PEOPLE FOR THE AMERICAN WAY FOUNDATION

The *Citizens United* Era:

How the SUPREME COURT Continues to Put BUSINESS FIRST

By Jamie Raskin

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It may be hard to name an era when you are still living through it, but chances are pretty good that future scholars of the United States Supreme Court will come to call our times "the Citizens United era." Like its historical forerunner of a century ago — the politically reactionary and judicially radical Lochner Court, the *Citizens United* Court has an organizing constitutional principle, a sharp political and economic bias and a distinctive jurisprudential style. These features were all on display in the 2010-2011 Supreme Court Term, which was, generally speaking, a blowout victory for the runaway power of the CEOs and managers of large corporations against the quaint, old-fashioned claims for fairness and justice brought by mere citizens, states, consumers, workers, company whistle-blowers, doctors, patients, parents, and corporate shareholders. The recent Term keeps the newly minted "corporate Americans" on top in every way and keeps the rest of us American Citizens United — united, that is, on the losing end of every major struggle with corporate power.

The governing constitutional principle of the *Citizens United* era is that corporations, which are nowhere mentioned in the Constitution and had heretofore been seen as the chartered creatures of state governments and subject to their laws, now enjoy the same political rights as the people under the First Amendment and may not be constrained by representative government if they wish to spend millions or billions of dollars in election campaigns to press their concerns. This revolutionary elevation of the constitutional rights of corporations has made plain to the public the pro-corporate bias that saturates the usually invisible workaday statutory interpretation also performed by Chief Justice John Roberts, Justice Antonin Scalia, Justice Clarence Thomas, Justice Sam Alito and Justice Anthony Kennedy — the ruling majority on what we last called "the Corporate Court." (See The Rise of the Corporate Court: How the Supreme Court is Putting Business First.) With alarming frequency, and whenever it matters most, this "conservative" bloc will torture out of any statutory language or constitutional text — or increasingly any dictionary definition — an argument that will allow a corporate litigant to prevail in a significant social or economic conflict. The Supreme Court jurisprudence in the new era is thus dismally results-oriented, haphazard and incoherent, extremely hostile to federalism and the states (as well as Congress), politically polarized, sarcastic and petty in tone, and overall a running mockery of the rule of law.

> "The laws that Congress and the states have enacted to protect our rights and advance justice for all were simply cast aside by the Roberts Court."

The 2010-2011 Term, which followed the *Citizens United* decision by one year, rounded up all the usual winners and losers in statutory battles and underscored the Court's determination to use the First Amendment as a shield to insulate corporate power and put state government in its place. While it is impossible here to cover all of the many dozens of commonplace decisions the Court handed down, this Report identifies the most crucial and divisive decisions that directly arrayed corporate power against the interests of doctors and patients, consumers and workers, tort victims, corporate shareholders, and corporate and government whistle-blowers. The laws that Congress and the states have enacted to protect our rights and advance justice for all were simply cast aside by the Roberts Court.

Doctors Lose, Pharmaceutical Companies Win:

In Sorrell v. IMS Health Inc., the Court Uses the First Amendment to Revive the Lochner Era

In *Sorrell v. IMS Health Inc.,* 564 U.S. ___ (2011), the majority struck down Vermont's Prescription Confidentiality Law, which provided that, unless physicians consented, pharmacies and health insurance companies could not sell to pharmaceutical companies (or use themselves), for marketing purposes, information about what drugs the physicians had been prescribing to their patients for which diseases and conditions. This is information, as Justice Kennedy explained for the majority, that "pharmaceutical manufacturers" like to use to "promote their drugs to doctors through a process called 'detailing.'" The detailing process involves direct visits to a doctor's office to persuade the doctor of the virtues of a particular drug. According to Justice Kennedy, "Salespersons can be more effective when they know the background and purchasing preferences of their clientele ... Knowledge of a physician's prescription practices — called 'prescriber-identifying information' — enables a detailer better to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message."

Does this corporate marketing interest actually rise to the level of a First Amendment right and does the Vermont statute violate it? Justice Kennedy answered yes to both questions. The Vermont law, which seeks to leave it up to physicians themselves whether their prescription histories should be made available to corporate salespeople, is unconstitutional because it "disfavors marketing, that is, speech with a particular content" and "disfavors specific speakers, namely pharmaceutical manufacturers." Just as the Court majority found in *Citizens United* that the ban on corporate campaign independent expenditures discriminated against corporations on the basis of their identity, the majority in *Sorrell* found that the state's attempt to protect "prescriber-identifying information" discriminated against pharmaceutical corporations and direct advertising speech.

In a brilliant opinion, Justice Stephen Breyer, writing for the dissenting justices, demolished these tawdry arguments. The effect of the Vermont law is not to forbid or require anyone to say anything or to endorse or disavow any view but only to "deprive pharmaceutical and data-mining companies of data, collected pursuant to the government's regulatory mandate, that could help pharmaceutical companies create better sales messages." But this effect "is inextricably related to a lawful government effort to regulate a commercial enterprise." The Court majority's unprecedented use of "heightened" First Amendment standards to examine such a policy is simply "out of place." At most, the Court should have used the "intermediate" test governing laws that affect commercial speech, which asks whether a law is narrowly tailored to "directly advance" a "substantial government interest," which this law clearly is, in terms of protecting the public health, securing the privacy of prescribers and prescribing information, and controlling the costs of health care.

Justice Breyer would not have even gone that far, insisting that the normal "rational basis" test for commercial regulation should apply in this context. He observed that the Roberts Court majority is rapidly eroding the distinction between political speech by citizens and commercial speech and conduct by corporations, wiping out well-developed First Amendment doctrine and threatening all kinds of essential regulations of industry practices, from the food and drug industry to electricity generation. He noted how the current Court is using the First Amendment in the same way that the Lochner Court used the Due Process clause: to invalidate ordinary public laws regulating economic life and business, shifting the locus of power from popularly elected legislatures to the judiciary.

> "The Roberts Court majority is rapidly eroding the distinction between political speech by citizens and commercial speech and conduct by corporations"

He writes:

> **Since ordinary regulatory programs can affect speech, particularly commercial speech, in myriad ways, to apply a "heightened" First Amendment standard of review whenever such a program burdens speech would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives.**

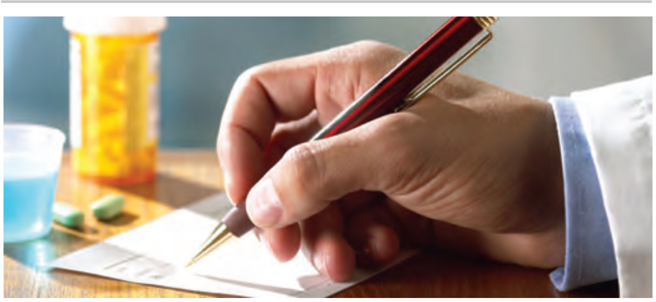
Justice Breyer is not crying wolf when he warns that the Court's new speech jurisprudence is breathing new life into old-fashioned Lochnerism. In tough language, he admonishes us that the Court has opened a "Pandora's Box":

> **Given the sheer quantity of regulatory initiatives that touch upon commercial messages, the Court's vision of its reviewing task threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty. History shows that the power was much abused and resulted in the constitutionalization of economic theories preferred by individual jurists. See Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).**

Read Justice Breyer — hardly a Ralph Nader-style critic of corporate power — and brace yourself for an onslaught of *Lochner*-style challenges to run-of-the-mill social and economic regulation based on the new corporate-infused First Amendment doctrines.

Patients and Medical Consumers Lose, Drug Manufacturers Win:

Pliva, Inc. v. Mensing and Bruesewitz v. Wyeth LLC



Patients and prescription drug users fared no better than physicians this Term when their rights came into collision with the power of the pharmaceutical companies. In two separate decisions, the majority sided with some of the most powerful corporations in America against health consumers and laws designed to protect them.

A central battleground has become the insistence by Big Pharma in the Roberts Court that federal laws preempt state laws designed to protect consumers and the public health. This is an argument that is music to the ears of the conservative Justices. Consider *Pliva, Inc. v. Mensing,* 564 U.S. __ (2011), in which Justice Thomas delivered the opinion for a 5-4 majority invalidating state law tort claims brought by two women who ended up with a severe neurological disorder called tardive dyskinesia after taking metoclopramide, the generic equivalent of Reglan, a drug designed to aid digestion. Justice Thomas found that federal law requiring generics to have the same labels as brand-name drugs preempted the company's obligation under state "failure to warn" tort laws to inform consumers that the label significantly understated the drug's risks. According to the majority, it would have been "impossible" for the generic drug makers to comply with both the federal and state laws.

> "The majority opinion's sweeping reading of the Supremacy Clause amounted to a dramatic expansion of federal preemption of state laws and, implicitly, an assault on the power of states to protect their citizens."

Writing for the dissenters, Justice Sotomayor eviscerated Justice Thomas' reasoning, pointing out first that it was not "impossible" for the pharmaceutical manufacturers to meet both their federal and state law responsibilities because the companies admitted "that they could have asked the FDA to initiate a label change," a step they simply never took. Had they made the request and had it been rejected, Justice Sotomayor noted, only then could an "impossibility" defense have been entertained. Justice Sotomayor pointed out that the majority opinion's sweeping reading of the Supremacy Clause amounted to a dramatic expansion of federal preemption of state laws and, implicitly, an assault on the power of states to protect their citizens.

Justice Sotomayor identified three "absurd consequences" of the majority decision that make it implausible that this result was any part of Congress' intention. First, the decision "strips generic-drug consumers of compensation when they are injured by inadequate warnings. . . .As the majority itself admits, a drug consumer's right to compensation for inadequate warnings now turns on the happenstance of whether her pharmacist filled her prescription with a brand-name drug or a generic. If a consumer takes a brand-name drug, she can sue the manufacturer for inadequate warnings under our opinion in *Wyeth*. If, however, she takes a generic drug, as occurs 75% of the time, she now has no right to sue."

Second, the decision "creates a gap in the parallel federal-state regulatory scheme in a way that could have troubling consequences for drug safety." State tort law has always furnished people an extra "layer of consumer protection" by providing an incentive for drug makers to "disclose safety risks promptly." An important component of this state-law consumer protection is now out the window. Finally, and closely related to this point, the majority decision "undoes the core principle ... that generic and brand-name drugs are the 'same' in nearly all respects." From now on, consumers "of brand-name drugs can sue manufacturers for inadequate warnings; consumers of generic drugs cannot." Nothing in the majority opinion, Justice Sotomayor wrote, "convinces me that . . .Congress enacted these absurd results."

Justice Sotomayor wrote with equal outrage about the majority's deployment of federal preemption doctrine to preclude a state law design-defect claim brought in a Pennsylvania lawsuit by the parents of Hannah Bruesewitz, a 10-year-old girl who suffered over 100 seizures after receiving a DTP (diphtheria, tetanus, and pertussis) vaccine. The Bruesewitzes claimed that the pharmaceutical company could have avoided the disastrous, life-changing side effects of a scientifically outmoded vaccine by fulfilling its duty under state products liability law to improve its vaccines in light of technological and scientific advancements.

In *Bruesewitz v. Wyeth LLC,* 562 U.S. ____, Justice Scalia delivered the majority's opinion, reading the following statutory text to block out all state law design-defect claims (after the petitioner has first gone to the Court of Federal Claims) under the National Childhood Vaccine Injury Act of 1986 (NCVIA):

> **No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.**

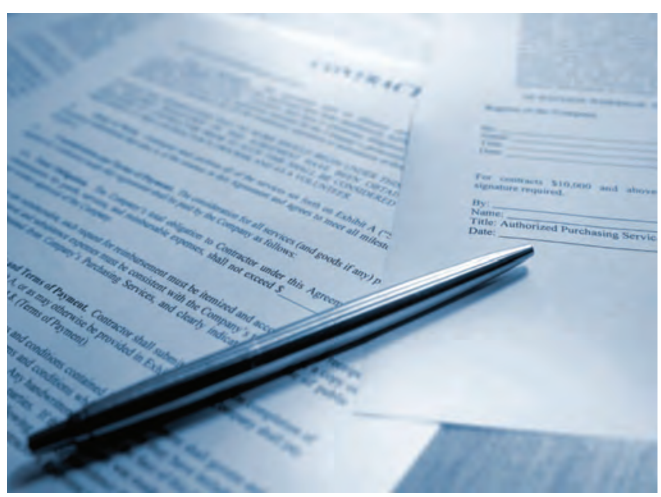
Justice Scalia's interpretation of this language to foreclose even *avoidable* design-defect claims makes no sense. In order to achieve his desired result, he simply wished part of the statutory language away, acting as if 13 words simply didn't exist:

> **No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the vaccine was properly prepared and was accompanied by proper directions and warnings.**

Justice Sotomayor spared him no embarrassment in puncturing his strikingly results-driven arguments. She began by observing that the majority "imposes its own bare policy preference over the considered judgment of Congress," and meticulously demonstrated that Justice Scalia's contorted interpretation depends on a series of illogical and specious assertions and the treatment of no fewer than 13 words in the above statutory language as pure surplusage. Indeed, reading these words out of the statute to negate the liability of pharmaceutical manufacturers in state court design-defect lawsuits cuts against every principle of plain-language statutory construction. After showing that the Court majority had just destroyed incentives for manufacturers to "take account of scientific and technological advancements," Justice Sotomayor closed with these stinging words: "Nothing in the text, structure, or legislative history remotely suggests that Congress intended that result."

Consumers Lose, Large Corporations with Adhesion Contracts Win:

AT&T Mobility LLC v. Concepcion



In *AT&T Mobility LLC v. Concepcion,* 562 U.S. (2011), the Concepcion family sued AT&T in federal court in California after they responded to the company's advertising for a "free phone" but discovered in their next bill a charge for $30 in sales tax for the phone. Their suit was consolidated with a class action lawsuit asserting false advertising and fraud against the company for this cynical bait-and-switch tactic contained in an "adhesion contract" — a "take it or leave it" standard form contract loaded up with fine print and unconscionably lopsided terms.

AT&T moved to dismiss the Concepcions' participation in the class action and to compel them to participate in individual arbitration because they had signed the company's adhesion contract, in which the company refused to sell them service unless they first surrendered their right to class-wide arbitration or litigation. Both the District Court and the Ninth Circuit found that the waiver of class action rights was unconscionable under California law because there was, procedurally speaking, "unequal bargaining power" and, in a substantive sense, an "overly harsh" result. These courts cited a rule derived from a California Supreme Court decision, the so-called Discover Bank rule, that dealt specifically with class-action waivers in arbitration agreements and had determined that:

> **When the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of another. Under these circumstances, such waivers are unconscionable under California law and should not be enforced.**

A number of other state supreme courts have arrived at the same conclusion: adhesion contracts nullifying the possibility of class relief are unconscionable — and therefore unenforceable — if they thwart the consumer's right to participate in class action lawsuits or arbitration in a context suggesting that a large corporation is ripping off a huge number of people in small increments and hoping to get away with it perpetually by blocking the possibility of class action relief.

But, with Justice Scalia leading the parade, the usual 5-4 majority returned and found that the California *Discover Bank* rule is — you guessed it! — preempted by the Federal Arbitration Act, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The District Court and Ninth Circuit saw no preemption in sight since this carefully drafted savings clause permits arbitration agreements to be nullified by "generally applicable contract defenses," and state-law unconscionability doctrine definitely appeared to qualify since it obviously extends way beyond the arbitration context and is therefore not designed to interfere with arbitration. But, putting on his always-reachable legislator's hat, Justice Scalia added up a bunch of policy reasons to favor individual arbitration over class-wide arbitration and found that all of the states defending their contract-law principles like California were sacrificing "the principal advantage of arbitration — its informality" and making "the process slower, more costly, and more likely to generate procedural morass than final judgment." Thus, the corporate bloc (which pretends in other contexts to respect the states) simply disregarded the plain language of the Federal Arbitration Act and returned to a favorite doctrine — federal preemption of progressive state laws for conservative policy reasons — to overturn the lower federal courts and extinguish California's law.

> "Justice Scalia makes up out of thin air a statutory preference for individual arbitration."

In a withering dissent filed for himself and Justices Ginsburg, Sotomayor and Kagan, Justice Breyer castigated the majority for not recognizing that the California *Discover Bank* rule did not create a "blanket policy" against class action waivers in the arbitration context. The rule applied to all contracts, including those having nothing to do with arbitration, and, in the arbitration context, applied only where certain conditions were met — contracts of adhesion involving a small amount of damage where it has been alleged that the advantaged party has carried out a scheme to deliberately cheat large numbers of consumers. Thus, it is impossible to see how this state rule could be directly targeting arbitration per se such that it compels preemption. Justice Breyer further observed that the California rule is not a policy against arbitration at all but only a policy, in certain conditions, against coerced *individual* arbitration.

The rule actually saves class arbitration from consumers being unfairly stripped of it. Yet, Justice Scalia makes up out of thin air a statutory preference for individual arbitration.

As Justice Breyer asked: "Where does the majority get its contrary idea — that *individual*, rather than class, arbitration is a 'fundamental attribute' of arbitration? The majority does not explain."

Justice Breyer closed his opinion by discussing the way that the unprecedented majority decision kills off the viability of class-wide relief in situations where consumers often need it the most, i.e., where large numbers of people are getting ripped off of relatively small sums of money. "What rational lawyer," he asks, "would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?" And he also reminded the federalism-spouting majority that "federalism is as much a question of deeds as words."

Millions of Low-Wage Women Workers Lose, Wal-Mart Wins:

Wal-Mart Stores, Inc. v. Dukes

Dismantling the class action mechanism — not just for consumers but for workers — was a commanding theme of the Term. In a decision that has attracted widespread notice and condemnation, the pro-corporate majority reassembled in Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___ (2011), under Justice Scalia's leadership. By a 5-4 vote, the conservatives destroyed a class certification in a lawsuit by one-and-a-half million women plaintiffs contending that they had suffered sex discrimination as employees of Wal-Mart under a system of standardless pay and promotion decisions delegated to mostly male local management teams all over the country.

But Justice Scalia insisted that the lower federal courts' certification of the class action for these low-wage women was flawed under the Federal Rules of Civil Procedure because "their claim must depend upon a common contention — for example, the assertion of discriminatory bias on the part of *the same supervisor*." (Emphasis added.) Justice Scalia saw no common contention in their lawsuit. This extraordinary holding is a sharpened dagger pointed at the heart of class action relief in employment lawsuits, which form precisely to make common complaints that cut across individual offices and departments. The claim that a "common contention" must relate to the *same supervisor* rather than the same corporate policy or practice threatens employment class action lawsuits all over America and has thrown a series of such job discrimination class action suits into disarray.

Writing for the four (partial) dissenters, Justice Ginsburg mobilized a series of striking facts to refute Justice Scalia's sweeping and sinister suggestion that there were not sufficient common issues to justify class action certification in this and similar cases: women occupy 70% of the hourly jobs in Wal-Mart stores but only 33% of management positions; the higher one looks on the corporate ladder, the fewer women appear; and women are paid less than men in every region. Justice Ginsburg also took the time to review some of the actual evidence produced in discovery, such as expert statistical findings establishing an "inference of discrimination," statements by Wal-Mart managers like "men are here to make a career and women aren't," and a finding by a committee of women Wal-Mart executives that "stereotypes limit the opportunities offered to women." Insisting that a corporate "system of delegated discretion" is indeed "a practice actionable under Title VII when it produces discriminatory outcomes," Justice Ginsburg took Justice Scalia to task for conflating the threshold class action certification criterion of a "common question" with the separate issue of incidental monetary relief, thus making class action lawsuits by employees (or consumers) to stop the discriminatory treatment far more difficult to get off the ground.

While the dissenters clearly demonstrated that the women met the threshold requirements for forming a class, they agreed with the majority that the specific type of class action the women sought to use in this case was not available to them. However, they would have remanded the case to allow the women to pursue an alternative type of class action suit. Unfortunately, the pro-corporate majority's ruling that the women cannot form a class of any type makes that impossible.

Injured Workers Lose, Foreign Multinational Corporations Win

J. McIntyre Machinery, LTD. v. Nicastro

In *J. McIntyre Machinery, LTD. v. Nicastro 564* U.S. ___ (2011), an industrial worker named Robert Nicastro brought a lawsuit in New Jersey state court against the British manufacturer of a three-ton metal shearing machine that neatly severed four fingers from his right hand. The company, headquartered in Nottingham, England, moved to dismiss the lawsuit on the grounds that the court lacked "personal jurisdiction" over it, the kind of jurisdiction required by the Constitution that gives a court the power to issue a ruling affecting a particular person, corporate entity, or other party to

> "Our corporate Court is so one-sided in its sympathies that it extends rights to foreign corporations"

litigation. Under the Due Process Clause, a state court cannot hear a case if the parties have no appropriately relevant contact or relationship with that state. The New Jersey Supreme Court found that jurisdiction clearly existed since the company aggressively put its equipment into the market in all 50 states and that Due Process was in no way offended by a state court asserting jurisdiction over a foreign manufacturer that knew that its products were being promoted and distributed through a nationwide marketing system — which McIntyre's were. Writing for the four-justice plurality (including Chief

> "Justice Ginsburg chastised the majority for this appalling decision, which marked a total break from precedent"

Justice Roberts, Justice Scalia and Justice Thomas, with Justices Breyer and Alito concurring), Justice Kennedy reversed the New Jersey Supreme Court on this question and found there was no personal jurisdiction since "no more than four machines ... ended up in New Jersey" and other ties between the company and New Jersey were too tenuous to fairly invoke jurisdiction against the foreign company.

Writing for herself and Justices Sotomayor and Kagan, Justice Ginsburg chastised the majority for this appalling decision, which marked a total break from precedent and traditional understandings of "specific jurisdiction" in the states. She reviewed how McIntyre Machinery advertised and sent representatives to attend all the major conventions and trade shows to put its product into the stream of U.S. commerce. She explained how it engaged a U.S. distributor to hustle and ship its machines within all 50 states. She also emphasized that this case is not anomalous but "illustrative of marketing arrangements for sales in the United States common in today's commercial world."

Invoking the famous "reason and fairness" standard derived from the *International Shoe case,* Justice Ginsburg asked the key question: "Is it not fair and reasonable, given the mode of trading of which this case is an example, to require the international seller to defend at the place its products cause injury?" She showed how more than a dozen federal and state courts all over America had come to precisely this conclusion in analogous personal injury cases. As the New Jersey Supreme Court observed in the opinion that the Roberts Court reversed, "With the privilege of distributing products to consumers in our State comes the responsibility of answering in a New Jersey court if one of those consumers is injured by a defective product." Perhaps most strikingly, she showed that under European Union law, a New Jersey corporation selling machinery in Europe would have to face injured workers "in matters relating to tort . . . in the courts for the place where the harmful event occurred." Thus, our corporate Court is so one-sided in its sympathies that it extends rights to foreign corporations, insulating them from liability, in ways that their own countries would never do with respect to U.S. corporations.

Shareholders and Investors Lose, Corporate Executives and CEOs Win:

Janus Capital Group, Inc. v. First Derivative Traders

Not content with the trail of tears left for injured workers, brokenhearted parents, ordinary consumers, and victims of discrimination working at Wal-Mart this Term, the Supreme Court even protected the leaders of large corporations when they turn against the corporation's putative owners. This Court apparently can see no evil in the schemes of Wall Street CEOs and executives even when they are targeting the shareholders. Indeed, this Term inflicted serious damage on the prospect of having a more honest and transparent market in corporate securities.

> "The sympathies of the corporate bloc on the Court run not to corporate investors and shareholders but to corporate managers and CEOs."

In *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. ___ (2011), the 5-4 majority found that Janus Capital Management LLC (JCM), a mutual fund investment adviser, could not be found civilly liable in a private action under SEC Rule 10b-5 for making various false statements to investors in its client mutual funds' prospectuses. Justice Thomas spoke for the corporate bloc in finding not that JCM's statements — which allegedly suppressed the truth about Janus Capital Group's involvement with "market timing" operations — were actually true but that it makes no difference either way because JCM was only the investment adviser, and not the corporation itself releasing its own prospectus. He found that, because Janus Capital Group created Janus Investment Fund and Janus Capital Management LLC provided Janus Investment Fund with investment advisory services, all the various entities "maintain legal independence." Get it? If you create a bewildering family of "individual" corporate entities and some of them are merely advising the others, the corporate-advising entities can make false statements that are quoted or cited by the companies releasing a prospectus, and everyone is free of 10b-5 liability! It's like magic. The deceiving speaker is like a "speechwriter" not ultimately responsible for the content of his boss' speech.

Writing for the four dissenting justices, Justice Breyer pierced through this fog of obfuscation and denial, observing clearly the interlocking and closely coordinating nature of the two key companies: "Janus Management and the Janus Fund are closely related. Each of the Fund's officers is a Janus Management employee. Janus Management ... manages the purchase, sale, redemption and distribution of the Fund's investments. Janus Management prepares, modifies, and implements the Janus Fund's long-term strategies," and so on and on. He then pointed out that Rule 10b-5 provides that it is unlawful for "*any person*, directly or indirectly ... to make any untrue statement of material fact" in connection with the purchase or sale of securities. (Emphasis added.) Justice Thomas "incorrectly interpreted the Rule's word 'make.' Neither common English nor this Court's earlier cases limit the scope of that word to those with 'ultimate authority' over a statement's content." Many prior cases established that management companies, boards of trustees, individual officers, investment advisers, lawyers and accountants could "make" statements within the meaning of 10b-5. The majority's endorsement of corporate-securities three-card monte effectively guts the rule going forward. As one California court put it in rejecting the test requiring a company to have legal "control" over third parties for the rule to operate against them, such a reading offers "company officials too much leeway to commit fraud on the market by using analysts as their mouthpieces."

The remarkable quality of the jurisprudence of the *Citizens United* era is that the sympathies of the corporate bloc on the Court run not to corporate investors and shareholders but to corporate managers and CEOs. It is hard to find an economic logic, much less a constitutional one, for such an orientation, but the underlying political dynamics seem clear enough.

Corporate and Citizen Whistleblowers Lose, Corporate Wrongdoers Win:

Schindler Elevator Corporation v. United States

The full extent of the Roberts Court majority's pro-corporate enthusiasm cannot really be seen until you look at cases where the Court deliberately chooses to undermine the power of government to detect, investigate and prosecute corporate criminality. For a final look at the 2010-2011 Term, consider a decision that gives you a taste of the corporate bloc's eagerness to shield government contractors engaged in fraud from facing even civil consequences.

The False Claims Act, which prohibits submitting false or fraudulent claims for payment to the U.S. government, authorizes citizens to bring *qui tam* actions against defrauding parties in the name of the government. The so-called "public disclosure bar" does not allow *qui tam* suits that are simply "based upon the public disclosure of allegations or transactions ... in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation." In other words, the often lucrative mechanism of the *qui tam* action is reserved for citizens who either already have, or go out and get, special knowledge of corrupt and fraudulent activity rather than those who simply follow public reports of government investigations and learn about them the way everyone else does.

The issue in *Schindler Elevator Corporation v. United States,* 563 U.S. ___ (2011), was whether a United States Army veteran of the Vietnam War who blew the whistle on hundreds of false claims for payment submitted by his former employer should lose the ability to prosecute a *qui tam* action because part of the evidence for his case included a federal agency's written response to a request his wife made for records under the Freedom of Information Act. Justice Thomas, of course, said yes, the whistle-blower action is out the window because such records are a "report" within the meaning of the exemption, despite the fact that information produced through FOIA is not mentioned in the "public disclosure bar" and had never before been treated as part of it. Justice Thomas swept past objections that guilty government-defrauders will now petition for FOIA records as a way to block *qui tam* actions and ignored the entire whistle-blower community that begged the Court not to undercut the statute in this way.

In an exhaustive dissenting opinion, Justice Ginsburg explained that all the other exclusions contained in the "public disclosure bar" relate to the "synthesis of information in an investigatory context," something that obviously does not apply to individual FOIA requests. She said that the Court's ruling "weakens the force of the [False Claims Act] as a weapon against fraud on the part of government contractors," and openly invited Congress to try to repair the damage of the decision.

The *Citizens United* Era and the Growing Invincibility of Corporate Power in Court

There are two obverse perils for Court-watchers in interpreting the meaning of Supreme Court Terms. One danger is to over read into the Term as if a Court carefully arranges all of the cases to produce a common organizing theme that can be reduced to a headline. This is obviously not how the Court works. The flip-side danger is to view each case in radical isolation and proceed as if there are not principles and values that organize the legal consciousness of different blocs of justices.

The radicalism of last year's *Citizens United* decision and the persistent divisions on the Court relating to controversial cases about corporate power mean that we have quite definitively entered into a new era of judicial consciousness. Moreover, with corporate profits booming and inequality widening in American society, the Supreme Court majority has taken sides in the struggle over the direction of the American political economy between those who defend corporate power and impunity and those who would like to restore democratic and popular channels of power. Will our economic life be organized around the needs of the people as expressed through representative government in the states and Washington or around the will of large corporations as registered regularly in court, in lobbying and now through aggressive independent campaign spending?

Corporations are a central part of the American and world economies and have played a fantastic role in the accumulation and investment of capital and the production of wealth. In a fair economy, corporations would compete and innovate; they would prosper and thrive and profit. But they would not govern. They would not intervene in representative politics; they would not oppress other parts of society lacking their wealth and power; and they would not be immune from civil and criminal consequences when they engage in misconduct.

Yet, the Roberts Court has already assured that, in the Citizens United era, the people cannot hope to have a fair fight with large corporations in public elections because mortal beings cannot compete with the hundreds of billions of dollars in disposable campaign capital enjoyed by those institutions endowed with "perpetual life" and limited liability: the pharmaceutical companies, the military-industrial complex, the energy industry, agribusiness, and so on. Thus, a high burden of hope for justice in our society rests on the courts to fairly enforce the law and protect us against corporate domination at every level of social and political life.

> "In the Citizens United era, the people cannot hope to have a fair fight with large corporations"

And, yet, this Supreme Court Term shines a spotlight on a five-justice majority that continues to rewrite the law, override the states and trample public values precisely in order to favor the exclusively self-interested will of corporate management over everyone else.

What You Can Do to Fight Back Against the Corporate Court

- Spread the word: Tell everyone you know about the danger posed to our democracy by the Corporate Court.
- Ask your senator to take a public stand against the Court's pro-corporate tilt and for government for the people.
- Urge your local newspaper to ask your senator to go on the record about this issue.
- Write to your senator and tell him or her we need Justices who will follow the law, not bend the law to favor corporations.
- Organize a community forum and invite law professors and local elected officials to participate.
- Share this report at forums or community meetings you attend to raise awareness.

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