

THE SUPREME COURT IN THE *CITIZENS UNITED* ERA:

A Century After the *Lochner* Era, the Roberts Court
Imposes a Startling New Corporatism on America

By Jamie Raskin



“I hope we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial by strength, and bid defiance to the laws of our country.”

— Thomas Jefferson

“We see no reason the Supreme Court would recognize constitutional protection for a corporation’s political expression but not its religious expression.”

— Judge Tymkovich, United States Circuit Court of Appeals for the Tenth Circuit for the majority in *Hobby Lobby Stores Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir., 2013)

I.

In the *Lochner* era, the Supreme Court invented a new constitutional “right”: the due process right of individuals to exercise unbridled freedom of contract in the workplace. In *Lochner v. New York*², the decision that gave the period its name, the Court struck down the New York Bakeshop Act³, a law setting a maximum 60-hour work week for employees of the state’s dangerously unhealthy bakery industry, which was centered in the tenements of New York City. The Court called the Act an interference with the right of the workers and employers to set their own contract terms.⁴

In the half-century between the 1880s and the 1930s, the Court in the same spirit, if sometimes on different legal grounds, invalidated more than 200 progressive federal and state laws, including minimum wage laws, child labor laws, occupational workplace safety and health laws, laws protecting coal mine workers, legislation protecting the right to organize unions, collective bargaining measures, and laws protecting workers and consumers against predatory practices by job placement companies.⁵ These laws were usually said either to impair the newly sacrosanct individual freedom of contract or to exceed Congress’ suddenly suspect powers under the Commerce Clause or the states’ police powers.⁶ In real-world terms, the *Lochner*-era Court privileged the private interests of people possessing wealth, capital, and superior bargaining power in the market over the democratic political and legislative will of people who depended for their survival in the economy on the labor of their own hands and bodies — and on a responsive representative government.

As a total offensive against economic and social legislation passed in the Progressive period and during the New Deal, the *Lochner* era became the paradigm case of conservative judicial activism. Nothing like it had been seen since the *Dred Scott* decision (1857),⁷ which invalidated the Missouri Compromise and created a due process shield around the institution of slavery and the property interests of the slave masters.⁸ But the *Lochner*-era Court was even more active in striking down workplace regulation than Chief Justice Taney had been in insulating slavery. Indeed, while *Dred Scott* helped lead the country into the Civil War, the *Lochner*-era Court waged a decades-long class war from the bench as the Justices gave the thumbs-down to social legislation whenever they thought legislators had gone *too far* in regulating business and labor contracts. The Court’s self-appointment as a super-legislature reviewing state and federal laws provoked the famous political clash with President Franklin Delano Roosevelt, who advanced a controversial and ill-advised plan to enlarge the membership of the Supreme Court. Although FDR did not succeed in changing the size of the Court, the Court changed its reactionary ways and, in *West Coast*

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Hotel Co. v. Parrish (1937),⁹ it upheld minimum wage laws, effectively abandoning the doctrine that government is presumptively forbidden to regulate contracts and property to protect the interests of working people.¹⁰

Today, many observers,¹¹ including several Supreme Court justices in dissent,¹² have noticed a striking affinity between the Court's discredited performance in the *Lochner* era and some of its current work in what I will call the *Citizens United* era. This observation has the ring of truth.

Today, as a century ago, big business overwhelmingly has its way with the Court; the right to organize workers into a union is under great stress; surprising new doctrines

emerge to clip Congress' wings under the Commerce Clause; and the Supreme Court's conservative majority shows no restraint in invalidating popularly enacted laws based on extrapolations from the most dubious constitutional theories and statutory interpretations.

But there are at least two important differences between the *Lochner* era and the *Citizens United* era. First, the doctrine has shifted: while the *Lochner* era read *individualist free market ideology* into the Constitution, the *Citizens United* era is reading *corporatism* into the Constitution, extending to mammoth business corporations the rights of the people, an endowment that translates, as we shall see, into corporate political and social power over the people. Second, the threat to political democracy is more comprehensive today than a century ago because the *Citizens United* ideology directly targets our democratic political infrastructure. Corporatist judicial ideology is thus not only regularly defeating democratically enacted laws in court but also relentlessly entrenching corporate power in the political process itself.

The doctrinal shift is striking. A century ago, the commanding impulse of conservative judicial activism was to protect the "free market" as an inviolable private domain where individuals could make contracts and exercise property rights free of state regulation. Today, the commanding impulse of conservative judicial activism is, more ambitiously, to zealously advance *business corporations* as the dominant social institution throughout our economic and political life by arming them with the primary constitutional rights of the people.

The social character of the new jurisprudence, therefore, is not the nostalgic 19th century *market individualism* of *Lochner* but a muscular 21st century *political and social corporatism* whose dramatic implications are just becoming clear. The critical doctrinal tool for empowering business corporations (and the class of wealthy Americans who own and run them) in this way is not the still-discredited Lochnerian concept of economic substantive due process, but rather the First Amendment, which has allowed the Court to promote this startling new corporatism in the name of free speech. Although the conceit of the age is that corporations are just winning "speech rights" that put them on an equal plane with individual citizens, the reality is that the new doctrine gives corporations essential powers and privileges over citizens in the political arena, the workplace, and the marketplace.

The development of unbridled corporatism in the *Citizens United* era has a schizophrenic quality. When it comes to defining new rights and powers for corporate management, the Court majority treats the traditional "corporate veil" in state law as an obsolete and dispensable formality, freely shuttling rights back and forth between human corporate owners and the corporate entity itself. Thus, in cases like *Citizens United*¹³ and *Hobby Lobby*,¹⁴ the Court enthusiastically attributes the personal free speech and religious rights of corporate owners and shareholders directly to the corporation. However, when employees, consumers, shareholders, and other citizens are

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injured by corporations and seek to hold the people who own them personally accountable for their injuries, the Court's majority treats the "corporate veil" like a thick full body armor insulating from liability anyone who profits from the corporate form.

Thus, corporations increasingly enjoy all the rights of the people, but the people increasingly have no rights against corporations. Indeed, as we shall see, the conservative majority on the Roberts Court not only interprets federal law in dubious ways to defeat corporate liability but often works its special wonders to preempt state laws that would hold corporations accountable for civil injuries they cause against patients and consumers.

But the second major difference between the *Citizens United* era and the *Lochner* era is the self-perpetuating nature of today's conservative judicial activism. By endowing corporations with the political rights of the people, the *Citizens United* Court gives them the tools to advance their agenda in election campaigns, tilting our politics in an emphatically corporatist direction and decisively shaping the views of many elected officials. It is those elected officials who come to select and confirm our nation's judges, including Supreme Court Justices, who are then in place to deliver more pro-corporate jurisprudence. *Citizens United* thus creates a vicious circle that will be harder to break even than *Lochner*, a decision that itself lasted more than three decades.

The *Lochner* doctrine on the Court was opposed and finally undone by a vibrant popular coalition of workers, unions, New Deal intellectuals and lawyers, and progressive politicians like President Roosevelt. Today, an overwhelming majority of the American people also oppose the *Citizens United* decision, a majority of the U.S. Senate last year voted in support of the Democracy For All constitutional amendment to restore public control over campaign finance,¹⁵ and citizens are bridling under the arrogant corporatism spreading throughout society courtesy of the Roberts Court.

Yet, because the *Citizens United* jurisprudence (unlike *Lochner*) is targeted like a laser beam on the political process itself, it creates political conditions for its own survival. The long-term corrective mechanisms in democracy that effectively worked to address *Lochner* have been undermined. The whole political system—legislators, chief executives, political parties, and judges—is in thrall to the influx of corporate money and plutocratic power. Today, therefore, the forces of democracy must work harder than ever to correct a massive theoretical mistake in the constitutional jurisprudence of the Court, and we need simultaneously to confront the practical reality of runaway corporatism in our politics, society, and economy.

II. Magic Wand: The First Amendment Erases Obstacles to Corporate Power

In the *Lochner*¹⁶ period, the constitutional magic wand was the Due Process Clause, which provides that people shall not "be deprived of life, liberty, or property, without due process of law." The *Lochner* Court breathed into this handful of words the whole philosophy of economic "substantive due process," under which it found that laws like the 60-hour work week for bakers in New York were an "unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract."¹⁷ The Due Process clause became the source of an entire structure of thought that nullified progressive economic and social regulation.

The magic wand today is the First Amendment's command that "Congress shall make no law... abridging the freedom of speech."¹⁸ Forget the inconvenient fact that corporations are artificial business entities that states have chosen to create, that they were created for the purposes of advancing commerce and limiting the liability of shareholders, that they were designed to have super-human abilities such as eternal life and the ability to be in many places at once and that the real people who own them retain all their personal constitutional rights. The Roberts Court simply threw caution to the wind and declared that artificial corporate entities enjoy the same constitutional rights as people to spend money on elections. For the five conservative Justices on the Roberts Court, the First Amendment is the magic wand that can instantly remove any public regulation that is an obstacle to corporate power in our polity and economy.

A. Corporations United, Citizens Defeated: The Plutocratic Politics of *Citizens United* and *McCutcheon v. FEC*

The key decision emancipating business corporations to become strategic political actors was, of course, *Citizens United* (2010). Redirecting a straightforward statutory matter where the parties had not even brought the constitutional issue to the Court, the majority ordered the parties to re-brief and reargue the case¹⁹ and then voted 5-4 to strike down the electioneering provisions of the Bipartisan Campaign Reform Act (BCRA) and to give corporate managers a First Amendment right to take unlimited amounts of money out of their treasuries to spend on political campaigns.²⁰

Justice Kennedy's precedent-shattering opinion was built on the premise that corporations are merely associations of citizens and thus acquire the rights of political speech that their members bring into the corporation.²¹ As he put it, a corporation that is engaged in political activity is just "an association that has taken on the corporate form."²² To uphold laws blocking corporate political expenditures, as the Supreme Court had done in cases as recent as *Austin v. Michigan Chamber of Commerce* (1990)²³ and *McConnell v. FEC* (2003),²⁴ is to censor the intrinsically valuable political speech offered by these associations of citizens based only on the



“identity of the speaker.”²⁵ Thus, for many decades, corporations had been the victims of speech discrimination and were not even aware of it!

This reasoning toppled two centuries of understanding of what a corporation is. Even the most conservative Justices had defined business corporations not as people or political membership groups but as “artificial entities,” economic instrumentalities chartered or registered by the states and endowed with significant legal benefits—limited liability of the shareholders, perpetual life of the company, favorable treatment and taxation of assets—in order to promote capital accumulation, investment, and growth. Corporations were always subordinate to public regulatory power, never equal participants in the process of forming the popular political will.

Chief Justice John Marshall framed the essential analysis in *Dartmouth College v. Woodward* (1819):²⁶ “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.”²⁷ Later, Justice Byron White, objecting to the first outbreak of a corporatist political jurisprudence on the Court in *First National Bank of Boston v. Bellotti* (1978),²⁸ pointed out that, in modern corporate law, we endow private business corporations with extraordinary privileges in order to “strengthen the economy generally.”²⁹ But, he argued, a business corporation has no constitutional right to convert its awesome state-enabled private wealth into the purchase of political power and influence. As he so cogently put it: “The state need not permit its own creation to consume it.”³⁰ 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.”³¹

But by a 5-4 vote in *Bellotti*, a majority led by Justice Lewis Powell, a former tobacco lawyer from Virginia and champion of corporate backlash against democratic political reform, found that corporations have a First Amendment right to spend to the heavens in referendum and initiative campaigns.³² This was the first toehold of the new political corporatism on the Supreme Court and the first time that the Court floated the metaphysical concept that the “corporate identity” of the speaker is not a statement of its *exclusion* from political rights under the Bill of Rights but rather the basis for its *inclusion*.

Now, in *Citizens United*, by waving the wand of the First Amendment, the Roberts Court—far to the right of any other Court in our history on the question of corporate power and privilege—has humanized, constitutionalized, and politicized the business corporation to an extent that would have dumbfounded and appalled the Founders. Indeed, the Roberts Court is the political antithesis of Thomas Jefferson, who perceived the corporate threat to political democracy and wrote (at a time when corporations had much less power than they do now): “I hope we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial by strength, and bid defiance to the laws of our country.”³³

The consequence for electoral politics of *Citizens United* and allied cases like *Speechnow.org v. FEC*³⁴—a 2010 D.C. Circuit Court of Appeals decision that struck down any limits on individual contributions to Super PACs—has been a dramatic upswing in spending by Super PACs and others groups outside of the political parties and candidates. In the 2012 federal election cycle, the first to follow the decision in *Citizens United*, over \$7.1 billion was spent, making it the most

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expensive election in human history.³⁵ Outside spending from groups not affiliated with a political party went over \$1 billion and tripled the amount spent in 2008.³⁶ Unleashed by *Citizens United*, CEOs took millions of dollars in profits out of corporate treasuries and dumped the cash into Super PACs. For example, in 2012, massive funder Las Vegas Sands gave \$52,021,625 to conservative organizations. Three corporations—Specialty Group, Inc., Contran Corporation, and Oxbow Corporation—pumped \$18 million into right-wing Super PACs.³⁷ Meantime, we can only guess at the extent to which corporations are providing the dark money that funds the pro-corporate messages of 501(c)(4) and 501(c)(6) organizations (which do not have to report their donors but can also spend freely on campaigns). But we can guess: For instance, the Chamber of Commerce, which is funded by its corporate members, has poured \$82.8 million into political ads since *Citizens United* was decided.³⁸ And corporations increasingly began to flex their new financial muscle to target politicians who dare to defy their wishes. For example, after the Richmond, California, city council and mayor successfully pushed for better safety standards and pollution controls at a local Chevron refinery, Chevron’s management put \$1.6 million of treasury funds into a Super PAC in the 2012 elections that worked successfully to defeat two of the pro-environmental council candidates.³⁹

Furthermore, in *McCutcheon v. FEC*,⁴⁰ the Court’s majority invoked the First Amendment to wipe out the \$123,200 aggregate cap on a single individual’s donations to federal candidates, PACs, and parties in an electoral cycle.⁴¹ Now, wealthy donors, drawn disproportionately from the corporate class, can contribute as much as \$3.5 million in a single election cycle.⁴² Those separate donations can be transferred among, and coordinated by, political groups, allowing donors to circumvent limits on giving to a specific candidate or party. In the aggregate, *McCutcheon* could enable a group of fewer than 450 people, each maxing out with \$3.5 million, to raise \$1.5 billion for Congressional candidates, the total amount that was raised by Republican and Democratic congressional candidates from all donors in 2010. In other words, the judicial abolition of aggregate personal contribution limits could simplify federal fundraising to the point where several hundred Americans fund all of the congressional races in the country, enthroning a tiny class of millionaire and billionaire mega-donors like the Koch brothers whose personal money comes from the benefits of corporate ownership and power.

B. Baptizing the Corporation and Damning the Workers: *Hobby Lobby*, the Religious Conversion of Big Business, and the Nullification of Secular Law

After entrenching corporate wealth in our political campaigns in the name of free speech, the Roberts Court in *Hobby Lobby*⁴³ then, astoundingly, invoked the personal rights of religious worship and conscience to give corporate owners an all-purpose, *Lochner*-style excuse to nullify the operation of any federal regulation that they claim burdens their corporation’s theological beliefs. In *Hobby Lobby*, the 5-4 majority held that a large for-profit corporation with more than 500 arts-and-crafts chain stores across the country and 13,000 employees is a “person” engaged in the “exercise of religion” within the meaning of the federal Religious Freedom Restoration Act (RFRA).

The five conservative Justices also rewrote RFRA in a second way to make it far easier for commercial corporations to take full advantage of their new status as religious adherents. RFRA triggers strict scrutiny of government actions only when they “*substantially* burden” the exercise of religion. In this case, the Affordable Care Act requirement that Hobby Lobby offer its female employees coverage of certain kinds of contraceptives that the corporation’s owners consider sinful (but would not themselves have to use or endorse) counted as a substantial burden on religious exercise. The majority thus not only magically found that a corporation was a “person” practicing its (his? her?) religion, but in essence wrote “*substantial* burden” out of RFRA so that the corporation could more easily ignore a law protecting employee health by simply claiming that the requirement offended the religious sensibilities of the corporation’s owners.



The extraordinary nature of the decision becomes clear when we focus on the fact that Hobby Lobby is a regular, secular business corporation devoted to profit-making.⁴⁴ It is neither a church nor a religious organization. It does not hire its workers based on religious preferences. Under the Affordable Care Act, if Hobby Lobby were a church or a nonprofit religious organization that had as its purpose the promotion of religious values, and if it primarily employed and served people along religious lines, it would be considered a “religious employer” and it would be *completely* exempted from the contraceptive-coverage requirement.⁴⁵ Even if it did not meet those criteria, the company could still be exempt under the law if it were a religious nonprofit institution that objected to contraceptive coverage for religious reasons, like certain private institutions of higher education.

But Hobby Lobby is neither a “religious employer” nor a nonprofit institution. It is a standard for-profit business corporation. That is why the *Hobby Lobby* case is of such surpassing importance. The Court has not only engineered a political emancipation of corporations in *Citizens United* but also their mass religious conversion in *Hobby Lobby*, a kind of Great Awakening for the corporate sector.

Justice Alito’s majority opinion pretends to be limited by invoking the fact that Hobby Lobby is a “closely held” corporation where a single family owns and runs the business. However, this point is an irrelevant distraction from the Court’s sweeping statutory and implicit constitutional holding, whose logic extends to all corporate entities, public and private, large and small. Furthermore, closely held businesses themselves can be enormous, such as the Mars candy company, which has 72,000 employees. Indeed, as many as 90% of U.S. business corporations are closely held, and they hire more than half of all American workers.

The religious baptism of the business corporation in the Roberts Court has breathtaking implications for the rule of law. It now follows logically from the decision that corporations have a

presumptive right to escape any federal law considered religiously objectionable, because RFRA provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden is the least restrictive means to further a compelling governmental interest.⁴⁶ As Justice Ruth Bader Ginsburg wrote in dissent:

In a decision of startling breadth, the Court holds that commercial enterprises, including corporations, along with partnerships and sole proprietorships, can opt out of any law (saving only tax laws) they judge incompatible with their sincerely held religious beliefs.

Thus, under the logic of *Hobby Lobby*, a secular corporation owned by fundamentalist Christians can refuse to pay for any contraceptive services under Obamacare; corporate owners who are Christian Scientist can refuse to pay for any health insurance plan for employees involving doctors or medical care; a secular corporation owned by Scientologists can refuse to pay for any psychiatric services for employees; and a secular corporation owned by Jehovah’s Witnesses can refuse to pay for any insurance covering blood transfusions.⁴⁷

Nor is there anything in the decision that confines its logic to health care. Although *Hobby Lobby* is a case about contraception, the religious rights protected under RFRA are general rights and are not confined in any way to religious beliefs focused on sex, procreation, or health care.⁴⁸ The ruling works for any corporation that seeks to invoke religious free exercise to obviate laws protecting American workers. As Right Wing Watch has reported, powerful forces on the religious and political right are preaching that Jesus and the Bible are opposed to minimum wage laws and collective bargaining.⁴⁹ Presumably every business corporation in America can now refuse to hire or do business with people who do not belong to the right religion, which means that every corporation now has the same right to discriminate on a religious basis that churches have always enjoyed. (Justice Alito went to great pains to state that the holding in *Hobby Lobby* did not confer a right to discriminate against African Americans, but the logic of this instantaneous exemption is obscure and the fact that this disclaimer needed to be made only underscores the radicalism of the decision.)

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Nor can a court question the depth of a corporation’s religious sincerity: If the management of a company says that the corporation is Christian, Muslim, Jewish, Branch Davidian, or Unification Church, and that its beliefs entail a certain practice, the government must accept it. For who has the right to question another person’s religion and who can be cross-examined as to the corporation’s religious history and commitments? The Supreme Court has determined that the rights of a religious convert are no less than those of a long-time practitioner,⁵⁰ which means that the corporate board or management can decide to adopt a new religion by following the normal procedures of corporate decision-making within the broad powers of the Business Judgment Rule. Corporate boards can vote on the religious beliefs of the corporation!

The sudden mass baptism of corporations as religious beings thus threatens a wipeout of progressive secular law that would make the judicial architects of *Lochner* proud. Under *Lochner* (1905),⁵¹ bosses could not be forced to pay employees higher wages or give them a certain number of hours off. Similarly, in *Plessy v. Ferguson* (1896)⁵² —the *Lochner* era’s definitive statement on Jim Crow racism—the Court approved state laws imposing segregation in public accommodations as a reasonable codification of the “established usages, customs, and traditions

of the people.”⁵³ The Court reversed *Lochner* in *West Coast Hotel Co. v. Parrish* (1937)⁵⁴ and it reversed *Plessy* in *Brown v. Board of Education* (1954)⁵⁵ and its progeny. But *Hobby Lobby* restores to the corporate business sector the power to discriminate and impose contract terms, this time in the guise of religious free exercise by the corporation. We can anticipate accelerating efforts in the corporate sector to escape federal laws and regulations by invoking the religious preferences and rights of the corporation.

C. Free Commercial Speech and Corporate Control of Data, Brought to You by the Roberts Court, No Democracy Added

The magic First Amendment wand also plays a key role on the Court today in striking down ordinary public health, safety, and consumer privacy regulations as inconsistent with the “commercial speech” and free data rights of corporations. In the alarming and telling case of *Sorrell v. IMS Health Inc.*, 564 U.S. ____ (2011),⁵⁶ the Court’s majority struck down Vermont’s Prescription Confidentiality Law,⁵⁷ which provided that, unless the physicians consented, pharmacies and health insurance companies could not sell pharmaceutical corporations information about what drugs the physicians had been prescribing to their patients. 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.’”⁵⁸ The detailing process, which corporations spend a jaw-dropping \$80 billion on every year, involves direct visits to doctors’ offices to persuade the doctor of the virtues of a particular drug.⁵⁹ 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.⁶⁰

Does this corporate interest in targeting marketing of drugs to physicians actually rise to the level of a First Amendment *right*? Does the Vermont statute violate it? Amazingly, Justice Kennedy answered “yes” to both questions,⁶¹ bringing the Supreme Court to the aid of the marketing departments of Big Pharma. The Vermont law, which seeks to leave it up to physicians themselves to decide 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.”⁶²

Just as the Court majority found in *Citizens United* that the ban on corporate independent expenditures in political campaigns 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 based on their identity and censored speech whose content is “direct advertising.”⁶³ In a major departure from practice, the Court thus treated commercial speech, which has always been given reduced First Amendment protection, more like a form of political speech.

In a brilliant opinion⁶⁴ for the dissenting justices, Justice Stephen Breyer demolished these tawdry arguments. The effect of the Vermont law is not to forbid or require anyone to say

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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.”⁶⁵ But this effect “is inextricably related to a lawful governmental effort to regulate a commercial enterprise.”⁶⁶ The Court majority’s unprecedented use of “heightened” First Amendment standards to examine such a data protection policy is simply “out of place.”⁶⁷ At most, Justice Breyer argued, the Court should have used the “intermediate” test governing laws that affect commercial speech.⁶⁸ Under the intermediate standard, the Court would ask whether a law is narrowly tailored to “directly advance” a “substantial government interest,” which this law clearly is, by virtue of protecting the public health, securing the privacy of prescribers and prescribing information, and controlling the costs of health care.⁶⁹

Justice Breyer would not have even gone that far down the road of heightened scrutiny, explaining that the normal “rational basis” test for commercial regulation properly applies in this context where no speech is present and no speech is censored.⁷⁰ 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 government regulation of industry practices, from the food and drug sectors to electricity generation.⁷¹ He then made the crucial analogy, noting that the current Court is manipulating the First Amendment in the same way that the *Lochner* Court manipulated 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. He wrote:

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.⁷²

Justice Breyer warned that the Court’s corporate speech jurisprudence is breathing new life into century-old *Lochnerian* habits. In tough language, he admonished 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).⁷³

The Smoking-Hot “Commercial Speech” Doctrine Protects Big Tobacco

But the rise of protective “commercial speech” doctrines to knock out public health and safety regulation is twisting our jurisprudence even when the courts do not assimilate commercial activity to the realm of political expression. We saw a notable example of this three years ago from one of George W. Bush’s most notorious circuit court judges. In *R.J. Reynolds Tobacco Co. v. FDA* (2012),⁷⁴ a three-judge panel of the United States Circuit Court of Appeals for the D.C. Circuit invalidated the FDA’s rule, issued under the 2009 Family Smoking Prevention and Tobacco Control Act,⁷⁵ requiring cigarette manufacturers to carry “graphic warnings,” in color and covering 50% of the front and back of each cigarette package sold here, warning people of the dangers of smoking.⁷⁶ Ignoring the entire sordid history of deceptive cigarette advertising, the court, in an opinion written by Judge Janice Rogers Brown, found that “there is no justification” for the graphic warning labels under the standards for analyzing regulation

of misleading commercial speech. The court then turned to the *Central Hudson* test for testing regulation of non-misleading commercial speech.

Under *Central Hudson*, the government must show that its asserted interest is “substantial.” If so, the Court must determine “whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.”⁷⁷

The majority “assumed” that the government’s goal of reducing smoking—which causes 480,000 deaths a year in the United States or 1300 deaths a day, including many from second-hand exposure—may be “a substantial interest,” but it held that the rule was nonetheless unconstitutional because the FDA failed to show that the graphic warning rule would directly advance its interest. Rejecting as irrelevant or insufficient all evidence from Canada, Australia, and other countries that have used graphic color warnings with great effect to reduce smoking,⁷⁸ the D.C. Circuit majority concluded that the FDA did not provide “a shred of evidence” that the graphic warnings would actually lower smoking rates in the United States.⁷⁹ On this impossibly stringent standard, which forces government to document the direct effectiveness of a policy that has never been used before by our government, the court ruled that the FDA had not shown “substantial evidence” that the graphic warnings would “directly” reduce smoking rates by a “material degree.” Amazingly, it struck down the FDA rule seeking to protect public health as a violation of the tobacco companies’ freedom of speech.⁸⁰

It appears that the D.C. Circuit panel’s decision to use the heightened scrutiny of *Central Hudson* in this case has been overruled by the logic of *American Meat Institute v. U.S. Dept. of Agriculture* (D.C. Cir. July 29, 2014), an *en banc* ruling from the entire court. If a federal regulation requiring graphic warnings on cigarette packages should again be adopted, the Supreme Court will likely have to address the issue. In any event, corporations seeking to thwart ordinary public regulation now have a clear strategic pathway in the *Citizens United* era: (1) identify a heretofore unarticulated speech interest that is somehow touched by the regulation, (2) claim that the speech is being (a) suppressed based on its content and (b) the speaker censored because of his or her commercial identity under *Sorrell*, and if that doesn’t work, (3) simply assert that, as a commercial speech regulation, the law does not directly advance the asserted social interest because there is no proof yet that it works. As in the *Lochner* era, all of the Court’s doctrinal analysis is skewed against democratic regulation.

D. Giving Corporations the Political and Religious Rights of the People Means Giving Corporations Political and Religious Power over the People

The Court’s First Amendment campaign to treat corporations like “persons” for constitutional purposes actually gives corporations the power to *dominate* the political and private lives of citizens.

*Citizens United*⁸¹ was decided in the name of free speech, but no person’s right to spend his or her own personal money on political ads for or against candidates was enlarged by it in any way. That right was already unlimited. Moreover, the rare private nonprofit corporations actually organized for purposes of electoral activity and political spending had already secured their First Amendment rights to engage in political spending and activity under the Supreme Court’s decision in *FEC v. Massachusetts Citizens for Life* (1986).⁸²

The only effect of *Citizens United* was to give CEOs of business corporations the power to take unlimited amounts of money from corporate treasuries and spend it advancing or defeating political candidates of their choosing. Its real-world consequence was thus not to expand the political *freedom* of citizens but to reduce the political *power* of citizens vis-à-vis huge corporations with vast fortunes. These corporations, endowed with limited shareholder

liability, perpetual life, and other privileges, may now freely engage in motivated political spending to enrich themselves and their executives, leaving workers and other citizens behind.

Similarly, with comic solemnity, the Supreme Court decided *Hobby Lobby*⁸³ in the name of religious liberty, but the decision makes a mockery of religion because no one's right to exercise their religion was substantially augmented in any way by it. This is because the Affordable Care Act's contraceptive provisions⁸⁴ made no person worship or not worship, have faith or no faith, or practice or refrain from exercising their religion in any way. Moreover, for-profit business corporations themselves cannot exercise religion. The concept is meaningless and absurd, and deeply impious to boot. As Justice Stevens observed in dissent in *Citizens United*, "corporations have no consciences, no beliefs, no feelings, no thoughts, no desires."⁸⁵ Inanimate for-profit corporations cannot believe in God, pray for forgiveness, experience transcendence, or have faith in an afterlife. They are inanimate, intangible, and artificial entities set up for the purposes of facilitating economic activity.



Justice Ruth Bader Ginsburg, dissenting in *Hobby Lobby*,⁸⁶ showed how no one's religious rights were violated by the Obamacare contraceptive insurance provisions. Contrary to the majority's argument, those provisions do not "substantially burden" the corporate owners in the exercise of their own personal religious beliefs. Cheerfully conceding the sincerity of the *Hobby Lobby* owners' objections to certain kinds of contraceptives, Ginsburg shows that nothing in the ACA makes them use such contraception or alter their religious practices in any way.⁸⁷

The owners are thus in the same position as the Native American father in *Bowen v. Roy* (1986),⁸⁸ who lost his case challenging the government's use of his child's Social Security number, which he said offended his sincere religious belief that a person's sacred spirit is profaned by being reduced to a number and entered into a bureaucracy.⁸⁹ In that case, Ginsburg points out in her *Hobby Lobby* dissent, the sincere religious adherent lost because the government's administrative mandate "placed no restriction on what the father may believe or what he may do."⁹⁰ Similarly, *Hobby Lobby*'s owners can believe and do whatever they want, but they may not have their company opt out of a federal law that does nothing to impair their own religious practice even though they disagree with it. *Hobby Lobby* employees who share the religious views of the owners are under no obligation to use the sinful contraceptive devices, and their use by other employees does not affect the religious exercise of the owners and managers.

The real-world effect of giving corporations religious rights under RFRA or the First Amendment is not to deepen their personal relationship with God or to enable them to commune with nature or achieve spiritual harmony, because these things are impossible for an artificial entity. Rather, the effect is to give corporate owners and managers the power to impose their own religious and political beliefs on their employees who have different religious beliefs—in this case, to deny female employees complete and free individual choices in reproductive and contraceptive care.⁹¹ This decision is not a victory for religious free exercise and individual moral choice in any sense, but a victory for corporate control over employees' personal choices in reproductive decision-making.

III. The Schizophrenic Jurisprudence of the New Corporatism

The Supreme Court's promotion of unbridled corporatism in the *Citizens United* era depends on a schizophrenic jurisprudence and an awful double standard. When it comes to defining new corporate rights and powers, the Court's majority treats the traditional "corporate veil" in state law as an obsolete and wholly dispensable formality, freely shuttling rights back and forth between human corporate owners and their corporate entities. Thus, in cases like *Citizens United* and *Hobby Lobby*, the Court enthusiastically ascribes the personal free speech and religious rights of corporate owners and shareholders directly to their corporation. However, when employees, consumers, shareholders, and other citizens are injured by corporations and seek to hold the people who own and run them accountable for their injuries, the Court's majority treats the formalities of the "corporate veil" like an impermeable and imperishable full body armor insulating from liability anyone who takes clever advantage of the corporate form.

Thus, corporations increasingly enjoy all the rights of the people but the people increasingly have no rights against the corporation. Indeed, the Roberts Court, often but not always in 5-4 votes, not only frequently interprets federal law to defer to the corporate form and defeat corporate liability, but often works its special wonders to find federal preemption of any state laws and doctrines that actually hold corporations accountable for torts, fraud, and wrongful conduct involving shareholders, workers, and customers.

A. Now You See it, Now You Don't: In the Roberts Court, a Legally Responsible Corporation Is Hard to Find

The same 5-4 majority that tears down the corporate veil to declare that corporations exercise the political and religious rights of the people puts all the formalities back up when shareholders bring actions against corporations for securities fraud. In *Janus Capital Group, Inc. v. First Derivative Traders*,⁹² decided the year after *Citizens United*, the conservative justices 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 24010b-5 ("10b-5")⁹³ for making various false statements to investors in its client mutual funds' prospectuses.⁹⁴ Justice Thomas spoke for the five conservative justices 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 rather that it makes no difference because the JCM was only the investment adviser, and not the corporation itself releasing a prospectus.⁹⁵ Justice Thomas found that, because Janus Capital Group created Janus Investment Fund and JCM provided Janus Investment Fund with separate investment advisory services, all the various Janus entities along the way "maintain legal independence."⁹⁶ By participating in an inscrutable family of corporations cloaked in "individual" corporate veils, the advising corporation can make false statements that are quoted or cited by the company releasing the prospectus, and everyone along the chain remains free of 10b-5 liability until you reach the very end—the mutual fund itself, which gave investors the allegedly fraudulent material provided by the fund adviser. But the mutual fund as an entity has no assets other than the investments it holds for shareholders, which is why investors had sued the fund adviser in the first place. No one is responsible! The fact of interlocking coordination among the people and corporate entities involved is deemed irrelevant to assigning responsibility.

Writing for the four dissenting justices, Justice Breyer⁹⁷ pierced through this fog of obfuscation and pretense, identifying the clearly 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.⁹⁸ 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.⁹⁹ 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.”¹⁰⁰ Many prior cases established that management companies, boards of trustees, individual officers, investment advisers, lawyers, and accountants could also “make” false statements within the meaning of 10b-5.¹⁰¹

The Court’s 5-4 endorsement of this three-card monte in the corporate securities market effectively guts the rule of 10b-5 going forward.¹⁰² Corporations dealing in securities can now get away with making false statements to their investors by outsourcing the job to other affiliated corporate entities who serve an “investment advisory” function. As one circuit court put it before *Janus* in rejecting the test requiring a company to have legal “control” over prevaricating 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.”¹⁰³ But this situation is now the law. Invoking a ludicrously pinched interpretation of the statutory “person” forbidden to make false statements, the majority authorizes corporations to multiply and divide themselves under the cloaks of many corporate veils so as to thwart 10b-5 liability and permit misleading statements that deceive and cheat investors.

B. Denying Personal Jurisdiction over Foreign Corporations: The Global Reach of the New Corporatism

If the Roberts Court majority offers little help to investors trying to navigate the maze of corporate veils in securities law, it is downright hostile to injured workers trying to get their cases heard against corporations in the first place. In *J. McIntyre Machinery, Ltd. v. Nicaastro* (2011),¹⁰⁴ an industrial worker named Robert Nicaastro 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 while he was working.¹⁰⁵ The defendant corporation, headquartered in Nottingham, England, had hired another company to distribute its equipment throughout the United States rather than make the sales directly. It moved to dismiss the negligence lawsuit on the grounds that the court lacked “personal jurisdiction” over it,¹⁰⁶ the kind of jurisdiction required by the Constitution that gives a court the power to issue a ruling affecting a party to litigation. Under due process, a state court cannot hear a case if the parties have no relevant contact or relationship with the state.

If the Roberts Court majority offers little help to investors trying to navigate the maze of corporate veils in securities law, it is downright hostile to injured workers

The New Jersey Supreme Court found that personal jurisdiction clearly existed in *Nicaastro* because the corporation aggressively put its equipment into the market in all 50 states, which is how the finger-destroying machine ended up in New Jersey.¹⁰⁷ According to the New Jersey¹⁰⁸ court, due process was in no way offended by a state court asserting jurisdiction over a

foreign manufacturer who knew that its products were being promoted and distributed through a nationwide marketing system.¹⁰⁹

However, a majority of the Court voted to reverse the New Jersey Supreme Court on this question. Justice Kennedy wrote for a four-justice plurality (including Chief Justice Roberts, Justice Scalia, and Justice Thomas), while Justices Breyer and Alito concurred. They found there was no personal jurisdiction to bring the case since the English company (as opposed to the distributor it contracted with) had not made an effort to make sales specifically in New Jersey, “no more than four machines . . . ended up in New Jersey” and other ties between the foreign corporation and New Jersey were too tenuous to fairly invoke jurisdiction against the company,¹¹⁰ which is definitely treated by the majority like a sterile and “artificial entity,” not a group of people doing business together to make money around the world.

Writing for herself and Justices Sotomayor and Kagan, Justice Ginsburg chastised the other Justices for this appalling decision, which marked a total break from precedent and the traditional understandings of “personal jurisdiction” in the states.¹¹¹ 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.¹¹² She explained how it engaged a U.S. distributor to hustle and ship its machines within all the 50 states.¹¹³ She emphasized that this case is not anomalous but “illustrative of marketing arrangements for sales in the United States common in today’s commercial world.”¹¹⁴

Invoking the well-established “reason and fairness” standard derived from the 1945 *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?”¹¹⁶ 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.¹¹⁷ 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.”¹¹⁸ 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.”¹¹⁹

Thus, our corporate Court majority is so one-sided and extreme in its sympathies that it extends rights of jurisdictional immunity to foreign corporations that their own countries would never extend to U.S. corporations.

C. Federal Preemption and Corporate Immunity: Rewriting Federal Laws to Nullify State Consumer Laws

The Roberts Court is also infamous for finding rules of “federal preemption” to save corporations from tort and accident liability here in the United States, based on the Constitution’s Supremacy Clause, which states that the U.S. Constitution and federal laws trump inconsistent state laws. In several recent decisions, the majority has sided with some of the most powerful corporations in America against consumers and medical patients and the state laws designed to protect them. This ferocious judicial attack on state law represents an interesting twist on the *Lochner* age, when state common law tort rules, like contributory negligence and assumption of risk, often defeated the claims of injured people and the Supreme Court just went along for the ride. Today, state laws tend to *favor* the possibility of individual recovery in personal injury cases but the conservative Roberts Court majority is stealing away jury verdicts by rewriting federal laws to find “preemption” of pro-consumer state laws and doctrines.



When Big Pharma argues that federal laws should preempt state laws designed to protect consumers and the public health, it usually finds a receptive audience among the conservatives on the Court. Consider *PLIVA, Inc. v. Mensing* (2011),¹²⁰ 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.¹²¹ 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 law to inform consumers that the label significantly understated the drug's risks.¹²² According to the majority's tortured opinion, it would have been "impossible" for the generic drug makers to comply with both the federal and state laws.¹²³

Writing for the dissenters, Justice Sotomayor¹²⁴ 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.¹²⁵ Had they made the request and had it been rejected, Justice Sotomayor noted, only then could an "impossibility" defense have been seriously entertained.¹²⁶ 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 in the medical marketplace against corporate misconduct.

Justice Sotomayor identified three "absurd consequences" of the majority decision that make it implausible that this result was any part of Congress' intention.¹²⁷ 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.¹²⁸

Second, "the majority's decision creates a gap in the parallel federal-state regulatory scheme in a way that could have troubling consequences for drug safety."¹²⁹ 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."¹³⁰ 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."¹³¹ From now on, consumers "of brand-name drugs can sue manufacturers for inadequate warnings; consumers of generic drugs cannot."¹³² Nothing in the majority opinion, Justice Sotomayor wrote, "convinces me that . . . Congress enacted these absurd results."

Justice Sotomayor wrote with equal outrage about the conservative justices' 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.¹³³ 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* (2011),¹³⁴ 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):¹³⁵

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.¹³⁶

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 away part of the statutory language, 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 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 Sotomayor¹³⁷ spared Scalia 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,"¹³⁸ and demonstrated that Justice Scalia's contorted interpretation depends on a series of illogical and specious assertions and the incomprehensible treatment of no fewer than 13 words in the above statutory language as pure surplusage.¹³⁹ 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,"¹⁴⁰ Justice Sotomayor closed with these stinging words: "Nothing in the text, structure, or legislative history remotely suggests that Congress intended that result."¹⁴¹

D. Phoning It In and Giving Consumers the Business: The Roberts Court Attacks Class Action and Stacks the Deck for Big Corporations

In *AT&T Mobility LLC v. Concepcion* (2011),¹⁴² 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.¹⁴³ 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.¹⁴⁴

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, which dealt specifically with class-action waivers in arbitration agreements and had determined that:

[W]hen 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. (internal quotation marks and citations omitted)

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 found that the California *Discover Bank*¹⁴⁵ rule is—you guessed it!—preempted by the Federal Arbitration Act,¹⁴⁶ 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.¹⁴⁷



But, putting on his always-accessible legislator’s hat when it comes to rewriting laws for big business, 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.”¹⁴⁸ Thus, the corporate bloc, which pretends pompously 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 corporatist reasons—to overturn the lower federal courts and extinguish California’s law.

In a withering dissent filed for himself and Justices Ginsburg, Sotomayor, and Kagan,¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ Thus, it is impossible to see how this state rule could be directly targeting arbitration per se such that it compels federal 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.¹⁵² 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.”¹⁵³

Justice Breyer closed his opinion by discussing the way that the unprecedented majority decision destroys the viability of class-wide relief in situations where consumers often need it the most: 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?”¹⁵⁴ And he reminded the federalism-touting, two-faced majority on the Court that “federalism is as much a question of deeds as words.”¹⁵⁵ Another way to make the same point is to say this: despite all of its shopworn rhetoric about federalism, the Roberts Court is making it impossible for the states to effectively regulate the corporations they charter, register, and oversee.

Corporate Justice: Forcing Small Businesses and Workers into Arbitration

Similarly, in a seemingly endless sequence of decisions with the five far right Justices outvoting their colleagues, the Roberts Court has allowed big corporations to take advantage of small businesses and workers by forcing them into arbitration through adhesion contracts that badly dilute their rights and manipulate individual consent. In *American Express Co. v. Italian Colors Restaurant* (2013), the Roberts Court majority upheld an arbitration agreement under which American Express allegedly used “its monopoly power to force merchants to accept a form contract violating the antitrust laws,”¹⁵⁶ as Justice Kagan wrote. The restaurant owner in the case wanted to challenge, as a violation of the Sherman antitrust act, the provision in the contract that jacked up the percentage on the fees it had to pay in order to have the right to accept American Express customers. But the contract’s compulsory individual arbitration clause made “pursuit of the antitrust claim a fool’s errand” because the expenses associated with proving an antitrust violation would far exceed any possible recovery. Thus, as Kagan wrote, “if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.” But the conservative majority’s answer, in Kagan’s cogent translation, was stark and unforgiving: “Too darn bad.”¹⁵⁷



In *Rent-a-Center, West, Inc. v. Jackson*,¹⁵⁸ Justice Scalia wrote for the five conservative justices and ruled that, when a worker filing an employment-discrimination suit against his employer claims that an arbitration agreement is void as “unconscionable,” it is the arbitrator himself who will decide the issue. An appalled Justice John Paul Stevens, writing for the four dissenting Justices, explained that the majority had turned a fundamental question of access to justice into a “fantastic” game of funhouse mirrors by allowing the arbitrator to decide whether the arbitration agreement and process are fundamentally unfair. This is not how a basic issue of justice should be decided:

When a party raises a good-faith validity challenge to the arbitration agreement itself, that issue must be resolved before a court can say that he clearly and unmistakably intended to arbitrate that very validity question. This case well illustrates the point. If respondent’s unconscionability claim is correct—i.e., if the terms of the agreement are so one-sided and the process of its making so unfair—it would contravene the existence of clear and unmistakable assent to arbitrate the very question petitioner now seeks to arbitrate.

And, in yet another 5-4 gift to corporate management, the majority in *14 Penn Plaza LLC v. Pyett*,¹⁵⁹ ignored three decades of precedent to rule that workers subject to a collective bargaining agreement providing for conclusive arbitration of all grievances lost their statutory right to bring Age Discrimination in Employment Act (ADEA) claims in court. Justice Souter, dissenting along with Justices Stevens, Ginsburg, and Breyer, argued that the Court should follow long-standing and directly controlling authority that rejected efforts by business management to force workers to sacrifice federal statutory rights in the collective bargaining process. Souter argued that workers’ rights under federal law are not waived in collective bargaining and that “antidiscrimination statutes ‘have long evinced a general intent to accord parallel or overlapping remedies against discrimination,’” so that workers do not forfeit their private rights of action in federal law just because they have exercised their rights under contractual arbitration.¹⁶⁰ But the Roberts Court majority never passes up an effort to negate the meaning of federal rights for workers and to lock workers into the closed and lopsided arbitration process favored by big corporations that seek to escape the rule of law.

IV. Will the People Govern the Corporations or Will Corporations Govern the People?

Judicial activism for the New Corporatism in America raises this profound question about the 21st century: Will the people govern the corporations or will the corporations govern the people?

The development of the Delaware corporate code and rapid expansion of corporations in the 19th century stimulated remarkable economic growth, and there is no doubt that the great advantages conferred on the corporate form have worked to advance material accumulation and prosperity in America, albeit on a sharply unequal basis.¹⁶¹

But from the days of Thomas Jefferson and Tom Paine forward, the champions of democracy have insisted that corporations must not be allowed to “challenge our government to a trial by strength, and bid defiance to the laws of our country,” as Jefferson put it.¹⁶²

This democratic principle was represented on the Supreme Court in the broadly accepted “artificial entity” theory.¹⁶³ Under this doctrine, corporations were not constitutional rights-bearing citizens¹⁶⁴ but “artificial entities” chartered or recognized by the states and favored with decisive legal advantages like limited liability of the shareholders and perpetual life of the corporation. They enjoyed only the rights and privileges conferred upon them by state law, and did not have general independent recourse to the constitutional rights of the people. For essentially two centuries,¹⁶⁵ even the most conservative justices, like former Chief Justice William Rehnquist and Justice Byron White, rejected the claim that private business corporations enjoy the constitutional political rights of the people. As Chief Justice Rehnquist put it, powerful actors in our economic life “pose special dangers in the political sphere.” The state creates the corporation, Justice White explained, and “the state need not permit its own creation to consume it.”

By treating business corporations like First Amendment political associations in *Citizens United*, the Roberts Court majority has torn down the wall of separation between private corporate treasuries and public election campaigns.

By treating business corporations like First Amendment political associations in *Citizens United*, the Roberts Court majority has torn down the wall of separation between private corporate treasuries and public election campaigns. By treating business corporations like spiritual beings with potential religious convictions in *Hobby Lobby*, the Roberts Court majority has handed corporate owners and managers an all-purpose excuse to escape secular laws that putatively offend their beliefs. When combined with the other ways *Hobby Lobby* completely transformed RFRA, the decision badly shakes the original Jeffersonian “wall of separation” between church and state,¹⁶⁶ and the combination of the two decisions suggests that churches will soon be arguing that they have a First Amendment right to spend money on political campaigns because the “identity of the speaker” and their legally conferred advantages are no bar to their political participation.

Of course, both the political spending and religious worship of every citizen in the United States were perfectly safe before these landmark decisions. The Court’s judicial activism in these cases does nothing for *individual rights* but dramatically expands *corporate powers*, reducing the relative political power of citizens and expanding the control of corporate employers over their

workers' choices and over the scope of democratic decision-making generally.

Meantime, as the Court aggressively enlarges the political and social power of corporations by imputing to them the individual constitutional rights of the people, it is constantly eroding the rights that people have against corporations by nullifying corporate liability. The corporate veil is shredded and corporations are treated like persons when they seek to exercise the political and religious rights of the people, but the corporate veil works like an armored suit when it is used by a maze of companies to defend against liability for corporate securities fraud—no real people here, just us corporations! Corporations are persons when it comes to



spending millions or billions of dollars in political campaigns to advance corporate priorities, but “personal jurisdiction” over a foreign corporation is easily defeated when an injured worker sues because the corporation is just an abstract and ethereal artificial entity operating abroad and it would be unfair to drag it into a proceeding dealing with the unfortunate human messiness of four severed fingers caused by the machine it sells in America. In the *Citizens United* era, massive corporations must be given the right to participate like citizens in state elections, but state laws that try to hold them accountable for personal injuries they cause are routinely quashed by the five-justice Court majority that increasingly reads “federal preemption” into laws totally silent on the subject and manifestly irrelevant to it.

At a time of continuing economic hardship for so many Americans, with the retirement funds of so many millions of Americans invested in Wall Street, we should all hope that corporations will thrive, innovate, and prosper. But corporations should never govern the people, an idea anathema to democracy as well as antithetical to a free market where businesses succeed based on performance, not political favoritism and intrigue.

It will take every bit of democratic resourcefulness in the country to undo the mistakes of the Roberts Court in the *Citizens United* age: The state legislatures should try to reestablish democratic control over corporations in the state corporate law codes, conditioning the grant of limited liability on the corporation’s agreement to political neutrality or at least management deference to the wishes of the majority of shareholders on matters of partisan political activity; Congress should send the Democracy For All constitutional amendment reversing *Citizens United* and *McCutcheon* to the states for ratification; shareholders should demand internal transparency and democracy in the deployment of corporate funds in public elections; Congress should make clear that it has not intended to preempt the states from enacting strong consumer, environmental, and public health laws; and so on.

But before we extricate ourselves from the follies of the age, it is necessary to recognize where we are. This is not the *Lochner* era, because the doctrine has shifted a bit. There is no longer a constitutional campaign on the Court against anything that interferes with a “free market”; there is a constitutional campaign to promote political and social *corporatism*, the unbridled power of business corporations in every sector of society. In this campaign, the magic wand, which doubles as a hammer, is not substantive due process, but the First Amendment freedom of speech. The irony is that only massive and vigorous exercise of First Amendment rights by real people will give us a chance to turn things around in the new age of corporate power.

² *Lochner v. New York*, 198 U.S. 45 (1905).

³ 1897 N.Y. Laws art. 8, ch. 415, § 110.

⁴ *Lochner*, 198 U.S. at 64 (“It is manifest to us that the limitation of the hours of labor as provided for in this section of the statute under which the indictment was found, and the plaintiff in error convicted, has no such direct relation to and no such substantial effect upon the health of the employee, as to justify us in regarding the section as really a health law. It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employees (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees. Under such circumstances the freedom of master and employee to contract with each other in relation to their employment, and in defining the same, cannot be prohibited or interfered with, without violating the Federal Constitution.”).

⁵ *United States v. Lopez*, 514 U.S. 549 (1995) (Souter, J., dissenting) (“It is most familiar history that [from the turn of the century until 1937 (“the *Lochner* era”)] the Court routinely invalidated state social and economic legislation under an expansive conception of Fourteenth Amendment substantive due process.”); Felix Frankfurter, J., MR. JUSTICE HOLMES AND THE SUPREME COURT, app. at 97-137 (1938) (listing, under the heading “Cases Holding State Action Invalid Under the Fourteenth Amendment,” 241 such cases from 1877 through 1938 and 237 cases from 1877 through 1937).

⁶ See Frankfurter, J., *supra*, note 5.

⁷ *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

⁸ *Id.* at 450 (“The rights of property are united with the rights of person, and placed on the same ground by the fifth amendment to the Constitution, which provides that no person shall be deprived of life, liberty, and property, without due process of law. And an act of Congress which deprives a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular Territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”).

⁹ 300 U.S. 379 (1937).

¹⁰ *Id.* at 393-394.

¹¹ See, e.g., David H. Gans, *The Roberts*

Court Thinks Corporations Have More Rights Than You Do, NEW REPUBLIC (June 30, 2014), <http://www.newrepublic.com/article/118493/john-roberts-first-amendment-revolution-corporations>; William Greider, *Thanks to the Roberts Court, Corporations Have More Constitutional Rights Than Actual People*, THE NATION (May 20, 2014), available at <http://www.thenation.com/blog/179932/thanks-roberts-court-corporations-have-more-constitutional-rights-actual-people>; Jeffrey Toobin, *Money Unlimited*, THE NEW YORKER (May 21, 2012), available at <http://www.newyorker.com/magazine/2012/05/21/money-unlimited>; Doug Kendall, Const'l Acctblty. Ctr., *Reversing Citizens United*, THE HUFFINGTON POST (Jan. 21, 2012), http://www.huffingtonpost.com/doug-kendall/reversing-emcitizens-unit_b_1219035.html.

¹² *Sorrell v. IMS Health Inc.*, 564 U.S. ___, 131 S. Ct. 2653, 2675 (2011) (Breyer, J., dissenting).

¹³ *Citizens United v. FEC*, 558 U.S. 310 (2009).

¹⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

¹⁵ S.J. Res. 19, 113th Congress (as reported by S. Comm on the Judiciary, July 30, 2014); see also S.J. Res. 5, 114th Congress.

¹⁶ U.S. Const. amend. V, applied to the states by *id.*, amend. XIV, § 1 (“nor shall any state deprive any person of life, liberty, or property, without due process of law”).

¹⁷ *Lochner*, 198 U.S. at 56.

¹⁸ U.S. Const. amend. I.

¹⁹ *Citizens United v. FEC*, 552 U.S. 1240 (ordering parties to brief and argue reformulated Questions Presented).

²⁰ *Citizens United*, 558 U.S. at 365-66.

²¹ *Id.* at 342-43.

²² *Id.* at 349.

²³ *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652 (1990).

²⁴ *McConnell v. Federal Election Comm'n*, 540 U.S. 93 (2003).

²⁵ *Citizens United*, 558 U.S. at 364.

²⁶ 17 U.S. 518 (1819).

²⁷ *Id.* at 636 (1819).

²⁸ 435 U.S. 765 (1978).

²⁹ *Id.* at 809 (White, J., dissenting).

³⁰ *Id.*

³¹ *Id.* at 826 (Rehnquist, C.J., dissenting).

³² *Id.* at 802. As a big tobacco lawyer, Lewis Powell had written a famous confidential memorandum 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 capturing corporate political dominance. See Charlie Cray (August 23, 2011), *The Lewis Powell Memo—Corporate Blueprint to Dominate Democracy*, Greenpeace.

³³ Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in THE WORKS OF THOMAS JEFFERSON, VOL. 12: CORRESPONDENCES AND OTHER PAPERS 1816-1826 42, 44 (Paul Leicester Ford ed., Fed. ed. 1905), available at <http://oll.libertyfund.org/titles/808>.

³⁴ 599 F.3d 686 (D.C. Cir. 2010).

³⁵ FEDERAL ELECTION COMMISSION, *FEC Summarizes Campaign Activity for the 2011-2012 Election Cycle*, FEDERAL ELECTION COMMISSION (April 19, 2013; revised March 27, 2014), available at http://www.fec.gov/press/press2013/20130419_2012-24m-Summary.shtml (“Presidential and congressional candidates running in the 2012 election cycle, political parties and political action committees (PACs) received more than \$7.1 billion and disbursed nearly \$7 billion in 2011-2012, according to campaign finance reports filed with the Federal Election Commission that cover activity from January 1, 2011 through December 31, 2012.”).

³⁶ CENTER FOR RESPONSIVE POLITICS, *Total Outside Spending by Election Cycle, Excluding Party Committees* (last accessed January 26, 2015), http://www.opensecrets.org/outsidespending/cycle_tots.php.

³⁷ Michael Beckel, Reity O'Brien, *Mystery firm is election's top corporate donor at \$5.3 million*, CENTER FOR PUBLIC INTEGRITY (last updated 12:19pm, May 19, 2014) <http://www.publicintegrity.org/2012/11/05/11689/mystery-firm-elections-top-corporate-donor-53-million>.

³⁸ Open Secrets, “Chamber of Commerce,” <http://www.opensecrets.org/outsidespending/detail.php?cycle=2014&cmte=US+Chamber+of+Commerce>.

³⁹ See Tawanda Kanhema, *Citizens*

Outspent: Inside Richmond's \$4m Election Campaign, RICHMOND CONFIDENTIAL (Nov. 5, 2012, 6:22pm), <http://richmondconfidential.org/2012/11/05/citizens-outspent-inside-richmonds-4m-election-campaign/>.

⁴⁰ 572 U.S. ___, 134 S. Ct. 1434 (2014).

⁴¹ *Id.* at 1457 (holding that “aggregate limits [on contributions] violate the First Amendment”).

⁴² Mark Bittman, *Why Care About McCutcheon?*, N.Y. TIMES (April 22, 2014), available at <http://www.nytimes.com/2014/04/23/opinion/bittman-why-care-about-mccutcheon.html>.

⁴³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

⁴⁴ *Id.* at 2760.

⁴⁵ U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, Affordable Care Act Rules on Expanding Access to Preventative Services for Women (last updated June 28, 2013) (reflecting the rules promulgated to govern the provision of contraceptives pre-*Hobby Lobby*), <http://www.hhs.gov/healthcare/facts/factsheets/2011/08/womensprevention08012011a.html>.

⁴⁶ 42 U.S.C. 2000bb-1(a) and (b).

⁴⁷ *Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting).

⁴⁸ *Id.* at 2760 (majority opinion).

⁴⁹ *Hobby Lobby and “Biblical Economics,”* RIGHT WING WATCH, July 22, 2014: <http://www.rightwingwatch.org/content/hobby-lobby-and-biblical-economics>.

⁵⁰ See *Hobbie v. Unemployment Appeals Commission of Fla.*, 480 U.S. 136, 143 (1987).

⁵¹ *Lochner v. New York*, 198 U.S. 45 (1905).

⁵² 163 U.S. 537 (1892).

⁵³ *Id.* at 550.

⁵⁴ 300 U.S. at 392.

⁵⁵ 349 U.S. 294, 298.

⁵⁶ 564 U.S. ___, 131 S. Ct. 2653 (2011).

⁵⁷ Vt. Stat. Ann., Tit. 18, § 4631(d), as amended by H. 750 (2009); invalidated by *Sorrell*, 131 S. Ct. at 2663.

⁵⁸ *Id.* at 2659.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2664 (answering the first

question in the affirmative); *Id.* at 2668, 2671 (answering the second question in the affirmative).

⁶² *Id.* at 2663.

⁶³ *Id.* at 2656-57.

⁶⁴ *Id.* at 2673 (Breyer, J., dissenting).

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Accord.*, Isabelle Bibet-Kalimyak, *A Critical Analysis of Sorrell v. IMS Health, Inc.: Using Strict Scrutiny as the Legal Standard of Judicial Review for Commercial Speech Is Risky and Unwarranted*, 67 FOOD AND DRUG L. J. 191 (June 2012), available at [http://www.fdli.org/mobile/resources-detail-view/?friendlyname=a-critical-analysis-of-sorrell-v.-ims-health-inc.-67-food-and-drug-law-journal-2012-;David.H.Gans,Sorrell.v.IMSHealth:CorporateCommercialSpeechintheAgeofCitizensUnited,CONST.ACCT.CTR.\(June21,2011\),availableathttp://theusconstitution.org/text-history/3035](http://www.fdli.org/mobile/resources-detail-view/?friendlyname=a-critical-analysis-of-sorrell-v.-ims-health-inc.-67-food-and-drug-law-journal-2012-;David.H.Gans,Sorrell.v.IMSHealth:CorporateCommercialSpeechintheAgeofCitizensUnited,CONST.ACCT.CTR.(June21,2011),availableathttp://theusconstitution.org/text-history/3035).

⁶⁸ *Sorrell*, 131 S. Ct. at 2674 (Breyer, J., dissenting); see also *Id.* (noting that the Court “normally applied a yet more lenient approach to ordinary commercial or regulatory legislation that affects speech in less direct ways”).

⁶⁹ *Id.* at 2674-75.

⁷⁰ *Id.* at 2675.

⁷¹ *Id.* at 2677-78.

⁷² *Id.* at 2675.

⁷³ *Id.* at 2684.

⁷⁴ 696 F.3d 1205.

⁷⁵ Pub.L. 111-31 (enacted June 22, 2009).

⁷⁶ *R.J. Reynolds*, 696 F.3d at 1221-22.

⁷⁷ *Id.* at 1217 (citing *Central Hudson Gas & Elec. Corp. v. Public Service Comm. Of N.Y.*, 447 U.S. 557 (1980)).

⁷⁸ *Id.* at 1219-20.

⁷⁹ *Id.* at 1218.

⁸⁰ *Id.* at 1221-22 (citing *Sorrell*, 131 S. Ct. at 2671 in defense of persuasive commercial speech).

⁸¹ *Citizens United v. FEC*, 558 U.S. 310 (2010).

⁸² In *Massachusetts Citizens for Life*, the Court held that the general ban on corporate treasury spending “in connection with” federal elections, found in Section 316 of the Federal

Election Campaign Act (FECA), could not be applied to the political campaign spending of Massachusetts Citizens for Life, a nonprofit corporation organized to participate in the political process and to advance a legislative agenda. 479 U.S. 238 (1986) When Massachusetts Citizens for Life published and distributed materials in the 1978 election cycle promoting “pro-life” candidates, the FEC brought an action against the group alleging that its spending violated FECA’s ban on corporate political spending, but the Supreme Court found this ban in violation of the First Amendment as applied to this nonprofit corporation because it burdened speech by citizens acting politically through the corporate form without advancing any “compelling justification” for such burden. *Id.* at 263. Significantly, the *Massachusetts Citizens for Life* Court found that the generally compelling rationale for excluding corporate spending from politics is missing when the participating entity is a nonprofit, nonstock corporation organized for political purposes. As the court put it, “The concern underlying the regulation of corporate political activity—that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace”—is simply absent. *Id.* (internal quotation marks omitted). As a nonprofit political corporation, Massachusetts Citizens for Life “was formed to disseminate political ideas, not to amass capital.” *Id.* at 259.

⁸³ *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014).

⁸⁴ Patient Protection and Affordable Care Act (commonly “ACA”), Pub. L. 111-148, § 2713 (a)(4), 124 Stat. 119, 131 (2010) (codified at 42 U.S.C. 300gg-13) (“(4) with respect to women, such . . . screenings . . . as provided for [by the] Health Resources and Services Administration] for purposes of this paragraph.”), available at <http://www.gpo.gov/fdsys/pkg/PLAW-111publ148/pdf/PLAW-111publ148.pdf>; see DOL Coverage of Preventative Health Services Rules, 29 C.F.R. § 2590.715-2713 - 13A (proposed rule as of Aug. 27, 2014; current through Feb. 18, 2015) (implementing the Affordable Care Act’s contraception provision); see also DOL Exemption and Accommodations in Connection with Coverage of Preventive Health Services Rules, 45 C.F.R. § 147.131 (proposed rule as of Aug. 27, 2014; current through Feb. 18,

2015) (granting nonprofit organizations with “religious objections” or closely-held for-profit entities with owners who object because of “sincerely held religious beliefs” an exemption from certain provisions of the ACA and its implementing regulations, specifically contraception coverage).

⁸⁵ 558 U.S. at 466.

⁸⁶ *Hobby Lobby*, 134 S. Ct. at 2787 (2014) (Ginsburg, J., dissenting).

⁸⁷ *Hobby Lobby* at 2804 (“No doubt the [owners of Hobby Lobby] and all who share their beliefs may decline to acquire for themselves the contraceptives in question. But that choice may not be imposed on employees who hold other beliefs. Working for Hobby Lobby or Conestoga, in other words, should not deprive employees of the preventive care available to workers at the shop next door, at least in the absence of directions from the Legislature or Administration to do so.”).

⁸⁸ 476 U.S. 693 (1986).

⁸⁹ *Bowen* at 697.

⁹⁰ *Hobby Lobby* at 2798 (internal citations omitted).

⁹¹ The fact that Hobby Lobby is a “closely held” family-owned corporation makes no difference, because all corporations are legally distinct from their shareholders in all cases, and the rights being asserted in *Hobby Lobby* are the rights of the corporation, not the owners. In any event, as a number of states pointed out in an *amicus* brief led by California, family-owned or controlled businesses account for more than 80% of all American businesses, 60% of all U.S. employment, and one-third of all Fortune 500 companies. Brief of California, Connecticut, Hawaii, Illinois, Iowa, Maryland, New York, Oregon, and Washington as Amici Curiae Supporting Petitioners, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. ___, 134 S. Ct. 2751 (2014), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2013/10/40797168.pdf>. The religious rights that a small or family-owned corporation wins are the religious rights that a big or publically held corporation will have. There is no constitutional difference between the status of a large corporation and a smaller one.

⁹² 564 U.S. ___, 131 S. Ct. 2296 (2011).

⁹³ SEC Employment of Manipulative

and Deceptive Devices Rule, 17 C.F.R. § 240.10b-5 (2011).

⁹⁴ *Janus Capital Grp.*, 131 S. Ct. at 2304 – 05.

⁹⁵ *Id.*

⁹⁶ *Id.* at 2299.

⁹⁷ *Id.* at 2305 (Breyer, J., dissenting).

⁹⁸ *Id.* at 2306.

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *Id.*; see also *Id.* at 2307 (“Every day, hosts of corporate officials make statements with content that more senior officials or the board of directors have ‘ultimate authority’ to control. So do cabinet officials make statements about matters that the Constitution places within the ultimate authority of the President. So do thousands, perhaps millions, of other employees make statements that, as to content, form, or timing, are subject to the control of another.”); see also *Id.* at 2307-10 (stating that “the majority [cannot] find support in any relevant precedent” for its construction of the word “make” to limit liability of all except ultimate decision makers, showing that the two cases centrally relied on by the majority for this holding are too factually and legally different to be even persuasive, and citing other Supreme Court precedent to show that similarly-worded securities rules provide for liability of those lower in the decision-making hierarchy).

¹⁰¹ See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 388 (1983); *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 253, n. 2 (2010) (cited by Breyer, J., dissenting in *Janus Capital*, 131 S. Ct. at 2310).

¹⁰² See *Id.* at 2310 (“Indeed, under the majority’s rule it seems unlikely that the SEC itself in such circumstances could exercise the authority Congress has granted it to pursue primary violators who “make” false statements or the authority that Congress has specifically provided to prosecute aiders and abettors to securities violations. See § 104, 109 Stat. 757 (codified at 15 U.S.C.A. § 78t(e) (Feb. 2011 Supp.)) (granting SEC authority to prosecute aiders and abettors).”).

¹⁰³ *Bielski v. Cabletron Systems*, 311 F.3d 11 at 38 (First Circuit, 2002).

¹⁰⁴ 564 U.S. ___, 131 S. Ct. 2780 (2011).

¹⁰⁵ *Id.* at 2786.

¹⁰⁶ *Nicastro v. McIntyre Machinery*

America, Ltd., 987 A.2d 575, 578 (N.J. 2010).

¹⁰⁷ *Id.* at 577.

¹⁰⁸ *Id.* at 591-592.

¹⁰⁹ *Id.* at 577.

¹¹⁰ *McIntyre*, 131 S. Ct. at 2790-91.

¹¹¹ *Id.* at 2794 (Ginsburg, J., dissenting).

¹¹² *Id.* at 2795 - 96.

¹¹³ *Id.* at 2801 - 02.

¹¹⁴ *Id.* at 2799.

¹¹⁵ *Int’l Shoe Mfrng. Co. v. Wash.*, 326 U.S. 310 (1945).

¹¹⁶ *McIntyre*, 131 S. Ct. at 2800 (Ginsburg, J., dissenting).

¹¹⁷ *Id.* at 2801-02.

¹¹⁸ *Nicastro*, 978 A. 2d at 81.

¹¹⁹ *McIntyre*, at 2803.

¹²⁰ 564 U.S. ___, 131 S. Ct. 2567.

¹²¹ *Id.* at 2578.

¹²² *Id.*

¹²³ *Id.* at 2577-78.

¹²⁴ *Id.* at 2582 (Sotomayor, J., dissenting).

¹²⁵ *Id.* at 2586.

¹²⁶ *Id.* at 2589.

¹²⁷ *Id.* at 2592 (“Today’s decision leads to so many absurd consequences that I cannot fathom that Congress would have intended to pre-empt state law in these cases.”).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 2592.

¹³⁴ 562 U.S. ___, 131 S. Ct. 1068.

¹³⁵ 42 U.S.C. §§ 300aa-1 to 300aa-34 (2012).

¹³⁶ 42 U.S.C. §§ 300aa-22(b)(1) (2012).

¹³⁷ *Bruesewitz*, 131 S. Ct. at 1086 (Sotomayor, J., dissenting).

¹³⁸ *Id.*

¹³⁹ *Id.* at 1094-95.

¹⁴⁰ *Id.* at 1101 (“By [construing the statute to] pre-empt all design defect claims against vaccine manufacturers for covered vaccines, the majority’s decision leaves a regulatory vacuum

in which no one—neither the FDA nor any other federal agency, nor state and federal juries—ensures that vaccine manufacturers adequately take account of scientific and technological advancements.”).

¹⁴¹ *Id.*

¹⁴² 562 U.S. ___, 131 S. Ct. 1740.

¹⁴³ *Id.* at 1744.

¹⁴⁴ *Id.*

¹⁴⁵ *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

¹⁴⁶ 9 U.S.C. § 2 (2012).

¹⁴⁷ *Concepcion*, 131 S. Ct. at 1744.

¹⁴⁸ *Id.* at 1751.

¹⁴⁹ *Id.* at 1756 (Breyer, J., dissenting).

¹⁵⁰ *Id.* at 1757 (“The Discover Bank rule does not create a ‘blanket policy in California against class action waivers in the consumer context.’” *Provencher v. Dell, Inc.*, 409 F.Supp.2d 1196, 1201 (C.D.Cal.2006). Instead, it represents the “application of a more general [unconscionability] principle.” *Gentry v. Superior Ct.*, 42 Cal.4th 443, 457, 64 Cal.Rptr.3d 773, 165 P.3d 556, 564

(2007).”).

¹⁵¹ *Id.*

¹⁵² *Id.* at 1761.

¹⁵³ *Id.* at 1759.

¹⁵⁴ *Id.* at 1761.

¹⁵⁵ *Id.*

¹⁵⁶ 133 S. Ct. 2304, 2313.

¹⁵⁷ *Id.*

¹⁵⁸ 561 U.S.__(2010).

¹⁵⁹ 556 U.S. 247 (2009).

¹⁶⁰ *Id.* at 279.

¹⁶¹ See generally Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp, & Mark D. West, *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. PA. L. REV. 791 (2002), available at [https://www.law.upenn.edu/journals/jil/articles/volume23/issue4/PistorKeinanKleinheisterkampWest23U.Pa.J.Int'lEcon.L.791\(2002\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume23/issue4/PistorKeinanKleinheisterkampWest23U.Pa.J.Int'lEcon.L.791(2002).pdf).

¹⁶² Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in THE WORKS OF THOMAS JEFFERSON, VOL. 12: CORRESPONDENCES AND OTHER PAPERS 1816-1826 42, 44 (Paul

Leicester Ford ed., Fed. ed. 1905), available at <http://oll.libertyfund.org/titles/808>.

¹⁶³ David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201, 201 at 212-220 (1990), available at <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3111&context=dlj>.

¹⁶⁴ Carl J. Meyer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L. J. (1990), available at http://reclaimdemocracy.org/mayer_personalizing/.

¹⁶⁵ *Timeline on Corporate Personhood*, PUBLIC CITIZEN, available at <http://www.citizen.org/documents/students-citizens-united-guide-corporate-personhood.pdf>.

¹⁶⁶ Letter from Thomas Jefferson to the Danbury Baptist Association (1802) (on file at the Library of Congress), available at <http://www.loc.gov/loc/lcib/9806/danpost.html>.



The Supreme Court's decision in *Citizens United* — which opened the floodgates for unlimited outside spending in elections — has come to represent a disastrous turning point for the American political process. In the years since that decision, our elections have become inconceivably expensive, and the strength of our democratic process has been eroded as wealthy special interests drown out the voices of everyday voters.

But the *Citizens United* decision also signified a broader shift, beyond just the political arena, in the way the Supreme Court interprets the Constitution and our laws. In this *Citizens United* era, the Roberts Court's ultra-conservative majority has established a precedent for privileging corporations over individuals, allowing corporations to enjoy the rights of the people while giving the people fewer and fewer rights against corporations. By radically distorting the First Amendment in order to allow corporations to influence elections, by inventing corporate religious liberty rights to clamp down on women's health choices, by interpreting federal law in ways that erase corporate liability, and by preempting state laws intended to protect employees and consumers against corporations, the Supreme Court seems to be embracing unencumbered corporatism.



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