number of initiatives over the years. And there was sort of no surprise to me knowing Jamie that he became what he did, a very distinguished professor of constitutional law at American University, the author of books on constitutional law and constitutional literacy. Jamie has always been that sort of person who is always thinking how things can be better and more just. But what has been so amazing to me is Jamie's second life. Jamie, now in addition to being a distinguished constitutional scholar, is an elected official and has been a State Senator since 2006, State Senator from Silver Spring to Takoma Park in Montgomery County, Maryland. He is now the majority whip of the Maryland State Senate where he has through his extraordinary leadership passed more than 60 bills on a variety of progressive topics and turned some great ideas into some great actions. So I think my dad would be really proud.

I will tell one quick Jamie story, and then I will get out of the way. Back in 2006, some months before Jamie was elected for the first time to the State Senate, he was actually testifying in the Maryland State Senate on the topic of same sex marriage. As he was testifying, one of the Republican Senators interrupted him to say, Well, yes, yes you are talking about equal protection and due process and all that sort of thing. When are you going to talk about the Bible? The Bible says that marriage is between one man and one woman. To which Jamie said, Yes Senator, but as I recall you put your hand on the Bible and swore to uphold the Constitution. You did not put your hand on the Constitution and swear to uphold the Bible.



Nicholas Worth

Keynote Address Jamin Raskin



Jamin Raskin

Nick—Thank you for that wonderful introduction—my cup runneth over. Your friendship means a lot to me.

Nick, Mildred, Abigail, and the whole Wurf family and nation, Dr. Bernard, Elissa McBride, Union Leaders from across America and around the world, Distinguished Guests:

As a State Senator and law professor, I do a lot of public speaking, but 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, the law school where I met my wife, and the law school that tried to kick me out when I protested against Harvard's corporate investments in South Africa back in the 1980s with my friends Jennifer Granholm and Michael Anderson. (In fact, I see a quote from Nelson Mandela outside of this room, right across from a quote from Derek Bok, so I guess all is forgiven now.) It's not just that this Lecture was given by great leaders like Vice-President Albert Gore and Swedish Prime Minister Olof Palme.

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. Jerry Wurf’s role in that struggle never fails to startle and move me. 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 Henry Loeb 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.

What I take from Jerry Wurf’s imperishable work 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 democracy needs, we need tough-minded and large-hearted union leaders who can see converging strains of history coming together and then organize us into better social movements and coalitions to rise to the occasion.

“What I take from Jerry Wurf’s imperishable work is that strong democracy requires a vibrant labor movement”

The Corporatization of Our Constitution and our Politics

“...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”

I hope everyone keeps in mind the image of Jerry Wurf and the member-driven, dues-paying AF-SCME 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 what the philosophers call 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

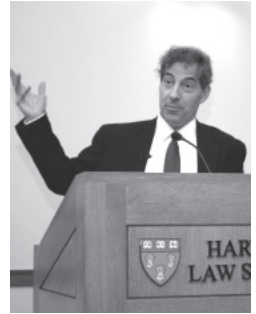
Now, I wanted to start on a bipartisan note by invoking our last great Republican President—

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,” and it never mentioned God.

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 Assessments" 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 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. It held that for-profit corporations have the right to spend unlimited sums—millions or billions of dollars—promoting or disparaging candidates for public office.

Now, I need not waste any time convincing a roomful of union leaders 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 that it is only Section 7 of the Wagner Act and union organizing that have established 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. 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, never as equal participants in the formation of the political will of the people.

Chief Justice John Marshall 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 conservative gambit 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 candidate political campaigns. The decision capsized three 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 Tillman 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 nullify not only the century-old ban on direct corporate contributions to candidates, but also 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 501(c)(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 because of their identity. For example, high school students in *Hazelwood v. Kuhlmeier* and *Morse v. Frederick*, Independent and third-party candidates for office (*Jenness v. Fortson* and *Forbes v. Arkansas Educational Television Commission*), government employees in *Garcetti v. Ceballos*, family planning and abortion providers (*Rust v. Sullivan*), and workers seeking to picket as part of so-called "secondary boycotts" (*DeBartolo*) have all faced Supreme Court decisions that upheld a reduction



Jamin Raskin and
Nick Worth

or cancellation of their free speech rights precisely because of their personal, political, or professional identities.



Jamin Raskin with
Mildred Wurf, son
Nick and daughter
Abigail

In the real world, *Citizens United* 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 Powell, 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* that 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 so-

licited 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 *Citizens 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 2007-2008 election cycle, Exxon-Mobil had profits exceeding \$85 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 2007-2008--\$8.5 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, \$8.5 million dollars—or 1-hundredth of 1% of its bi-annual profits, to de-

“...despite all of the whining by the plaintiffs in Citizens United about being silenced, the corporate perspective was replete in American politics.”

feat 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 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 the decision in *Citizens United*, the wall of separation came tumbling down and, as President Obama stated, the “floodgates opened.” That was the comment that provoked 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

“...catastrophes experienced by the nation went unaddressed in the campaign and ignored by Congress.”

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 501(c)(4) and 501(c)(6) 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, 501(c)(4)s and unions. The combination of *Citizens United* and the *SpeechNow.org* decision from the D.C. Circuit, which wiped out any limits on individual giving to Super PACs, meant that the top one percent of donors accounted for two thirds 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 501(c)(4)s and 501(c)(6)s which transfer the funds to Super PACs but have no obli-

gation 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 and pass single payer.

“As we survey the wreckage of the Court’s campaign finance jurisprudence, we find a tissue of fallacies...”

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 one exacerbating the underlying dynamics of political inequality.

Money is treated as speech. Corporations are treated as citizens organized into political groups. Campaign contributions may 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 de-corporatizing 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 profits, 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

“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.”

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—*International Association 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 rec-

ognized 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-Aboud 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 solution makes 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, and the Supreme Court would almost certainly reject a First Amendment claim by shareholders to such a rebate. The Court would say that there is no state coercion bearing down on the shareholders since they can take their money elsewhere if they don’t like corporate political spending 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 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

“Corporations have trillions of dollars in the treasury... and they can spend billions of dollars on political ventures quite effortlessly.”



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, 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 guil-

lotine at the hands of a Court that used to accept union security clauses as a necessary corrective to the Free Rider Problem but now eyes them suspiciously as an assault on associational freedom.

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 AFL-CIO, amazingly, filed on behalf of the petitioners in the *Citizens United* case should be the last time that the labor movement ever makes such a campaign finance 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 prem-

“...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.”

ises through statute, the other that confronts it with an aggressive constitutional politics.

The *Citizens United* Shareholder Protection and Democracy Act

As we have seen, the *Citizens United* majority says that corporations have political rights because they are, in essence, associations of individual citizens. As Justice Kennedy put it, “the speaker is an association that has taken on the corporate form.” 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.” He is confident of this because he assumes that all political spending will be thoroughly disclosed online: “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. America needs statutory rules requiring rapid disclosure by corporations on their websites of all political spending, and we need the “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," like mutual funds, insurance companies, federal, state and local retirement

“More than 70% of the shares at the nation’s Fortune 1000 firms are owned by ‘giant institutional investors’”

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 501(c)(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.

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. 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 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 of Chica-

go 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. He wrote: “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.

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 U.S. 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 the 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. In 2014, I am a lot more afraid of a runaway Supreme Court than a runaway constitutional amendments 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 also reli-

“The Democracy Amendment is the logical culmination of this process and supplies what was missing when the Constitution was rewritten”

gious 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 the watershed of *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 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 of corporations praying to God is absurd. It is nonsense.

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*, but 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 advanced by the corporation here would not have

a prayer in any other Court at any other time. 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.

The *Citizens United* Era

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*.

“...future generations will probably come to call this the *Citizens United* era”

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 in the early 20th century intended to do in building a wall of separation between corporate treasury wealth and democratic election campaigns.

As democratic citizens, we should want all law-abiding private corporations to succeed, innovate, create, thrive and prosper, but never to govern and thereby to 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, as we are surrounded by Kings and Wurfs and the veterans of the civilizing struggles of the last century, we must remember what an awesome legacy we all have to live up to.

Question and Answers

Q. Henry Garrido, AFSCME District Council 37, New York: I am interested in this concept of shareholders. Unions have pension funds that we invest. When it comes to shareholder resolutions, the Department of Labor reminds us about shareholder and fiduciary responsibility. The issue of divestment came up about apartheid. We were told about the pressure, you cannot do that. There may be pressure still at that level from the perspective of pension investment. But could we get some movement on this?

A. That's an awesome question. The Supreme Court in *Citizens United* is giving you precisely the opening you need because all you have got to do is come back and say, OK, we are shareholders and the Supreme Court has told us that this corporation is not just an economic entity. It is a political entity. So we want to express ourselves as shareholders and that is perfectly valid and legitimate. I think not only is it the right thing to do and an appropriate thing to do, but maybe also the only thing to do at this point. We have got you the leverage of the pension and retirement funds, the progressive universities or at least to the extent that universities can be pushed by their students to push shareholder resolutions to make the corporations conform to some decency and behavior in the world. So I think that you have got your answer. I think you can say the Supreme Court has said this is precisely what we are supposed to be doing. But when they go and invest in Mitt Romney's Super PAC, we are just vindicating fiduciary



Question from
Henry Garrido,
AFSCME District
Council 37, New York

responsibility and advancing our shares by saying this is a waste of corporate assets. We have got to wake up, so that our money is aligned with our values, as people who have retirement funds and pension funds and shares in corporations.

Q. James Williamson, Cambridge citizen-activist: Thank you. The problem for me is there are not enough people like you in decision-making positions either at the state or at the federal level, and I am feeling rather hopeless about that. And *Citizens United* has not made it seem a lot more likely. How do we break the lock hold on government power that corporations have and their minions for whom they are the corporate paymasters, in the words of Ralph Nader? How much hope can we put in the institutional Democratic Party? There are lots of good people in the Democratic Party here locally, I am involved with some of that. But institutionally the Democratic Party seems to be in lockstep with all of the kinds of stuff that I think you are focusing on. So it is sort of a two part question. Change ends specifically with the institutional Democratic Party.

A. Well, on the change question, it goes somewhat back to the other question. I think the labor movement needs to make allies with corporate shareholders. I think a lot of shareholders would love the option of saying they can have a rebate when the company engages in political spending. I think a lot of people would love to get that \$50 to \$80 back, or whatever it might be. Why shouldn't people? The Supreme Court and the right have been so focused on making certain labor union

members have the right to opt out and get a rebate if they are just paying the administrative fee, why shouldn't the shareholders get that same right? So some change can be pushed through corporate America and through Wall Street and through shareholder resolutions. I don't feel hopeless because I think the demographics of the country are changing in a fundamental way and in a profound way. I have seen lots of huge mobilizations of people to turn things around in struggles all over the country. So I guess I would say I would place my faith in the people and the people in this room and the organized workers to turn things around, rather than in big partisan structures that are basically mechanisms for raising money.

Q. Louisa Bull, Unite union UK: This might seem like a quite naïve question. What you said about the Supreme Court and their bias, are there any cases that are going to come up through the system or any movement being discussed to overturn those decisions? In the UK, the kind of strategy that we would be adopting when we get a case is obviously we try to find our own cases. I wonder if that is even remotely possible?

A. Well, you know there has been a conflict within the labor movement about this question. When *Citizens United* was brought to the Supreme Court, the AFL-CIO actually filed a brief on behalf of the corporate rights precisely because corporate and labor rights had been linked so heavily in the doctrine. And that's what I was trying to attack there in the analysis. I don't think we have to accept that. I don't think we should accept that, I don't



Question from
Louisa Bull,
Unite union UK

think it has been to the benefit of unions because of this constant downward pressure on the rights to organize and to be able to sustain themselves with the member dues against the free rider problem. But look, my students are always shocked when I tell them this: the fact of the matter is if you look at the whole sweep of American history, the Supreme Court has been a profoundly conservative or reactionary institution for most of its life. It still gets a little bit of a halo because of what happened in *Brown versus Board* and *Roe versus Wade*, but that was about two decades when the Court was very briefly aligned with civil rights and civil liberties movements in the country. For the entire history of slavery, the Supreme Court was totally lined up with the slave masters and the slave holders, even after the Civil War and the Reconstruction period. The Supreme Court in *Plessy versus Ferguson* upheld Jim Crow in 1896, which lasted for another half century. So what we are talking about is really just a few decades of judicial liberalism. To my mind, this means standing with the rights of the people for a few decades. With the Rehnquist Court and the Roberts Court, the Court has swung back and retreated to its old reactionary baseline of standing up for wealth, power and property. Even the equal protection clause does not really work for African Americans and other minority groups any more. It works a lot better for white people who are challenging affirmative action and majority Black Congressional districts.

Q. Henry Garrido, AFSCME District Council 37, New York: At the risk of committing blasphemy I am going to take a crack at taking a page out of

the National Right to Work Foundation and say, is there anything that we could do at the state level? When they ask a question like ten different times till they get the Supreme Court the way that *Harris v. Quinn* is doing now. Is there anything you could do at the state level either to carve out or to derail at least the tendencies of *Citizens United* the way it is applied today?

A. Yes. That is why I come back to getting corporate disclosure of political expenditures legislation passed either through your campaign finance reporting entity or, better yet, to the shareholders. If a corporation wants to spend money on politics, it has got to disclose it to the shareholders or it has also to clear it with the shareholders on the theory that it is the shareholders' free speech rights that are being expressed by the corporation. And let's push that real hard. Let's make them defend *Citizens United* the way it is written because it is justified in the name of the political beliefs and values of the shareholders. We know that is phony. But let's get them to defend that. Everybody in this room if you presumably have a retirement or a pension plan, your money is ending up in those corporations, and who knows where they are spending their money.

Right now Congressman Chris Van Hollen was unable to get the DISCLOSE Act through Congress. They do not even have to disclose where their political spending is. And the hundreds of millions that we know about may just be at the tip of the iceberg because of all of the money that is being kind of sanitized and laundered through

501(c)(4) and 501(c)(6) organizations that do not have to disclose who their donors are. Sunlight, disclosure, consent of the shareholders.... Get those things through. Those should be popular broadly. When you poll those things, 70 or 80 percent of the people agree with it. Then maybe the corporations try to challenge those. And the CEOs say it is our right to spend it without consulting the shareholders, without telling anyone. Let them rule on that. Let's force them on that. In the meantime, we have this Constitutional movement underway with a move to amend, and other groups that are trying to put on the agenda repealing *Citizens United*. Ryan Clayton is here from Wolf PAC, a group that is working on this issue.

Q. Jeff Farrell, UFCW International, California: I am just curious what other states are working on this Constitutional amendment idea? And what could we do here in the progressive states?

A. The California House, I think yesterday, passed the call for a Constitutional convention. They beat us to it. There is a movement in California to do it, and I think it has already been introduced in ten states. I would expect it to be introduced this year in double that or more. There are a lot of states starting to come on. It starts to pass in a few states, and people say we have really got to turn it around. The Constitutional politics should not be seen as a different road from the statutory. But it is all the same.

If you look at the history of women's suffrage, the movement to put it in the Constitution came along

with all these other laws to try to give women equality in the workplace. I think that is how Constitutional amendments work. They become an umbrella for movements to move the country in another direction. The conservatives have no qualms about putting in Constitutional amendments. They have got a million of them: flag desecration, balanced budget amendment, school prayer. They throw them all in, and they plant a flag. We have become 'fraidy cats about Constitutional amendments, despite the fact that the history of Constitutional amendments in America since the Bill of Rights has been a history of progressive amendments that enlarge and deepen democracy. The Fifteenth Amendment... no discrimination in voting based on race, the Fourteenth Amendment... equal protection and due process, the Thirteenth Amendment abolishing slavery, the Seventeenth Amendment providing for the direct election of U.S. Senators, the Nineteenth Amendment granting women's suffrage, the Twenty-third Amendment giving people in D.C. participation in Presidential elections, the Twenty-fourth Amendment abolishing poll taxes, the Twenty-sixth Amendment lowering the voting age to age 18. I mean the Amendments in our Constitution tell the story of popular struggle, and it is not over yet. What we do in this century is very important in terms of what they have done, which is not a Constitutional Amendment. They could never have gotten that in through a Constitutional Amendment. It was Justice Powell and the right-wingers on the Court today who have snuck it in and re-defined corporations as people and given them the rights of the people.



Chris Mackin ,
President,
Ownership Associates

Q. Chris Mackin, Ownership Associates: Here is a little bit of a provocation. But I will sort of pick up on the quotations of one of the Justices you put up that strangely refers to corporations as if they are some kind of social institutions, some kind of association like a union is.... Which it clearly is not. Because corporations are property, they are not democratic social institutions. They are associations of shareholders pursuing property rights and so forth. Imagine for the purposes of discussion two kinds of corporations: one corporation that is a property entity and another one that is a social institution, a democratic cooperative, for example. Not too far from here is a company called Equal Exchange that has a hundred members who are in fact the owners of that company, not through property rights, but through personal rights of association because they are members of a cooperative. They perhaps should be given the rights understood in *Citizens United*; in fact they would have the right kind of values to have a voice as a corporation because they are a legitimate social institution. Now the question is, if that is true as a provocation, then another route at what we are trying to get at is how to convert corporations to social institutions. A thought?

A. The last thought, I am totally with you. In fact, I introduced legislation which has spread across the country to create benefit corporations allowing them to build a public purpose into their charter. I am with you on that. Are you talking about a 501(c)(3) or a for-profit? People have asked me this about benefit corporations. Benefit corporations

are progressive corporations, but their money still comes from people wanting to buy their canoes or their pet food. It does not come from people putting their money into supporting their political objectives. So I still think *Citizens United* is wrong. But as long as we have got it, I hope that they are involved because we are in a big battle here. But I do not want to confuse the issue. A corporation is really a different kind of thing. The twenty-five people who created that business could also now say they are wearing different hats saying they are now going to create a social movement, a political party, and entity and where they are going to put our own money in.... and that's great. I would like to say the reason why people go to McDonald's is to get a Big Mac and fries. They do not go to support the political agenda of the McDonald's Corporation. And I think that is true across the board.

Q. Yvonne Cortes Flores, AFSCME Local 1624: Before I came here, we had a really good presentation about ALEC. So I wanted to get your feedback. Obviously they are a threat. Do you put them up in the same capacity as *Citizens United*. What are your thoughts on this?

A. ALEC is not fooling anyone, speaking as a state legislator. We have known all along who ALEC is. What they do is a good job of getting some right-wing bills passed and then basically taking them on the road to the red states. There is a lot of the Koch brothers money funneled into there. But look, I am not afraid of a fair fight against these people. I am just afraid of an unfair fight. That is why this is at the level of an emergency because

we have got big stuff on the horizon. We have tremendous inequality in the country. We need to defend working people. We also have to save the planet from corporations and people who are in absolute denial about the reality of climate change. They are going to take all of us over a cliff. We are talking about vast exorbitant sums of money. We can handle ALEC. But we have got to deal with the Supreme Court.

Q. Megan Lane, International Union of Operating Engineers, Sacramento: I was just going to mention that I saw nine or ten years ago a documentary called “The Corporation.” I just want to recommend it as we educate our members about this whole situation. I think about how many of our members really know about this *Citizens United* and really understand it. Sometimes showing a documentary is helpful. I think that is really a good one about this change and shift that you have been discussing about corporations becoming people.

A. I agree totally. It is an excellent documentary. For me, it is important to say that it is not about abolishing corporations, it is about keeping them in the right place, and not confusing the boundaries. As the Court has said, corporations have been fantastically successful for accumulating wealth, investing wealth, and making economic change happen, but you need to have both regulatory fences to control what they are doing in terms of the environment, labor, and so on, but also constitutional fences to make sure they do not devour the government. Then we live in a Hunger Games-style corporate state.

Q. Joe Spallino, IBEW Seattle: This could be off topic a little, but if you do not want to go there I understand. But since we have someone of your stature here.... The Supreme Court's right-wing bent. Could you break down what happened with the Affordable Care Act, and Roberts voting to pass it, or voting to uphold it?

A. Well, Roberts split the baloney very finely. So what he said was that he was able to vote with the conservatives to say that Congress did not have the power under the Commerce clause to pass the Affordable Care Act. Why? Because of the individual mandate provision. Now allow me a digression because this drives me crazy. That individual mandate provision came out of the Heritage Foundation and Governor Romney as a counter to the progressives who said we needed a single-payer plan. In any event, that is what ended up coming out. The individual mandate provision, you have got to be covered. If you are not covered, you have to purchase yourself some insurance. The conservatives came in with a case saying that under the Commerce clause Congress does not have the right to pass a law that compels people to buy something. I think even now that is totally baloney. They are saying you cannot force people to do things under the Commerce clause. What was the Civil Rights Act of 1964, which was passed under the Commerce clause, other than telling the hotels and restaurants of the South that they have to serve people they do not want to serve.

In any event, they got five votes including Roberts saying Congress does not have the right to tell

people to buy insurance, finding it Unconstitutional under the Commerce clause. But then Roberts flipped over and voted with the four liberals saying he would uphold it because it is a tax. So under Congress's taxing power, it was valid. And so he was able to kind of have it both ways. But the conservatives wanted a constriction of Congress's power under the Commerce clause. I mean they wanted to decapitate the Affordable Care Act too. But they at least wanted to establish the principle, and they did. But he was able to save a huge social collision on Obamacare.

Q. Do you think he was planning to kill it, or was there more of a long-term strategy at work?

A. He is very good at planting these little time bombs. In reducing Congress's power in the Commerce clause, that has been the basis for the Clean Air Act, the Clean Water Act, the National Labor Relations Act was upheld under the Commerce clause, the Fair Labor Standards Act. I mean all of that were battles fought for decades in the Supreme Court. So again the right-wing is at war against the Commerce clause. And so this in a certain sense was a victory for them in principle. But he was able to pull a rabbit out of his hat and say the conservatives win on the doctrine but Obama can have the program he borrowed from Romney.... He did not want to go all the way because he knew the reaction would be much like *Bush v. Gore*. This was in 2000, and that was the most insane outburst of judicial activism in U.S. history for the Supreme Court to intervene in a Presidential election and to command that ballots

not be counted: 170,000 ballots left on the table in Florida for the first time in American history. Between that in 2000 and *Citizens United* in 2010, that's a decade of movement where the right went from stealing one Presidential election to fixing the whole political process on behalf of the interests of big corporate power.

Q. Shane Brinton, California United Homecare Workers: Thank you for your presentation. You make a very compelling case for the need for a Constitutional amendment to reverse *Citizens United*. But even if we had that, I am worried that wealth would still play a major part in our democracy because of *Buckley v. Vallejo*. So even if a corporation could not use its treasury money to buy an election, a CEO could use personal wealth that they raided from the corporate treasury to buy an election. I am curious do you think it is important to address the doctrine of money as speech in the context of a Constitutional amendment, or at least in legal challenges?

A. Fantastic question. The answer is yes I do. And all of that goes to the question of what happens at a Constitutional convention. Or if it does not get there, what happens when we debate what Constitutional amendments say. One very popular proposal that is out there is to say that Congress has the power to regulate expenditures in political campaigns, which would allow us both to abolish corporate spending and the power to set limits on contributions in expenditures, which is considered totally boring and obvious in most parts of the world. But here the Supreme Court is defining

it in such a way that it allows for plutocracy to govern and for certain people to have thousands of times more political power than others.

Announcement from Darrin Spann: Any further questions.....

A. I have bored them into silence!

Darrin Spann: I don't think so.

Applause.

Elaine Bernard: On behalf of the Harvard Trade Union Program, I want to thank you for honoring Jerry Wurf and for providing guidance on what needs to be done to reinvigorate U.S. democracy.

