

The DEFINITIVE GUIDE to OVERTURNING Citizens United



**JEFFREY D. CLEMENTS**

**CORPORATIONS**  
**ARE**  
**NOT**  
**PEOPLE**

**RECLAIMING DEMOCRACY**  
from Big Money and Global Corporations



FOREWORD BY **BILL MOYERS**

SECOND  
EDITION  
Updated & Expanded

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“*Corporations Are Not People* will inform you, outrage you, and inspire you to return corporations to their proper position as tools of public policy rather than masters of it.”

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“There is no better primer to describe how we arrived where we are today and our opportunity to change the direction of our nation.”

—**Peg Lautenschlager, former Attorney General of Wisconsin**

“This book gives you valuable tools.”

—**David Cobb, cofounder, Move to Amend**

“A brilliant contribution to the literature on the crime of corporate personhood—and what we can do about it.”

—**Thom Hartmann, bestselling author of *Unequal Protection* and host of the *Thom Hartmann Program***

Second Edition

**CORPORATIONS**  
**ARE NOT**  
**PEOPLE**

RECLAIMING DEMOCRACY  
FROM BIG MONEY AND GLOBAL  
CORPORATIONS

JEFFREY D. CLEMENTS



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# Corporations Are Not People

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*For Bob Clements*

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*And for all of the people working to renew American democracy,  
for whom this book is dedicated, and to the cause of which  
100 percent of author royalties are committed.*

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# Preface

## to this Second Edition

Three years ago, with the original edition of *Corporations Are Not People*, I thought that the title might require some explanation. I am not sure that is still true.

When politicians from Massachusetts Democrat Elizabeth Warren to Arizona Republican John McCain join in unison to declare, “Corporations are not people!” and when a major presidential candidate has been ridiculed and rebutted for his pronouncement that “corporations are people, my friend,” it may be that the phrase now has some resonance.

In these past three years, the country has shared in the catastrophe that is *Citizens United v. Federal Election Commission*. Since the Supreme Court struck down our election spending laws to vindicate, in the Court’s words, the “disadvantaged class of persons” that are corporations, we have had a \$10 billion election brought to us, often secretly, by a few corporations, unions, and billionaires. We have become all too familiar with Super PACs, dark money, and dysfunctional government.

As we, the people are losing our role in elections and representative government, we also are losing our voice and power in the courts: global corporations and activist judges have deployed the reasoning of *Citizens United* to create a new “corporate veto” in the courts over financial, health care, environmental, and energy laws,

among others. Some corporations have even had epiphanies, and now claim First Amendment religious rights to evade the law.

This book explains how this happened in America and how we can fix it. On both scores, this edition has a great deal of new material. The danger of “corporate rights” and big money domination of our elections and government has accelerated rapidly in the past three years. You will find a lot of new information on that. At the same time, the growing response of so many Americans over the past three years is nothing short of historic. That story, and how you can help, is here, too.

Largely under the radar of a mainstream media that seems able to see only binary smack-down politics, Americans are coming together to accelerate several related engines of reform:

*A vibrant national movement for a Twenty-Eighth Amendment to the Constitution to overturn Citizens United has moved “from pipedream to mainstream.” Six hundred cities and towns, and sixteen states, have enacted amendment resolutions by overwhelming, cross-partisan majorities. More than 160 members of Congress are now cosponsoring proposals for the Twenty-Eighth Amendment, and the president of the United States and former Supreme Court Justice John Paul Stevens have expressed support;*

*A revolt is breaking out among judges, law professors, lawyers, state Attorneys General, and others who are fighting back in the courts, determined to defend the Constitution’s purpose of enhancing rather than defeating the possibility of republican democracy;*

*From North Carolina to New York, Maine to California, and even in Washington, D.C., a vigorous demand to “get money out and voters in” is expanding, with small donor–public funding initiatives, voting rights for everyone, transparency and*

*accountability reforms, and more reforms to make a democracy that works;*

*Reform of our corporate laws and new thinking about our economy have made more progress in the past three years than in many previous decades—one example alone being the more than twenty states that have enacted benefit corporation laws and the more than nine hundred new benefit corporations that eschew and will replace the “shareholders and CEOs above all” ideology that no longer works.*

*Corporations Are Not People* is about why these engines of reform are so necessary and how you can help accelerate them to the scale that our country and the world urgently need.

I have been inspired by so many Americans who working to save our country. This edition is dedicated to all of them, and all author royalties will be donated to organizations helping them in their work.

Thanks to all of them, and to all of you who join this work, *Citizens United* will not stand, our Constitution will serve human beings and protect an effective democracy, and we will restore the promise of a republic governed by “We, the People.”

Jeff Clements  
Concord, Massachusetts  
July 4, 2014

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# Preface to the First Edition

Of course corporations are not people. Do we really need a book about that obvious truth? Unfortunately, we do.

After the United States Supreme Court's decision in *Citizens United v. Federal Election Commission* in 2010, the identity of corporations and their place in our government of the people is not so obvious anymore, at least not to the Supreme Court and to the armies of corporate lawyers pushing for more corporate constitutional rights. And the fact that corporations are not people does not seem to be obvious to too many cowed and trembling lawmakers at all levels of government. There are exceptions, to be sure, but in the face of wildly unbalanced corporate money and influence, too few of our elected officials stand with conviction and firmness to state the obvious about corporations in defense of the public interest.

*Citizens United* is the biggest and most radical (to use a word from the dissent of Justice Stevens) decision in a regular series of recent Supreme Court decisions in favor of corporations. In *Citizens United*, the Supreme Court overturned decades of precedent, reversed a century of legislative effort to keep corporate money from corrupting democracy, and upended the American ideal that we are a government of people rather than a government of corporate wealth. The decision, in many ways, symbolizes how far off track we have fallen from our ideal of the American Republic, governed by the people.

In the pages that follow, I hope to show what *Citizens United* is all about, where it came from, and what I think this triumph of corporate power means for you and for all Americans. Much of the book is about what I see as the devastating effect of unbalanced corporate power, sustained and strengthened by a deliberate, organized, and extremely well funded campaign to transform—I would say, pervert—our Bill of Rights into a charter for corporations as much and even more than for people.

I also hope to show, however, why we do not have to leave it at that depressing juncture. As I describe in Chapter Seven, thanks to the mechanism of constitutional amendment that has come through before when our democracy is on the line, we can fight back to restore government of the people and to save our country. Thousands of people have started that work already, working for the People's Rights Amendment as the Twenty-Eighth Amendment to the Constitution. I hope that you will join us; the Resources section that follows Chapter Eight offers some ways you can do that.

Many people across the country have taken up the effort to preserve our nation and world against unbalanced corporate power and have shared their ideas, time, spirit, and hard work with me. I hope that all of them will know how much they have influenced this book and how grateful I am, even if I could not list everyone here.

Bill Moyers is at the top of the list of a few who deserve special mention. Bill has been a hero and a teacher for me and for so many Americans. He tells the truth. Calmly and clearly, to be sure, but make no mistake, he tells the truth, out loud for all to hear. He never gives up on the journey of America and of humanity, and his curiosity, determination, and grace make that journey live for all of us. I cannot say how grateful and honored I am to have him write the Foreword to this book.



I am blessed to be part of the Clements family. Thank you to Marilyn Clements and this wonderful extended clan of opinionated, smart, loving, patriotic people, who work hard for the good, stand for principle, and believe in writing and in books. They put in hours helping me to make this one better.

I am deeply appreciative of so many who early on understood the danger of *Citizens United* and corporate power, who have worked so hard, and who are bringing such hope and purpose to the cause of liberty and democracy. They have picked up the constitutional amendment banner used so well by our forefathers and foremothers. These modern-day heroes do not accept that our generation is less determined or less true to the American cause of freedom and democracy than those who came before. They reject defeatism. They are standing for people's rights and against corporate rights, and they have inspired much of this book.

One of these heroes is John Bonifaz, a determined visionary and leader. On top of launching Free Speech for People, a nationwide campaign to overturn *Citizens United*, he took the time to read drafts and helped make this book better than it would have been. I thank John and all of the friends and supporters who are helping move Free Speech for People and the People's Rights Amendment forward.

Many others generously shared their time, ideas, comments, and criticisms. My colleague Gwen Stowe, associate at Free Speech for People and manager at Clements Law Office, LLC, made far more contributions to all aspects of this project than I can list. Pam Kogut, my old friend and colleague, first at the Massachusetts attorney general's office and now at Clements Law Office, LLC, provided smart edits and wise suggestions. I am lucky to work with Pam and Gwen.

I also am grateful for the terrific work of Neal Maillet and the Berrett-Kohler team and for many people who provided comments, suggestions, and correction of errors, including David Korten,

Daniel Greenwood, Rob Ellman, Shauna Shames, Kristen Mousalli, Ariel Jolicoeur, Ted Nace, Steve Cobble, and David Swanson. I know that the final product is not everything they might have thought possible, but I also know that it is better thanks to them. Thanks, too, to Thom Hartmann.

Finally, as always, my loving gratitude to Nancy, Will, Sophie, and Ben.

Jeff Clements  
Concord, Massachusetts  
October 2011

# Foreword

## Fighting Back

*Bill Moyers*

Rarely have so few imposed such damage on so many. When five conservative members of the Supreme Court handed for-profit corporations the right to secretly flood political campaigns with tidal waves of cash on the eve of an election, they moved America closer to outright plutocracy, where political power derived from wealth is devoted to the protection of wealth. It is now official: just as they have adorned our athletic stadiums and multiple places of public assembly with their logos, corporations can officially put their brand on the government of the United States as well as the executive, legislative, and judicial branches of the fifty states.

The decision in *Citizens United v. Federal Election Commission* giving “artificial entities” the same rights of “free speech” as living, breathing human beings will likely prove as infamous as the Dred Scott ruling of 1857 that opened the unsettled territories of the United States to slavery whether future inhabitants wanted it or not. It took a civil war and another hundred years of enforced segregation and deprivation before the effects of that ruling were finally exorcised from our laws. God spare us civil strife over the pernicious consequences of *Citizens United*, but unless citizens

stand their ground, America will divide even more swiftly into winners and losers with little pity for the latter. *Citizens United* is but the latest battle in the class war waged for thirty years from the top down by the corporate and political right. Instead of creating a fair and level playing field for all, government would become the agent of the powerful and privileged. Public institutions, laws, and regulations, as well as the ideas, norms, and beliefs that aimed to protect the common good and helped create America's iconic middle class, would become increasingly vulnerable. The Nobel Laureate economist Robert Solow succinctly summed up the results: "The redistribution of wealth in favor of the wealthy and of power in favor of the powerful." In the wake of *Citizens United*, popular resistance is all that can prevent the richest economic interests in the country from buying the democratic process lock, stock, and barrel.

America has a long record of conflict with corporations. Wealth acquired under capitalism is in and of itself no enemy to democracy, but wealth armed with political power—power to choke off opportunities for others to rise, power to subvert public purposes and deny public needs—is a proven danger to the "general welfare" proclaimed in the Preamble to the Constitution as one of the justifications for America's existence.

In its founding era, Alexander Hamilton created a financial system for our infant republic that mixed subsidies, tariffs, and a central bank to establish a viable economy and sound public credit. James Madison and Thomas Jefferson warned Americans to beware of the political ambitions of that system's managerial class. Madison feared that the "spirit of speculation" would lead to "a government operating by corrupt influence, substituting the motive of private interest in place of public duty." Jefferson hoped that "we shall crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to

a trial of strength and [to] bid defiance to the laws of our country.” Radical ideas? Class warfare? The voters didn’t think so. In 1800, they made Jefferson the third president and then reelected him, and in 1808 they put Madison in the White House for the next eight years.

Andrew Jackson, the overwhelming people’s choice of 1828, vetoed the rechartering of the Second Bank of the United States in the summer of 1832. Twenty percent of its stock was government owned; the rest was held by private investors, some of them foreigners and all of them wealthy. Jackson argued that the bank’s official connections and size gave it unfair advantages over local competition. In his veto message, he said: “[This act] seems to be predicated on the erroneous idea that the present stockholders have a prescriptive right not only to the favor but to the bounty of Government. . . . It is to be regretted that the rich and powerful too often bend the acts of government to their selfish purposes.” Four months later, Jackson was easily reelected in a decisive victory over plutocracy.

The predators roared back in the Gilded Age that followed the Civil War. Corruption born of the lust for money produced what one historian described as “the morals of a gashouse gang.” Judges, state legislators, the parties that selected them, and the editors who supported them were purchased as easily as ale at the local pub. Lobbyists roamed the halls of Congress proffering gifts of cash, railroad passes, and fancy entertainments. The US Senate became a “millionaires’ club.” With government on the auction block, the notion of the “general welfare” wound up on the trash heap; grotesque inequality and poverty festered under the gilding. Sound familiar?

Then came a judicial earthquake. In 1886, a conservative Supreme Court conferred the divine gift of life on the Southern Pacific Railroad and by extension on all other corporations. The

railroad was declared to be a “person,” protected by the recently enacted Fourteenth Amendment, which said that no person should be deprived of “life, liberty or property without due process of law.” Never mind that the amendment was enacted to protect the rights of freed slaves who were now US citizens. Never mind that a corporation possessed neither a body to be kicked nor a soul to be damned (or saved!). The Court decided that it had the same rights of “personhood” as a walking, talking citizen and was entitled to enjoy every liberty protected by the Constitution that flesh-and-blood individuals could claim, even though it did not share their disadvantage of being mortal. It could move where it chose, buy any kind of property it chose, and select its directors and stockholders from anywhere it chose. Welcome to unregulated multinational conglomerates, although unforeseen at the time. Welcome to tax shelters, at home and offshore, and to subsidies galore, paid for by the taxes of unsuspecting working people. Corporations were endowed with the rights of “personhood” but exempted from the responsibilities of citizenship.

That’s the doctrine picked up and dusted off by the John Roberts Court in its ruling on *Citizens United*. Ignoring a century of modifying precedent, the Court gave our corporate sovereigns a “sky’s the limit” right to pour money into political campaigns for the purpose of influencing the outcome. And to do so without public disclosure. We might as well say farewell to the very idea of fair play. Farewell, too, to representative government “of, by, and for the people.”

Unless.

Unless “We, the People”—flesh-and-blood humans, outraged at the selling off of our government—fight back.

It’s been done before. As my friend and longtime colleague, the historian Bernard Weisberger, wrote recently, the Supreme Court remained a procorporate conservative fortress for the next

fifty years after the Southern Pacific decision. Decade after decade it struck down laws aimed to share power with the citizenry and to promote the “general welfare.” In 1895, it declared unconstitutional a measure providing for an income tax and gutted the Sherman Antitrust Act by finding a loophole for a sugar trust. In 1905, it killed a New York state law limiting working hours. In 1917, it did likewise to a prohibition against child labor. In 1923, it wiped out another law that set minimum wages for women. In 1935 and 1936, it struck down early New Deal recovery acts.

In the face of such discouragement, however, embattled citizens refused to give up. “Into their hearts,” wrote the progressive Kansas journalist William Allen White, “had come a sense that their civilization needed recasting, that the government had fallen into the hands of self-seekers, that a new relationship should be established between the haves and the have-nots.” Not content merely to wring their hands and cry “Woe is us,” everyday citizens researched the issues, organized public events to educate their neighbors, held rallies, made speeches, petitioned and canvassed, marched and exhorted. They would elect the twentieth-century governments that restored the “general welfare” as a pillar of American democracy, setting in place legally ordained minimum wages, maximum working hours, child labor laws, workmen’s safety and compensation laws, pure foods and safe drugs, Social Security and Medicare, and rules to promote competitive rather than monopolistic financial and business markets.

The social contract that emerged from these victories is part and parcel of the “general welfare” to which the founders had dedicated our Constitution. The corporate and political right seeks now to weaken and ultimately destroy it. Thanks to their ideological kin on the Supreme Court, they can attack the social contract using their abundant resources of wealth funneled—clandestinely—into political campaigns. During the fall elections

of 2010, the first after the *Citizens United* decision, corporate front groups spent \$126 million while hiding the identities of the donors, according to the Sunlight Foundation. The US Chamber of Commerce, which touts itself as a “main street” grassroots organization, draws most of its funds from about a hundred businesses, including such “main street” sources as BP, ExxonMobil, JPMorgan Chase, Massey Coal, Pfizer, Shell, Aetna, and Alcoa. The ink was hardly dry on the *Citizens United* decision when the Chamber organized a covertly funded front and fired volley after volley of missiles, in the form of political ads, into the 2010 campaigns, eventually spending approximately \$75 million. Another corporate cover group—the Americans Action Network—spent more than \$26 million of undisclosed corporate money in six Senate races and twenty-eight House of Representative elections. And “Crossroads GPS” seized on *Citizens United* to raise and spend at least \$17 million that NBC News said came from “a small circle of extremely wealthy Wall Street hedge fund and private equity moguls,” all determined to water down the financial reforms designed to avoid a collapse of the financial system that their own greed and reckless speculation had helped bring on. As I write in the summer of 2011, the *New York Times* reports that efforts to thwart serious reforms are succeeding. The populist editor Jim Hightower concludes that today’s proponents of corporate plutocracy “have simply elevated money itself above votes, establishing cold, hard cash as the real coin of political power. The more you spend on politics, the bigger your voice is in government, making the vast vaults of billionaires and corporations far superior to the voices of mere voters.”

Against such odds, discouragement comes easily. If the generations before us had given up, however, slaves would still be waiting on our tables and picking our crops, women would be turned back at the voting booths, and it would be a crime for workers to



organize. Like our forebears, we will not fix the broken promise of America—the promise of “life, liberty, and the pursuit of happiness” for all our citizens, not just the powerful and privileged—if we throw in the proverbial towel. Surrendering to plutocracy is not an option. Confronting a moment in our history that is much like the one Lincoln faced—when “we can nobly save or meanly lose the last best hope on earth”—we must fight back against the forces that are pouring dirty money into the political system, turning it into a sewer.

How to fight back is the message of this book. Jeffrey Clements saw corporate behavior up close during two stints as assistant attorney general in Massachusetts, litigating against the tobacco industry, enforcing fair trade practices, and leading more than one hundred attorneys and staff responsible for consumer and environmental protection, antitrust practices, and the oversight of health care, insurance, and financial services. He came away from the experience repeating to himself this indelible truth: “Corporations are not people.” Try it yourself: “Corporations are not people.” Again: “Corporations are not people.” You are now ready to join what Clements believes is the most promising way to counter *Citizens United*: a campaign for a constitutional amendment affirming that free speech and democracy are for people and that corporations are not people. Impossible? Not at all, says Clements. We have already amended the Constitution twenty-seven times. Amendment campaigns are how we have always made the promise of equality and liberty more real. Difficult? Of course; as Frederick Douglass taught us, power concedes nothing without a struggle. To contend with power, Clements and his colleague John Bonifaz founded Free Speech for People, a nationwide nonpartisan effort to overturn *Citizens United* and corporate rights doctrines that unduly leverage corporate economic power into political power. What Clements calls the People’s Rights

Amendment could be our best hope to save the “great American experiment.”

To find out why, read on, and as you read, keep in mind the words of Theodore Roosevelt, a Republican, who a century ago stood up to the mighty combines of wealth and power that were buying up our government and called on Americans of all persuasions to join him in opposing the “naked robbery” of the public’s trust:

*It is not a partisan issue; it is more than a political issue. It is a great moral issue. If we condone political theft, if we do not resent the kinds of wrong and injustice that injuriously affect the whole nation, not merely our democratic form of government but our civilization itself cannot endure.*

## Introduction

# What's at Stake?

**T**his book is about how an audacious, long-term, and well-funded strategy created new constitutional rights for “things” such as corporations and money, at the expense of the rights of people and democracy itself. This might be a bleak tale, except that now, four years after *Citizens United*, this book also is about the remarkable success of so many Americans who insist on rewriting the end of the story and renewing the promise of our democracy.

America's story is one of defiant struggle against the odds for an improbable vision: that all people, created and born free and equal, can live and govern together “in the pursuit of happiness.” This dream of a society of free people with equal rights, where people govern themselves, was unlikely indeed in the eighteenth century. In a world of empires, governed by royalty and divided by class, and in our own country, with millions enslaved, where women were considered the property of their husbands, and where land ownership was considered a prerequisite to participation in government, the pursuit—let alone the fulfillment—of this vision was far-fetched indeed.

Yet we Americans never let that vision go, despite dark days. In generation after generation, for more than two centuries, the power of this dream drove us and inspired the world. Despite all of

the contradictions, shortcomings, missteps, and failures along the way, this basic American story remains true, and it is an undeniable triumph of the human spirit. Cynics and critics will have their say, but Americans really did come together to defeat the British Empire; to overthrow the evil of slavery and work for justice; to secure equal voting rights for women; to insist that everyone, not only the wealthy, has an equal vote and voice; to suffer, work, and fight year after year to defeat fascist, communist, fundamentalist, and totalitarian challenges to our vision of democracy, equality, and freedom.

People are free. People are equal. People govern. We have lived by that and died for that, and whenever we fell short, we worked and sacrificed for that, to ensure, as Abraham Lincoln said in one of our darkest moments, “. . . that government of the people, by the people, for the people shall not perish from the earth.”

To triumph again over powerful enemies of human equality, dignity, and freedom in our generation, we must properly identify the challenge and bring clarity of thinking and action to making our republic work again. As so often before, success and struggle begin with the simplest of propositions: Corporations are not people and every American is an equal citizen.

In *Citizens United v. Federal Election Commission* in 2010, the Supreme Court of the United States concluded, in effect, that corporations are people with First Amendment free speech rights and that democracy is for sale; it is a “marketplace.” According to the Supreme Court, we cannot prevent corporations, unions, and billionaires from controlling who wins, who loses, and who gets a voice in elections and government—and who does not. In one stroke, the Court erased a century or more of bipartisan law and two previous Supreme Court rulings that affirmed the right, if not the duty, of the people to regulate corporate political spending to preserve the integrity of American democracy.

As a result, a small group of people, corporations, and unions have poured more than \$20 billion into state and federal elections since the *Citizens United* decision. The global oil giant Chevron openly dropped \$2.5 million into the Speaker of the House of Representatives' PAC, with only yawns from a Washington press corps incapable of seeing scandal at the end of their noses. Chevron even spent \$1.2 million in a city council election in Richmond, California, a community of 100,000 people living in the shadow of a Chevron refinery that caused 15,000 residents to go to area hospitals.

The US Chamber of Commerce, working for global corporations, spent more than \$35 million—the source of which is secret—in the 2012 election and has passed the \$1 billion mark in lobbying spending since 1998. In case that kind of money was not enough to warrant politicians' attention, the Chamber president warned, "When we bite you on the ass, you bleed."

The "corporate capture of the courts," as Elizabeth Warren has put it, goes beyond the issue of money in politics. The same "corporate speech rights" fabricated by the Court in *Citizens United* now are used with regularity to strike down laws deemed unfriendly to corporate profits. In 2014, one business corporation with 13,000 employees and more than 500 stores, Hobby Lobby Stores, Inc., has even gone to the Supreme Court with a claim that it—the corporation itself—has a constitutional right of free exercise of religion so as to to deprive those employees of legally required insurance coverage for reproductive health care.<sup>1</sup>

Corporate-oriented courts now are creating astounding new corporate constitutional rights. The pharmaceutical industry has a right to traffic in private prescription information, driving up health care costs. Monsanto has a right "not to speak" to block GMO labeling. Utility corporations have a right to promote energy consumption in defiance of conservation policies. Cigarette corporations have a right to eliminate warning labels.

Corporations now have a right to deprive employees of information about whether they may join a union. Verizon and the telecommunications industry claim a constitutional right to secretly turn over customer data and information to the government.

*Citizens United*, then, is not merely a mistake easily corrected, nor is the case simply about campaign finance or money in politics. The Court's declaration in *Citizens United* that corporations have the same rights as people must strike most Americans as bizarre. To the five justices in the majority and to the corporate legal movement out of which they have come, however, it was more like a victory lap or an end zone dance for a three-decade-long campaign.

This campaign, begun in the 1970s, had already succeeded in creating a corporate trump card to strike down federal, state, and local laws enacted for the public's benefit. Even before *Citizens United*, the fabrication of corporate rights and the reality of corporate power controlled economic, energy, environmental, health, budget, debt, food, agriculture, and foreign policy in America.

The results? Massive job outsourcing abroad; destruction of our manufacturing capacity; wage stagnation for the vast majority of Americans and unprecedented enrichment of the very few; uncontrolled military spending and endless wars; out-of-control health care spending at the same time that millions of people cannot get health care at all; bloated and unsustainable budgets and debt at every level of government; national and global environmental crisis; loss of wilderness and open land, and the takeover of public hunting and fishing grounds; chain store sprawl and gutting of local economies and communities; obesity, asthma, and public health epidemics; and a growing sense that the connection between Americans and our government has been lost.

Not forever, though. Since *Citizens United*, millions of Americans have decided that we do not have to live with this and that we can put the American project back together again.

To most effectively respond, we need to see where *Citizens United* came from and how much we have lost to the triumph of corporate and money power. Most of the first six chapters of this book, therefore, examine these themes from different perspectives. In Chapter Three, I digress to examine what a corporation actually is as a matter of law and fact. This may be a digression, but it lies at the heart of why corporations can have no constitutional rights superior to the rights of the American people to make laws governing corporations. Corporations are not merely private entities, owing no duties to the public. Corporations are legal creations of government, with the duties as well as privileges that we, the people, decide upon in public debate.

In the latter part of the book, I describe a roadmap back to democracy, republican government, and balance in a sustainable economy. The heart of this road map is a strategy, already making significant progress, for reversing *Citizens United*, cleaning the swamp of our corrupted politics, and designing corporations that better serve our society.

We are well on our way to a Twenty-Eighth Amendment to the Constitution that will overturn *Citizens United* and corporate rights, and restore people's rights and equal citizenship. People, outside of Washington, D.C., anyway, are coming together across political, ideological, and cultural differences to work on bigger, more fundamental reforms in elections, voting rights, and anti-corruption. And corporate law no longer is left only to corporate lawyers. People in business, people as customers, and people as citizens are insisting on corporate accountability and corporate law reform. They want corporations that better reflect the public policy reasons for which we allow the legal benefits of incorporation, such as limited liability, and they are making it happen.

Finally, a word about nomenclature: I am not "anticorporate," and this book is not "anticorporate," whatever that means. When

I refer to “corporations” and “corporate power” and the like, I am talking about large global or transnational corporations. Size matters. Complexity and power matter. Whether corporations operate in the economic sphere without dominating the political sphere matters.

Thousands and thousands of corporations in America are just like the corporation I set up for my business and just like the kinds of corporations that you may have set up or worked for. They are convenient legal structures for businesses to make economic activity more efficient, productive, flexible, and, we hope, profitable.

If I am “anti” anything, I am opposed to any force that takes God-given rights away from people and threatens one of the most remarkable runs of democracy and republican government in the history of humanity. Today that force is defined by the misguided ideology and unbalanced power that *Citizens United* represents and has let loose: insufficiently controlled global corporations empowered with “rights” and locked-in political inequality that leaves elections and government to those with vast sums of money. To succeed in making government of the people real in our generation, we will need to restore our right and duty to check, balance, and restrain that power.



## Chapter One

# American Democracy Works, and Corporations Fight Back

**I**n 1838, a quarter century before he became the nation's sixteenth president, a twenty-nine-year-old Abraham Lincoln stepped up to speak at the Young Men's Lyceum in Springfield, Illinois. He spoke about what was to become the cause of his life: the preservation of that great American contribution to the human story, government of, for, and by the people. He insisted that the success or failure of the American experiment was up to us. "If destruction be our lot, we must ourselves be its author and finisher. As a nation of freemen, we must live through all time, or die by suicide."<sup>1</sup>

Lincoln's generation of Americans, and every generation since, has faced daunting questions of whether "destruction be our lot," and we certainly have our share today. Most people can point to a host of complex and related reasons for rising anxiety about our future. Global and national environmental crises seem relentless and increasingly related to energy, economic, military, and food crises. Our unsustainable debt and budgets—national, state, local, family, personal—seem beyond control, reflecting an economy that has not generated significant wage growth in a generation.

We have been locked in faraway wars for more than a decade, at war in one form or another for a half century. Despite our victory over totalitarian communism, we spend more on our military than all other countries combined. We, the descendants of republicans with great suspicion about standing armies, now maintain a costly military empire across more than one hundred countries and a sprawling secret government that collects the communications data of everyone. Many Americans now doubt that we are, in fact, a government of the people and no longer believe that our democracy and government are working.

We can point to an array of causes, and we can point fingers at one another, but a taproot of many of these related problems is our collective failure to do what generations of Americans before us did: choose to take responsibility as citizens to manage hyper-concentrations of political power among the largest corporations and the wealthiest few. We have lost sight of the implications in a republic of the extreme wealth and power of transnational corporations. The agenda of the largest corporations and those who control them is not the agenda of the American family and the American community. Yet the corporate agenda is now dominant at home and across the world.

### **The Impact of *Citizens United***

In 2010, in *Citizens United v. Federal Election Commission*, the Supreme Court proclaimed that the American people are not permitted to determine how much control corporations and concentrated wealth may have over elections and lawmakers. The Court, in a 5–4 decision, ruled that a federal election law designed to prevent corporations and unions from dominating elections and government violated First Amendment free speech rights.

The impact of the Supreme Court's folly now is beyond dispute. More money was spent by fewer donors in the 2012 election than

ever before in history. As much as \$10 billion in the federal election;<sup>2</sup> billions more in state and local elections.<sup>3</sup> “Dark money” from corporations, billionaires, and unions was run through secretive “social welfare” nonprofit corporations acting as partisan political operatives;<sup>4</sup> foreign money was run through corporate subsidiaries and trade associations;<sup>5</sup> and Super PACs, corporations, candidates, and operatives pretending to be “uncoordinated” unleashed saturation attack ads across the land, all to drown out other issues, candidates, ideas, and, ultimately, Americans’ faith in effective democracy.

This spending is not “free speech,” unleashed at last, nor is it a burst of democratic enthusiasm for electioneering. Instead, it is the deployment of power of, for, and by a very few.

How few? A few dozen donors contributed 60 percent of the Super PAC money, and almost all of the Super PAC money came from just 3,318 donors. That is 0.0011 percent of the American population.<sup>6</sup> One billionaire global casino mogul alone contributed \$93 million.<sup>7</sup> One global oil corporation alone, Chevron, handed \$2.5 million to the “Leadership PAC” of the Speaker of the House, who has promised to oppose cutting oil and gas subsidies and to block action on the climate catastrophe.

Almost all political contributions of any sort—80 percent—come from just 0.5 percent of the population. This “donor class,” interwoven with corporations and lobbying firms, are largely concentrated in New York, Washington, Los Angeles, Chicago, and Boston.<sup>8</sup>

Political domination by the few has even overwhelmed state ballot initiatives, originally intended to check concentrated corporate and wealth power. A century ago, American government was “fast becoming a plutocracy,” and an “invisible government” of large corporations overwhelmed government of the people.<sup>9</sup> Voters acted in many states to amend state constitutions, creating the citizen ballot initiative to enable more democracy to check

the special interest lock on state legislatures. People in the states intended the initiative process to ensure that “this government shall be brought back to the real control of the people.”<sup>10</sup>

Now the ideology of *Citizens United* has broken the check and balance of the citizen initiative. In 2012, “corporations and some of the wealthiest Americans” spent more than a billion dollars in initiatives in just eleven states, “an unprecedented explosion of money used to pass new laws and influence the public debate.”<sup>11</sup> In the state of Washington, corporations such as Monsanto, Pepsico, Nestle, and Dupont spent more than \$20 million to defeat a ballot initiative to require disclosure of genetically modified organisms (GMOs) in food. Of that \$20 million, only \$600 came from people or businesses in the state itself.<sup>12</sup>

Even small cities and towns have felt the impact of *Citizens United*. In Richmond, California, a community of 100,000 people, a single corporation—Chevron again—spent \$1.2 million to control the outcome of the city council election. Richmond Mayor, Gayle McGlaughlin, says that Chevron will spend another \$2 million in city elections in 2014. A Richmond citizen serving on the city council, Tom Butt, adds, “They want a city council loyal to them. I think it’s wrong for a corporation to pour that kind of money into a local election. Nobody can match that.”<sup>13</sup>

Most Americans agree, but that does not matter, according to *Citizens United*. Corporations and unions now have the same rights under the First Amendment as people. And if “free speech” means unlimited election spending by the powerful, that cannot be “infringed.”

## **The *Citizens United* Decision**

In *Citizens United*, the Court struck down the federal Bipartisan Campaign Reform Act (also known as McCain-Feingold, after its Republican and Democratic sponsors). The Bipartisan Campaign

Reform Act had banned electioneering spending by corporations and unions for or against specific candidates within sixty days of a federal election. The law was intended to prevent corporations and unions from bypassing election integrity and anticorruption laws dating back more than a century.<sup>14</sup>

The case is called *Citizens United* because a Virginia non-profit corporation by that name sued the Federal Election Commission to challenge the corporate spending restriction in the Bipartisan Campaign Reform Act. *Citizens United*, the corporation, wished to use its corporate money and donations from for-profit corporations to make and distribute what the Court described as a feature-length advertisement against Hillary Clinton, who was running for president when the case began. Further, *Citizens United* sought to do this within the sixty-day period before an election when the law restricted corporate spending on electioneering activity. According to *Citizens United*, the law violated corporations' First Amendment rights of free speech because it prevented *Citizens United*, the nonprofit corporation, from engaging in electioneering activity and did not allow for-profit corporations to contribute to that campaign to influence the election.<sup>15</sup>

Of course, people are free to make a feature-length advertisement attacking a powerful senator running for president if that is what people wish to do, and people may pool their money to do this. That is essential for political participation. At first blush, the background to the case seemed to warrant concern about government restrictions on the free ability of people to pool resources to advocate views.

The Court majority in *Citizens United*, however, was not content to leave the case at first blush. Instead, they saw an opportunity to throw out a century of law they thought too restrictive of corporations. In the end, the *Citizens United* decision decreed

that all corporations (and all unions) have a constitutional right to spend unlimited money in any American election—federal, state, local, and judicial.

The Supreme Court had rejected this argument only a few years earlier, when Justices William Rehnquist and Sandra Day O'Connor were still on the Court. In 2003, in the case of *McConnell v. Federal Election Commission*, the Court ruled that the very same corporate spending provision in the McCain-Feingold law did not violate the First Amendment. In *McConnell*, the Court agreed that Congress may make different election spending rules for corporations than for people. The Court in *McConnell* followed the 1990 case of *Michigan Chamber of Commerce v. Austin*, in which another majority of the Court had ruled that corporate money, aggregated with advantages that come from the government, is not the same as people's money pooled together. Corporate spending in elections can be restricted because government creates the advantages for corporations to make them effective in the economic sphere, and the same advantages pose dangers in the political sphere.

Now in *Citizens United*, the Court, with the additions of a new chief justice, John Roberts, and a new justice, Samuel Alito, threw out *McConnell* and *Austin*. The *Citizens United* Court said its earlier decisions were wrong. The Court struck down the McCain-Feingold law as a violation of free speech rights and invited billions of corporate dollars into American elections.

Justice Anthony Kennedy wrote the opinion in *Citizens United* for the Court. At first, Justice Kennedy's opinion sounds like a ringing defense of free speech and American democracy. He writes that the government may not "ban speech." Yes! All "speakers" must be allowed and no "voices" may be silenced. Yes! The government cannot restrict a "disadvantaged person or class" from speech. Yes! All "citizens, or associations of citizens," must have a right to get their views about candidates or anything else out to the people. Of course!

But wait. Who are these “voices,” “speakers,” and “disadvantaged persons”? They are corporations, particularly global corporations with trillions of dollars in revenue and profits. And what was this onerous “ban on speech”? A rather weak law that said a corporation may not, within sixty days of an election, spend its “general treasury” money to support or attack candidates for federal office. That’s it.

The Court announced its decision on a cold January day in 2010 when most Americans were anxious about millions of job losses, angered by national debt and massive deficits deepened by corporate bailouts, and worried about our military and global strength overstretched by distant wars while China, Germany, and other economic powerhouses at peace charged ahead. Now the Supreme Court says corporations are “disadvantaged persons” with “rights” that trump and invalidate our laws?

## **The Initial Response**

Immediately, four dissenting justices on the Court, led by eighty-nine-year-old Justice John Paul Stevens, sounded the alarm. Justice Stevens’s ninety-page dissent, among his last work before retiring, may be his greatest legacy.

Stevens, born and raised in Chicago, had enlisted in the US Navy on December 6, 1941, the day before the Japanese attack on Pearl Harbor, and received the Bronze Star for his service in World War II. He then began a twenty-five-year career as a lawyer and represented numerous corporations in antitrust cases. In 1969, Stevens led the investigation and prosecution of corrupt judges in Illinois and was hailed for his fair, honest, and determined approach. A Republican, he was appointed to the Court by President Gerald Ford in 1975. It would be difficult to find a more honest, moderate, and balanced judge.

Alarmed by the majority's decision, Stevens took the unusual step of reading his dissent aloud in the Supreme Court's public chamber. Although the elderly judge's voice at times faltered, his words were unmistakable. Stevens called the Court's action in *Citizens United* a "radical departure from what has been settled First Amendment law." He blasted the Court's conclusion that corporations, "like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster." Justice Stevens said that "glittering generality" obscured the truth about what *Citizens United* really meant for America, already suffering from undue influence of corporate power. Then Justice Stevens said this:

*The Framers [of our Constitution] thus took it as a given that corporations could be comprehensively regulated in the service of the public welfare. Unlike our colleagues [on the Supreme Court], they had little trouble distinguishing corporations from human beings, and when they constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans that they had in mind. . . .*

*At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self-government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.*

Rejection of the *Citizens United* decision crossed all political lines. President Obama called the decision a "strike at the heart



of democracy.” John McCain, the 2008 Republican presidential candidate, put it bluntly: “What the Supreme Court did is a combination of arrogance, stupidity, and naivete, the likes of which I have never seen.”<sup>16</sup> Others, including members of Congress, labeled *Citizens United* the worst decision since the Supreme Court ruled in the 1856 case of *Dred Scott v. Sanford* that African Americans could never be American citizens. A founder of the Tea Party said, *Citizens United* “just allows them to feed the machine. Corporations are not like people. Corporations exist forever; people don’t. Our founding fathers never wanted them; these behemoth organizations that never die. . . . It puts the people at a tremendous disadvantage.”<sup>17</sup>

Polls confirmed that more than 75 percent of Independents, Republicans, and Democrats alike rejected the decision.<sup>18</sup> People formed groups to launch a constitutional amendment campaign to overturn the decision and corporate rights, and pushed for public funding of elections, disclosure, and other reform to lessen the damage of *Citizens United*.

Since that January day in 2010, millions of Americans have signed petitions calling on Congress to send a constitutional amendment reversing the Court’s decision in *Citizens United* to the states for ratification. Many worked in their communities to enact constitutional amendment resolutions. By the beginning of 2014, constitutional amendment resolutions had passed by overwhelming margins in sixteen states and more than 500 cities and towns in every region of the country. Put on notice, more than 160 members of the House and Senate have cosponsored constitutional amendment bills.<sup>19</sup>

Why this reaction? The real people are not buying the metaphors of corporations as “speakers” or “disadvantaged persons.” They do not agree that corporate and union money is simply another “voice.”

Rather, most Americans understand two fundamental truths about our Constitution and system of government that the Court got wrong: First, corporations are not entitled to the inherent, human rights that “we, the people” wrote into our Constitution. Large corporations already have far too much power in America and across the world, and requiring that we allow that power to be deployed without limit in elections and government will be the death of democracy and republican government. Second, with respect to elections and representation in government, every American, rich or poor, has the same right to speak, participate, be represented in government, and serve if their fellow citizens so desire. At election time and in governing, Americans indeed are created equal. We are citizens, not mere spectators to arguments among factions of the rich.

Senator John McCain summed it up: “[We] need a level playing field and we need to go back to the realization that Teddy Roosevelt had that we have to have a limit on the flow of money, and that corporations are not people.”<sup>20</sup>

### **Roots of *Citizens United*: Earth Day 1970**

To see how the *Citizens United* disaster happened, we need to go back to the 1970s and the formation of the organized corporate campaign to put American democracy on a leash. First came a wave of engaged citizens and responsive government, then came the corporate reaction. *Citizens United* could not have resulted without the deliberate drive for corporate power and rights that began four decades ago.<sup>21</sup>

After a century of industrialization, Americans had by 1970 had enough of corporations using our rivers, air, oceans, and land as sewers and dumps, leaving most people and communities with the costs and giving the profits to shareholders. One day in April 1970, twenty million Americans of every age and political party

came out into the streets and the parks to celebrate the first Earth Day. They demanded a better balance between corporations and people and better stewardship of our land, water, and air. Look at the photos from this first Earth Day and you will see families with children, men in suits and ties and neatly dressed women, working- and middle-class Americans, people of all ages and races.

These millions continued a longstanding American principle of guarding against concentrated corporate power that might overwhelm the larger interests of the nation. This nonpartisan tradition goes back not only to Franklin Roosevelt's New Deal, not only to Theodore Roosevelt's Square Deal, but to the founding of America. James Madison, a chief architect of the Constitution, wrote in the early 1800s that "incorporated Companies with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only."<sup>22</sup> Always willing to be more colorful, Thomas Jefferson said that he hoped to "crush in its birth the aristocracy of our monied corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country."<sup>23</sup>

In the 1830s, President Andrew Jackson and his allies battled against the partisan activity of the Second Bank of the United States, a corporation. Jackson pressed the urgent question of "whether the people of the United States are to govern through representatives chosen by their unbiased suffrages or whether the money and power of a great corporation are to be secretly exerted to influence their judgment and control their decisions."<sup>24</sup> Even President Martin Van Buren, hardly a radical, warned of "the already overgrown influence of corporate authorities."<sup>25</sup>

That first Earth Day in 1970 again awakened our government to the necessity of restoring the balance of corporate power and public interest, of those who control powerful corporations and the rest of Americans. With a Republican president in the White

House and bipartisan support in Congress, the extent of reform that quickly followed in the months and a few short years after the first Earth Day remains astonishing:

- Environmental Protection Agency
- Clean Water Act
- Federal Water Pollution Control Amendments
- Clean Air Act Extension
- Toxic Substances Control Act
- Safe Drinking Water Act
- Wilderness Act
- Surface Mining Control and Reclamation Act
- Endangered Species Act
- Marine Mammal Protection Act
- Resource Recovery Act
- First fuel economy standards for motor vehicles

These 1970s reforms were long overdue. For a time, they worked, and they made a profound difference in the quality of life of the vast majority of Americans. No longer could dumping untreated sewage and toxic waste in our waters be considered a standard business practice; no longer could corporations walk away from hazardous waste and chemical sites; more wilderness areas preserved more of our birthright and that of future Americans; new laws rejected the industry view that we just had to live with the discharge of brain- and organ-damaging lead from millions of cars and the spread of lead paint in every building in the land; access to clean, safe water was assured for far more Americans; and much more.

The market did not do this. We did this by acting as citizens in a republic.

As with every time in American history, of course, the 1970s were times of crisis and challenge. Yet the American people worked the levers of democracy and saw a connection between those levers—voting, organizing, debating, petitioning, marching—and our government’s conduct.

Environmental balance was not all. We often remember the strife and problems of the late 1960s and early 1970s but think of the progress for the country: in race and gender equality; ending the Vietnam War; real wage growth for average Americans; global leadership in trade and commerce and manufacturing; steady, comprehensive, creative, and effective resistance across the globe to dictatorial communism; public accountability when the president broke the law; more open government and better congressional oversight; manageable debt and budgets in Washington, D.C., and the states; employee rights and safety; and a constitutional amendment to enfranchise millions of Americans from eighteen to twenty years old. The people demanded change; our government delivered change.

The biggest corporations on the planet, however, did not celebrate the responsive democracy that followed Earth Day. Instead, they organized to fund a sustained program to take political power and rights for themselves and away from average Americans. With *Citizens United*, we see the end game of this project, but it has been years in the making.

### **1971: Lewis Powell and the “Activist-Minded Supreme Court”**

In late August 1971, Lewis Powell, a mild-mannered, courtly, and shrewd corporate lawyer in Richmond, Virginia, soon to be appointed to the US Supreme Court, wrote a memorandum to

his client, the US Chamber of Commerce. The next day, he traveled to the Chamber's offices in Washington, D.C., to meet with the leaders of the powerful lobby. There, Powell outlined a critique and a plan that changed America.<sup>26</sup>

Powell, like the *Citizens United* dissenter Justice John Paul Stevens, was a decorated World War II veteran who had returned home to build a respected law practice. By all accounts, he was a gentleman—reserved, polite, and gracious—and a distinguished lawyer and public servant. Commentators and law professors cite Powell's "qualities of temperament and character" and his "modest" and "restrained" approach to judging.<sup>27</sup> At his funeral in 1998, Sandra Day O'Connor, who had joined the Supreme Court in 1987, said, "For those who seek a model of human kindness, decency, exemplary behavior, and integrity, there will never be a better man."<sup>28</sup> Even the rare critic will cite Lewis Powell's decency and kindness.<sup>29</sup>

Much about these accounts must be true, but none tells the whole story of Lewis Powell. All of them, and even the principal Powell biography, omit the details of how he used his gifts to advance a radical corporate agenda. It is impossible to square this corporatist part of Powell's life and legacy with any conclusion of "modest" or "restrained" judging.

Powell titled his 1971 memo to the US Chamber of Commerce "Attack on American Free Enterprise System." "No thoughtful person," he explained, "can question that the American economic system is under broad attack." In response, corporations must organize and fund a drive to achieve political power through "united action." Powell emphasized the need for a sustained, multiyear corporate campaign to use an "activist-minded Supreme Court" to shape "social, economic and political change" to the advantage of corporations.

Powell continued:

*But independent and uncoordinated activity by individual corporations, as important as this is, will not be sufficient. Strength lies in organization, in careful long-range planning and implementation, in consistency of action over an indefinite period of years, in the scale of financing available only through joint effort, and in the political power available only through united action and national organizations.*

The roots of *Citizens United* lie in Powell's 1971 strategy to use "activist" Supreme Court judges to create corporate rights. "Under our constitutional system," Powell told the US Chamber of Commerce, "especially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change."

Powell's call for "business to go on the offensive" should not be misunderstood as a "conservative" or "moderate" reaction to the excesses of "liberals" or "big government." Rather, to understand the perspective of Powell and his allies is to understand the difference between a conservative and a corporatist.

## **Powell and the Tobacco Corporations Show the Way**

By 1971, Lewis Powell was a director of more than a dozen large corporations, including Philip Morris Inc., a global manufacturer and seller of cigarettes. Powell joined the Philip Morris board of directors in 1964, when the corporation sought to mitigate the US Surgeon General's report about the grave dangers of smoking. Powell remained a director, and an executive committee member, of the cigarette company until his appointment to the Supreme Court in 1971. Powell also advised the Tobacco Institute, a

lobbying and misinformation shop that was stripped of its corporate charter in the 1990s after decades of using phony science and false statements to create a fraudulent “debate” about smoking and health.<sup>30</sup>

The cigarette corporations’ response to public efforts to address addiction, smoking, and health is a big part of the larger story of how corporations undermined the Constitution and American democracy. The tobacco companies, with Powell’s encouragement, began testing the ideas that Powell urged upon the US Chamber of Commerce in 1971. By a campaign of aggressive resistance to efforts to address the devastating social and public costs of its lethal products, the cigarette corporations created a model. As a director and an executive committee member of Philip Morris, Powell shared responsibility for the fraudulent attack on the conclusions of scientists and the surgeon general by the cigarette industry and for its false insistence for years that “no proof” showed cigarettes to be unhealthy.

Hints of this work can be seen in the Philip Morris annual reports issued during Powell’s tenure as a director. We now know, thanks to recent findings of a federal judge, that many of the assertions in these annual reports were knowingly false. According to the reports themselves, these statements and others were made “on behalf of the board of directors,” including Powell:

1964: “The industry continues to support major research efforts directed towards resolving the many unanswered questions on smoking and health.”

1967: “The year 1967 was marked by an intensification of exaggerated claims made relative to the possible adverse health effects of smoking on health. . . . We deplore the lack of objectivity in so important a controversy. . . . Unfortunately the positive benefits of smoking which are so widely acknowledged are largely ignored by many



reports linking cigarettes and health, and little attention is paid to the scientific reports which are favorable to smoking.”

1967: “We would again like to state that there is no biological proof that smoking is causally related to the diseases and conditions claimed to be statistically associated with smoking . . . no proof that the tar and nicotine levels in smoke are significant in relation to health.”

1970: “Often the scientific information which is relied on to indict cigarette smoking is of dubious validity.”

Powell endorsed these false statements as a director and executive committee member. He also actively encouraged the disinformation campaign, congratulating the Philip Morris CEO for the company’s “attacks” (as the industry called it) on the American Cancer Society and urging the CEO to “restrain” the “extremism” of the Cancer Society and scientists.<sup>31</sup>

Absent proof, it might be reckless to say that Philip Morris and the other tobacco corporations engaged in a willful, aggressive, wide-ranging conspiracy and racketeering enterprise so that the corporations could sell more products that kill people. Now that the evidence is in, however, we know that this is exactly what happened. *We know*, thanks to scientists, victims of the conspiracy, state attorneys general (both Democrats and Republicans), the US Department of Justice (under both Presidents Bill Clinton and George W. Bush), and Judge Gladys Kessler and a panel of US Court of Appeals judges appointed by Presidents Ronald Reagan, Bill Clinton, and George H. W. Bush.

In 2006, the US Department of Justice took the cigarette corporations to trial, alleging that they had engaged in a racketeering conspiracy. Eighty-four witnesses testified in the nine-month trial, and hundreds of internal corporate secrets were finally exposed. When the verdict came in, Judge Kessler concluded

that “overwhelming evidence” proved that the cigarette corporations “conspired together” to fraudulently deny that cigarettes caused cancer, emphysema, and a long list of other fatal diseases; to manipulate levels of highly addictive nicotine to keep people smoking; to market addictive cigarettes to children so that the corporations would have “replacement smokers” for those who quit or died; and that they “concealed evidence, destroyed documents, and abused the attorney-client privilege to prevent the public from knowing about the dangers of smoking and to protect the industry” from justice.<sup>32</sup>

As counsel to the cigarette industry and as a Philip Morris director, Powell already had begun testing the use of activist-minded courts to create corporate rights. In one case in the late 1960s, Powell argued that any suggestion that cigarettes caused cancer and death was “not proved” and was “controversial.” According to Powell, the Federal Communications Commission wrongly violated the First Amendment rights of cigarette corporations by refusing to require “equal time” for the corporations to respond to any announcement that discouraged cigarette smoking as a health hazard.<sup>33</sup>

Even the US Court of Appeals for the Fourth Circuit, based in the tobacco-friendly South, rejected this claim. Although Powell lost that time, he went on to win far more than he could have imagined after he got on the Supreme Court and helped change the Constitution.

Powell’s 1971 memo to the US Chamber of Commerce laid out a corporate rights and corporate power campaign. The Chamber and the largest corporations then implemented these recommendations with zeal, piles of money, patience, and an activist Supreme Court. In equating corporations with “We, the People” in our Constitution, no justice would be more of an activist than Lewis Powell after he joined the Supreme Court in 1972.

## 1972: Powell Gets His Chance

In January 1972, the US Senate confirmed President Nixon's nomination of Lewis Powell to the Supreme Court. In a private farewell dinner, The Philip Morris CEO hosted a celebration of Powell's achievement and the corporation provided him with a judicial robe to wear during his service on the Court.<sup>34</sup>

President Nixon filled two Supreme Court vacancies that month, the other going to William Rehnquist, a conservative Republican lawyer from Phoenix, Arizona. Rehnquist had never been shy about his conservative views, which were well known and, to some, controversial. At the same time, neither Congress nor most Americans knew of Powell's corporatist views. In his Senate confirmation hearing, no one asked about his recent proposal to the US Chamber of Commerce recommending the use of an "activist-minded Supreme Court" to impose those views on the nation. No one asked because Powell, and the Chamber kept Powell's memo secret; neither disclosed the memo during his background check or confirmation proceedings.<sup>35</sup>

Once on the Court, these two Nixon appointees followed very different paths. Justice Powell would go on to write the Court's unprecedented decisions creating a new concept of "corporate speech" in the First Amendment. Using this new theory, the Court struck down law after law in which the states and Congress sought to balance corporate power with the public interest. With increasing assertiveness after Powell retired in 1987, the Supreme Court has used the new corporate rights theory to invalidate laws concerning food, the environment, public health and drugs, financial and insurance reform, and more.<sup>36</sup>

Powell helped shape a new majority, but several justices resisted the new model of "corporate rights." The most vigorous resistance came from the conservative Justice William Rehnquist. He

grounded his dissents in the fundamental proposition that our Bill of Rights sets out the rights of human beings, and corporations are not people. For years, Rehnquist maintained this principled conservative argument, warning over and over again that corporate rights have no place in our republican form of government.<sup>37</sup>

## **Here Come the Foundations**

Despite the Rehnquist dissents, Powell's vision of an unregulated corporate political "marketplace," where corporations are freed by activist courts from the policy judgment of the majority of people, won out. Powell, of course, could not have acted alone. He could not have moved a majority of the Court to create corporate rights if no one had listened to his advice to organize corporate political power to demand corporate rights. Listen they did—with the help of just the sort of massive corporate funding that Powell proposed.

Corporations and corporate executives funded a wave of new "legal foundations" in the 1970s. These legal foundations were intended to drive into every court and public body in the land the same radical message, repeated over and over again, until the bizarre began to sound normal: corporations are persons with constitutional rights against which the laws of the people must fall.

Huge corporations, including Powell's Philip Morris, invested millions of dollars in the Chamber of Commerce's National Chamber Litigation Center and other legal foundations to bring litigation demanding new corporate rights. In rapid succession, corporations and supporters funded the Pacific Legal Foundation, the Mid-Atlantic Legal Foundation, the Mid-America Legal Foundation, the Great Plains Legal Foundation (Landmark Legal Foundation), the Washington Legal Foundation, the Northeastern Legal Foundation, the New England Legal Foundation, the Southeastern Legal Foundation, the Capital Legal Center, the National Legal Center for the Public Interest, and many others.<sup>38</sup>

These foundations began filing brief after brief challenging state and federal laws across the country, pounding away at the themes of corporations as “persons,” “speakers,” and holders of constitutional rights. Reading their briefs, one might think that the most powerful, richest corporations in the history of the world were some beleaguered minority fighting to overcome oppression. The foundations and the corporate lawyers argued, “Corporations are persons” with the “liberty secured to all persons.” They used new phrases like “corporate speech,” the “rights of corporate speakers,” and the “corporate character of the speaker.” They demanded, as if to end an unjust silence, “the right of corporations to be heard” and “the rights of corporations to speak out.”

This campaign sought to redefine the very role of corporations in American society. The message was insistent: We should no longer think of corporations as useful but potentially insidious industrial economic tools. We should no longer be concerned that corporations might leverage massive economic power into massive political power or trample the public interest for the profit of the few. Instead, we should think of corporations as pillars of liberty, institutions that Americans can trust. They would protect our freedom for us. They would stand up to “government” for us.

A 1977 brief written by the Chamber of Commerce, for example, argued that the Court should strike down a state law that limited corporate political spending in citizens’ referendum elections because corporations help maintain our freedoms: “Business’s social role is to provide the people a valuable service which helps maintain their freedoms. . . . The statute at issue prevents the modern corporation from fulfilling a major social obligation. . . .”<sup>39</sup>

By 1978, the millions of dollars that corporations invested in this campaign began to pay off. The first major victory came in 1978 with a successful attack on a Massachusetts law in *First*

*National Bank of Boston v. Bellotti*. Several international corporations—including Gillette, the Bank of Boston, and Digital Equipment Corporation—filed a lawsuit after the people of Massachusetts banned corporate political spending intended to influence a citizen ballot initiative. Justice Lewis Powell cast the deciding vote and wrote the 5–4 decision wiping off the books the people’s law intended to keep corporate money out of citizen ballot questions.<sup>40</sup> For the first time in American history, corporations had successfully claimed “speech” rights to attack laws regulating corporate money in our elections.

With that success, an emboldened corporate rights campaign next attacked energy and environmental laws. In the 1982 case of *Central Hudson Gas & Electric Corporation v. Public Service Corporation of New York*, utility corporations and the new array of corporate legal foundations all argued that a New York law prohibiting utilities from promoting energy consumption violated the corporations’ rights of free speech. The corporations won again, and again Justice Powell wrote the decision for the activist Supreme Court that he had imagined in his 1971 Chamber of Commerce memo. The corporate interest in promoting energy consumption for corporate profit trumped the people’s interest in energy conservation.<sup>41</sup> Over a period of six years, Justice Powell wrote four key corporate rights decisions for the Supreme Court. These unprecedented cases transformed the people’s First Amendment speech freedom into a corporate right to challenge public oversight and corporate regulation.

Powell led a majority of the Court to accept the repeated mantra that “corporations are persons” and corporate “voices” must be free, and the sustained attacks on the people’s laws continued for the next two decades. Oil, coal, and utility corporations, tobacco corporations, chemical and pharmaceutical corporations, alcohol corporations, banking and other Wall Street corporations, and

many others all successfully claimed corporate speech rights to invalidate federal, state, and local laws. As you will see in Chapter Two, corporations even succeeded in attacking the right of parents to know whether the milk they fed their children came from cows treated with Monsanto's genetically engineered recombinant DNA bovine drug.

In 2007, the Chamber of Commerce's National Chamber Litigation Center celebrated thirty years of using judicial activism on behalf of corporations and admitted that it was the "brainchild of former US Supreme Court Justice Lewis Powell." The brainchild, with its motto of "Business Is Our Only Client," bragged about such "victories" as convincing the Supreme Court to throw out a decision by a jury of people to impose punitive damages for the unlawful conduct of Philip Morris.<sup>42</sup>

## The Consequences

The success of the Powell–Chamber of Commerce plan transformed American law, government, and society, with two devastating consequences for the country. First, corporations gained vastly increased political power at the expense of average citizens. Corporations poured out money to lobbying and election campaigns and to help friendly politicians and hurt unfriendly politicians. With even modest reform crushed by corporate rights decisions such as *First National Bank of Boston v. Bellotti*—and now much more so, *Citizens United*—corporations could threaten and deliver "independent expenditure" campaigns against politicians who did not bend their way. Corporate money to influence legislative votes and politician behavior lost its scandalous, shameful nature. Bags of corporate cash were no longer bags of cash; they were "speech." How could "speech" be corrupt or scandalous?

Washington, D.C., and many state capitals became playgrounds for corporate lobbyists, and our elected representatives

became increasingly disconnected from the will of the people. With the new, organized corporate radicalism, staggering amounts of corporate money flooded Washington, D.C., and our political system. Between 1998 and 2013, for example, the Chamber of Commerce alone spent more than \$1 billion on lobbying.<sup>43</sup> Pharmaceutical and health care corporations spent more than \$5.7 billion on lobbying in those years.<sup>44</sup> Three corporations seeking military contracts—Northrop Grumman Corporation, Lockheed, and Boeing—spent more than \$660 million on lobbying. GE Corporation (\$298 million), AT&T (\$162 million), the pharmaceutical lobby PHRMA (\$246 million), ExxonMobil (\$193 million), Verizon (\$183 million), and many more corporations all joined the lobby-fest.<sup>45</sup> In the states, corporate-funded lobbying entities such as the American Legislative Exchange Council (ALEC) and the State Policy Network began to dominate legislatures.<sup>46</sup> Financial, labor, energy, environmental, health care, trade, and other policy tilted sharply in favor of corporate interests; the hurdles for advancing the public interest became much higher.

Second, “corporate rights” created a corporate trump card over public interest laws. If laws that were inconvenient to corporate business models somehow made it through the lobbyist machine, corporations now had constitutional “rights” to attack the laws in the courts. It no longer mattered if the majority of people and our representatives chose laws to curb pollution, require disclosure, protect the public health, or nurture small businesses and local economies. The democratic process was no longer enough to decide the issue. After the creation of “corporate speech” rights, it was now up to judges, rather than the people, to decide whether the law served an “important” interest and was not too “burdensome.”

And not just any judges would make these decisions. As with the other branches of government, corporations have captured



the courts. Several recent studies by legal scholars confirm that the current Supreme Court favors corporations over people more than ever before, and the impartiality of justice in the states is eroding rapidly.<sup>47</sup> After *Citizens United*, corporate interests began dumping ever more money into state judicial elections. In twenty state Supreme Court elections in 2012, the campaigns spent \$56 million (compared with less than \$6 million in 1990). Ten donors alone contributed \$19.6 million, with much of the money coming from R. J. Reynolds Tobacco and other corporations.<sup>48</sup> According to the American Constitution Society, “The data confirm a significant relationship between business group contributions to state supreme court justices and the voting of those justices in cases involving business matters.”<sup>49</sup>

## **The Lost Promise of Earth Day**

On that long ago Earth Day in 1970, Americans reclaimed the water, air, land, and forests that belong to all of us and to our descendants. We reclaimed the promise of government of the people, where people and our representatives would weigh, debate, and decide the balance of private and public, corporate and human. Since that spring day in 1970, we have pushed resources and the ecological systems on which life depends to the breaking point. Even as the oil, gas, and coal corporations mimic the strategy of the cigarette corporations to create a fraudulent “controversy” and “open question” about the global warming “hoax,” we have ripped past the point of no return on climate catastrophe.

Although the evidence of national and global environmental destruction at a level that will challenge our civilization and way of life is more compelling now than it was back in 1970, our leaders in government are not even debating, let alone enacting, possible solutions. Incredibly, the current debate in Congress is not what we can do to save our world but whether Congress should

strip the Environmental Protection Agency of its authority to regulate pollution that causes the global climate crisis.

Corporate media might tell you that the reason for inaction is that Americans oppose environmental regulation and oppose drastic changes to address the energy and environmental crisis. Yet there is little reason to believe that this is true. In fact, try an experiment. Find a moment to talk seriously in a nonpolitical, nonconfrontational way with your friends, neighbors, or family members, regardless of what political party or philosophy they may favor. I bet that you will find that they, too, think that we cannot rely on corporations to protect freedom for us and that corporate business as usual will condemn us to disastrous energy, economic, and environmental policies and will ensure that we pass to our children a very bleak and weak nation and world.

This basic understanding of the connection between our state of decline and crisis on one hand, and our corporate-driven energy, environmental, economic, foreign, and military policy on the other, is one of the many points of consensus among the American people that the corporatist political elite ignores. According to an independent, nonpartisan 2010 Pew Research poll, for example, huge majorities of Americans favor better fuel efficiency standards for cars and trucks (79 percent), more funding for alternative energy (74 percent), more spending on mass transit (63 percent), and tax incentives for hybrid or electric vehicles (60 percent).

Similarly, for years, most Americans have supported, and still support, stronger, not weaker, environmental and energy policies. This is true even in times of recession, terrorism, and deep concern about budgets. From 1995 to 2008, when the independent multiyear Gallup poll question was last asked, through every variety of political environment, from good economies to bad, from terrorist attacks to war, the American people have been consistent in

their response. More than twice as many Americans say we need “additional, immediate, and drastic action” to prevent major environmental disruption compared to those who say “we should just take the same actions we have been taking on the environment.” The percentage of those identifying a need for “drastic, immediate action” was 35 percent in 1995, 38 percent in 2007, and 34 percent in 2008. When you add in those who say “we should take some additional action,” the range of Americans who want better, stronger, tougher environmental protection stayed between 80 and 90 percent for more than a decade. The percentage of those who chose the status quo answer (“we should just take the same actions we have been taking on the environment”) ranged from 13 to 20 percent. And even after years of corporate-funded confusion and denial about the environment, the vast majority of Americans still worried about the quality of the environment (69 percent) and global warming (58 percent) “a great deal” or “a fair amount”; only 16 percent believe that our government does “too much” to protect the environment.<sup>50</sup>

Polls are not infallible, but I suspect that these results would be duplicated in most family discussions around the dinner table. And I believe that we would see a similar disconnect between what people know about the state of our nation and the world and what the corporate-dominated government does. Whether the issue is the environment, the economy, the decades of wars in the Middle East, bloated military budgets, corporate agriculture subsidies and industrial food systems, or other corporate welfare, what most people think or want out of our government does not matter much anymore.

We have become accustomed to thinking that we cannot change, that our problems are too big, that our government cannot be effective. This was not always so, and it does not have to be

so now. The choice we face in America now about whether to succeed or fail begins with our choice about whether we agree with Lewis Powell, the US Chamber of Commerce, and the corporate rights movement that massive, global corporate entities are the same as people.

## Chapter Two

# Corporations Are Not People—and They Make Lousy Parents

*If the tobacco companies really stopped marketing to children, the tobacco companies would be out of business in 25 to 30 years because they will not have enough customers to stay in business.*

—Bennett Lebow, cigarette corporation CEO<sup>1</sup>

“**F** #\*k you.” That (without the sanitizing symbols) is what Bad Frog Brewery, Inc., a corporation chartered under Michigan law, demanded the constitutional right to have on its labels. In the mid-1990s, the corporation wanted to market its beer with a foul-mouthed frog who, as the label said, “he just don’t care.” The corporation offered a mascot on the label, a large cartoon frog elevating its middle finger. Because New York law prohibits alcohol labels that are “obscene or indecent” and “obnoxious or offensive to the commonly and generally accepted standard,” the state liquor authority refused to approve the label for sale in New York. The corporation balked at complying with the law and filed a lawsuit against the New York State Liquor Authority and the people who served on it.

At first, Bad Frog insisted that the up-yours gesture was a “symbol of peace, solidarity, and goodwill.” After taking the case to the federal appeals court in New York, the corporation admitted that its beer label conveyed, “among other things, the message ‘f#! you.’” (The court decision helpfully explains that this was “presumably a suggestion of having intercourse with yourself.”) Noting the “serious issues” in the case, the court ruled in Bad Frog’s favor and voided the New York law, leaving the people powerless to stop corporations from spewing vulgarities from beer shelves across the land.<sup>2</sup>

OK, it’s not the most serious case in the world. Maybe most people don’t really care if lewd beer labels fill the shelves, although the people of New York cared enough to have a law preserving some decency in the beer aisle. Still, the case of the finger-waving frog reflects the hallmarks of the new corporate rights era: the shameless (“honest, the finger means peace, solidarity, and goodwill”), the irresponsible (“he just don’t care,” placed beside the health warning label), and the display of power over the people (“we will do whatever sells, and your law can’t stop us”). These themes now run through far more serious areas of our national, community, and family life than beer labels.

## **Beyond Beer Labels**

The fabrication of corporate constitutional rights has not only changed our politics and law; corporate rights and corporate power affect everything: the water we drink, the air we breathe, the food we eat, what our kids learn in school (and what they buy on the way home), what kind of health care we get, the wars we fight, and the taxes and debt generations to come will carry.

Do you want to know if your food is safe? Do you want to be able to choose milk, cheese, and yogurt from cows that are not injected with a genetically engineered drug that is banned in most

of the world? Do you want to know if your water supply has been contaminated with diesel fuel, toxic chemicals, and radiation so that global energy corporations can “frack” natural gas? Do you want to stop toxic-pesticide manufacturers from claiming that their products are “safe for kids” in big letters on the label? Do you want the school to which you are required to send your kids to be inundated with youth-targeting advertisements? Do you want college education to be available without Wall Street corporations sucking billions of dollars of tax money into Ponzi-like for-profit student-debt schemes? In the new corporate rights era, the corporations say you can’t.

### **The Right to Addict Kids**

What should we do when a wealthy, suit-clad drug pusher sidles up to children and uses cartoon images and tricks to exploit teen insecurities and risk-taking to get kids hooked on a fatal drug? What kind of person would hang around a school yard trying to get teens and preteens hooked on an addictive drug known to kill hundreds of thousands of people a year? That’s exactly what Philip Morris and the other cigarette corporations did for decades. When parents, lawmakers, prosecutors, and judges tried to stop them, the cigarette corporations self-righteously insisted on the corporate “free speech right” to say, well, to say what Bad Frog Brewery likes to say.

In the late 1990s, the people of Massachusetts tried to protect school kids from the cigarette companies’ “youth-targeting” campaigns, banning cigarette ads within 1,000 feet of a school or playground. The US Supreme Court struck down the law in 2001, calling it a violation of the speech rights of the cigarette corporations. In many ways, this case shows how much our courts and our Constitution have shifted away from the people and to corporations in the years since the 1970s, before the Powell–Chamber of Commerce campaign began.

Back in 1971, Lewis Powell, as a private lawyer for the cigarette companies, argued that the corporations had a First Amendment right to spread corporate lies in response to what the corporations called propaganda about smoking and health. He and the cigarette industry were laughed out of court.<sup>3</sup> Back then (and in the two hundred years before that), the corporate legal foundations and the Supreme Court had not grafted the new concept of corporate speech into the Bill of Rights. Thirty years later, though, everything had changed. In 2001, the Supreme Court did exactly what the cigarette corporations asked, striking down the Massachusetts law that required cigarette advertisements to stay 1,000 feet away from schools and playgrounds.

### **Why Did We Need a School Playground Cigarette Law?**

Inside the tobacco corporations, they referred to children as “replacement smokers.” Corporate marketing plans and sales documents analyzed the need to replace smokers who died; children younger than eighteen years old were prime targets. The cigarette corporations had studies showing that if kids did not start smoking by the time they were eighteen, they probably never would become regular smokers. For decades, the cigarette corporations secretly researched nicotine, smoking, and the habits of teenagers. They spent millions of dollars on teenager tracking, marketing, and manipulation. Internally, the cigarette companies called addicting teens to cigarettes a “key corporate priority.”<sup>4</sup>

For decades, cigarette corporations tried to dispute allegations like these. They can do so no more after the Court of Appeals affirmed the 1,000-plus-page decision of Judge Kessler, the federal judge who oversaw the 2006–2007 racketeering trial of the cigarette corporations. Judge Kessler concluded: “The evidence is clear and convincing—and beyond any reasonable doubt—that



Defendants have marketed to young people twenty-one and under while consistently, publicly, and falsely denying they do so.”<sup>5</sup>

Judge Kessler’s judicious reference to “young people under twenty-one” actually gives the cigarette corporations more credit than they deserve. Inside the companies, the term “younger adult” was a euphemism. Younger adult and YAS (meaning “younger adult smoker”) are corporate-speak for child or teenager. Corporate marketing studies of YAS included children as young as ten years old, and the companies studied the percentage of “twelve- to seventeen-year-olds” who “smoked at least a pack a week.” They called teens aged fifteen to nineteen the “new-smoker age group,” and they noted with encouragement that “the thirteen-year-old age group ‘shows the most dramatic increase in proportion of smokers.’”<sup>6</sup> The cigarette corporations knew that “YAS are the only source of replacement smokers—[fewer] than one-third of smokers start after age 18,” and the companies spent hundreds of millions of dollars to increase sales to children between the ages of twelve and seventeen.<sup>7</sup>

According to Judge Kessler: “Defendants realize that they need to get people smoking their brands as young as possible in order to secure them as lifelong loyal smokers.” She quoted dozens of internal corporate documents, including an “opportunity analysis” weighing how to exploit teen insecurities: “Socially insecure, they gain reinforcement by smoking the brands their friends are smoking, just like they copy their friends’ dress, hairstyle, and other conspicuous things. To smoke a brand no one has heard of—which all new brand names are—brings one the risk of ostracism. It’s simply not the ‘in’ thing to do.”<sup>8</sup>

What makes people go to work each day, year after year, trying to figure out how to hook children on smoking? A cigarette executive provides the answer in a long-concealed internal document: the possibility of billions of dollars in corporate profit. “If

we hold these YAS for the market average of 7 years," he wrote, "they would be worth over \$2.1 billion in aggregate incremental profit. I certainly agree with you that this payout should be worth a decent sized investment."<sup>9</sup> By the 1990s, the "decent-sized investment" targeting kids for cigarette sales had succeeded in ensuring that 72 percent of six-year-olds recognized the cartoon symbol of Camel cigarettes.<sup>10</sup>

This is why several states, including Mississippi, Washington, and Massachusetts, began law-enforcement actions against the cigarette conspiracy. These cases began to uncover the truth about the conduct of the cigarette corporations, and by 1998, Massachusetts banned outdoor cigarette advertisements within 1,000 feet of a playground, elementary school, or secondary school.<sup>11</sup> Massachusetts attorney general Scott Harshbarger said the law was needed "to stop Big Tobacco from recruiting new customers among the children of Massachusetts."<sup>12</sup>

In response, the tobacco corporations did not apologize and change; they went on offense. They cried "Free speech!" and sued to block the law. They turned to the Powell-Chamber corporate rights theory that by 2000 had become a very potent tool for corporations to evade responsibility, accountability, and public oversight. The corporate legal foundations imagined by Lewis Powell and the Chamber of Commerce in the 1970s by now were fully funded and rushed into the fray. They filed briefs alongside the tobacco companies, demanding that the Supreme Court protect the "vital role in American society" of corporations. They quoted Henry David Thoreau and weirdly complained that during World War II, "Commercial speech became a casualty as surely as Veronica Lake's 'peekaboo' hairstyle."<sup>13</sup>

The corporate lawyers repeated the now familiar refrain that corporations are the same as people. They said that restricting the cigarette corporations' advertising around playgrounds and school

yards violates corporate speech rights under the First Amendment.<sup>14</sup> The Supreme Court, by this time fully shaped by the legacy of Lewis Powell, agreed and struck down the Massachusetts law.<sup>15</sup> The law keeping Joe Camel and the cigarette ads away from schools and playgrounds was dead.

Now, a decade later, the cigarette corporations and those who lead them are unembarrassed by the federal verdict that they engaged in an illegal racketeering conspiracy. They are using *Citizens United* to go on offense. The usual corporate activists, including the Chamber of Commerce Litigation Center (which has described itself as Powell's "brainchild") has joined the cigarette industry in the courts to block implementation of the 2009 Family Smoking Prevention and Tobacco Control Act, which requires updated warning labels. In August 2012, the Court of Appeals in Washington struck down the new warning labels. Despite a strong dissent, the majority ruled that the required warning labels violated corporate First Amendment rights and a "broader concept of individual freedom of mind" for corporations and people alike.<sup>16</sup>

## **Cigarette Corporations Aren't People**

Sometimes First Amendment cases frustrate Americans because the freedom at stake often is the freedom to say things that are unpopular, cause offense, challenge or undermine government policy supported by many, or inflict emotional pain. Infuriating though that can be, people usually appreciate that the Supreme Court's protection of someone's unpopular free speech also protects a core American value and benefits all of us. When the courts save the "right" of cigarette corporations to advertise around playgrounds and elementary schools, or to conceal product hazards, however, is a single human being made any more free? Is our public debate and state of knowledge any more expanded or enriched?

When the government suppresses the speech of real people, we all lose some of our freedom. Our ability to govern ourselves is compromised when ideas and information are restrained, even bad ideas and unpleasant information. When we regulate corporate economic conduct, though, what rights of anyone are lost? Is speech even at issue at all?

The Massachusetts law regulated corporate conduct, not speech. If the Massachusetts law curtails the youth-targeting strategies of cigarette corporations, sales might drop, but how does that create less freedom of speech for anyone? Any human being who had something to say about cigarettes and youth smoking remained free to say or write whatever that person wanted, wherever and whenever he or she wanted, about cigarettes, youth smoking, or anything else. The Massachusetts law about cigarette advertising had nothing to do with people or groups of people speaking, writing, or expressing their point of view in any way. Even if someone wanted to stand outside a public park or school with a sign saying, "I love cigarettes and kids should, too," the Massachusetts law did not touch them.

In the unlikely event that a real person actually did that, though, what would happen? Perhaps we would see how free speech is supposed to work in America: other people would talk with the miscreant and ask him or her to consider whether that was a decent thing to do. The creep might respond, and debate would ensue. At some point, the cigarette enthusiast or his or her opponents would get tired and move along. If the smoking advocate really had strong views about the merits of smoking, the debate might continue the next day when the person came back again or in writing, interviews, meetings, or wherever people wanted to talk, listen, and debate. The Massachusetts law prevented none of that.

Try talking or debating with Joe Camel; it doesn't work. It doesn't work because Joe Camel and the corporation that spawned him are not people. Corporations never get tired, and they never move along until the money stops or the law steps in. People speak. Corporations do not speak. With the Court's new corporate speech theory, corporations won a dangerous immunity from the will of the people, while real people and American freedom gained nothing. Indeed, we lost freedom and a tool of self-government.

### **Monsanto: Secret Genetically Modified Food**

In 2013, people in the state of Washington brought a citizens' initiative to the ballot to enforce their right to know if their food contained genetically modified organisms, known as GMOs. As with 93 percent of Americans, they thought food containing GMOs ought to be labeled so that people can make their own choices.<sup>17</sup> With 93 percent favorability, victory might seem assured. Not after *Citizens United*.

The year before the Washington initiative, Monsanto, DuPont, PepsiCo, Nestle, and a few other corporations had spent \$46 million to defeat citizen initiative for GMO labeling in California. The millions of corporate dollars saturated the state with a false and misleading portrayal of the initiative as a "deceptive scheme" and "a blank check paid by the taxpayers" that would "increase food costs by billions."<sup>18</sup>

In 2013, the chemical and GMO industry used the same playbook in the Washington State initiative, spending more than \$20 million. Led by Monsanto, five international corporations alone contributed \$14 million of the total.<sup>19</sup> The GMO labeling proposal failed by a narrow margin. Of the \$20 million funding that defeat, only \$600 came from individuals or businesses in the state.

People are not giving up on the right to know what is in our food and to preserve the right to choose what kind of farming and economy we wish to support. When a citizen initiative to label GMO food eventually prevails though, litigation about corporate rights to strike down the law is sure to follow. After all, that's exactly what happened to farmers and other people in Vermont.

When the people in Massachusetts were battling for the right to stop cigarette corporations from targeting children, people in Vermont were in a fight of their own. As in Massachusetts, the people of Vermont were about to learn that the rules had changed and winning the debate and overcoming corporate lobbyists in the legislative process is not enough anymore.

Monsanto is a transnational chemical, biotech, and industrial corporation with more than \$14 billion in annual global sales. Monsanto's products have included DDT, saccharine, aspartame, sulfuric acid, Agent Orange, and various plastics and chemical products. Now Monsanto focuses on genetically engineered agriculture and an array of pesticides and herbicides. In response to questions about safety, Monsanto's spokesperson says, "Monsanto should not have to vouchsafe the safety of biotech food. Our interest is in selling as much of it as possible. Assuring its safety is the FDA's job."<sup>20</sup>

In the 1990s, Monsanto started selling a genetically engineered drug to be injected into the blood of dairy cows to force them to produce more milk. The drug was rBST (also called rBGH by some and labeled Posilac by Monsanto). Monsanto had used recombinant (meaning artificially created) DNA to fabricate rBST. BST stands for bovine somatotrophin, a naturally occurring hormone in cows, and BGH refers to "bovine growth hormone." The r in rBST and rBGH stands for "recombinant DNA" and refers to the Monsanto drug, which is not natural.

Because of safety and other concerns, most free, democratic countries in the world banned the use of rBST in any dairy product intended for human consumption. Canada prohibited the drug after “more than nine years of comprehensive review of the effects of rBST on animal and human safety, and consideration of the recent findings by two independent external committees.”<sup>21</sup> All twenty-seven countries of the European Union, as well as New Zealand and Australia, banned rBST. In the United States, Monsanto got its way. The Food and Drug Administration (FDA) quickly approved the use of rBST in 1993, brushing aside the views of farmers, mothers and fathers, scientists, and other people who had opposed approval.

Dexter Randall, a sixty-five-year-old dairy farmer who has lived and worked in Vermont all his life, had joined others in trying to stop the FDA from approving Monsanto’s drug. They presented studies showing elevated antibiotic residues in milk (increased antibiotics were needed because rBST increased disease in cows). They pointed to other studies showing higher levels in rBST milk of an insulin-like growth factor linked to breast cancer in humans, as well as other dangers. They cited the absurdity of forcing cows to produce more milk, driving milk prices lower, at a time when family dairy farms all over the country were failing and taxpayers were paying millions of dollars to keep milk prices high enough to prevent a collapse of farm communities.

“Organic dairy farmers were already not getting paid enough for their milk, and when rBGH went on the market they suffered even more,” says Randall. “But in addition to these economic concerns there were the health impacts of the product—the possible harm it could cause to livestock and humans. No long-term studies had been done. None of the truth was brought out. Our government let corporations override everything that made sense to the people.”<sup>22</sup>

The Vermont farmer says, “Zillions of studies were presented to the FDA, but anything they saw they just turned the other way.” The FDA claimed that it lacked the authority to consider “social” or “economic” factors or to require a label on rBST dairy products. The FDA also reported that “a State that has its own statute requiring food labeling based on a consumer’s right-to-know would not be preempted by FDA from requiring rBST labeling.”<sup>23</sup>

Randall and many other people in Vermont went to work to ensure that Vermont law would protect the people’s right to know. “We lobbied our state senators and representatives, sent letters to the editor, talked all over the place, made people aware of the problem,” Randall says. “We basically held a protest in front of the statehouse, just to get our legislators and the public to take notice. We tried talking to our commissioner of agriculture and to other officials there.”

Monsanto pushed back, and progress was slow. Randall says, “There was always money overriding us—the industry rules. The Grocers’ Association was screaming bloody murder, having to put labels on their products. Is it such a crime? People were still going to buy their products, but now they had a choice. I’ve always been a person for choice—you need to choose what size pants you’re going to buy, don’t you?”

Finally, after organizing, researching, testifying at hearings, and letter writing, the people persuaded the Vermont legislature to pass, and the governor to sign, a law to protect the right to know about our food. The Vermont law said, “If rBST has been used in the production of milk or a milk product for retail sale in this state, the retail milk or milk product shall be labeled as such.”<sup>24</sup>

In deciding how to implement the law in a balanced way, the Vermont Department of Agriculture held four hearings around



the state, including one with interactive television. Ninety-nine speakers took the time from work and home to participate in the hearings, and 152 written comments were filed.<sup>25</sup> Monsanto and the industrial dairy and grocery groups certainly weighed in, but according to the commissioner of agriculture in Vermont, “Most individuals expressed that they felt they had a right to know what they wanted to purchase for themselves and their families.”<sup>26</sup>

Monsanto and the industrial dairy corporations lost the public debate, lost the debate in the legislature, and failed to persuade the commissioner of agriculture to keep people in the dark about rBST. They were not done, though. Monsanto had Covington & Burling, a corporate law firm in Washington, D.C., to lead the attack.

For years, Covington & Burling had serviced the drive to shelter corporations from public oversight by creating new theories of “corporate speech.” According to Judge Kessler in the federal racketeering trial of the cigarette corporations, Covington & Burling took a leading role among corporate lawyers in furthering the illegal cigarette industry scheme: “Two of those law firms,” she said, “in particular Covington & Burling, became the guiding strategists for the Enterprise and were deeply involved in implementation of those strategies once adopted.” She added, “What a sad and disquieting chapter in the history of an honorable and often courageous profession.”<sup>27</sup>

In Vermont, Covington & Burling represented the interests of Monsanto and the industrial dairy lobby in trying to stifle knowledge and disclosure about milk products derived from rBST-treated cows. They claimed that corporate speech rights entitled the industry to disregard the new right-to-know law. They insisted that Monsanto and the industry could refuse to disclose when milk and dairy products came from cows treated with Monsanto’s genetically engineered rBST.

The industry claimed that giving information to people would only cause “fear and uncertainty.”<sup>28</sup> Employing odd euphemisms, the corporate lawyers called cows injected with the Monsanto drug “supplemented cows,” while natural cows became “unsupplemented cows.” Covington & Burling explained why “fear and uncertainty” would result from the truth: “Mandatory labeling of milk products derived from supplemented cows will have the inherent effect of causing consumers to believe that such products are different from and inferior to milk products from unsupplemented cows.”

What about farmers or dairies that did not want to use the Monsanto drug; they should be free to tell people about the natural way they make their milk, right? Oh, no, said the corporate lawyers: “The industry’s experience in recent months demonstrates that voluntary ‘rBST-free’ type labeling of milk and milk products has a high potential for misleading consumers and for sowing the seeds of uncertainty, distrust, and fear about the quality and safety of milk and milk products.” According to Monsanto, it is your right to know about your food—not Monsanto and its drug that is banned in most of the world—that sows the “seeds of uncertainty, distrust, and fear.”

Monsanto not only threatened to sue Vermont but also began to intimidate and silence farmers, dairies, and stores that tried to sell “rBST-free” milk.<sup>29</sup> Monsanto even filed a federal lawsuit against a Maine dairy to force it to stop stating on its labels, “Our Farmers Pledge: No Artificial Growth Hormones.”<sup>30</sup>

Nevertheless, people such as Dexter Randall stood up to the intimidation, and Vermont went ahead with its right-to-know law. Covington & Burling and the industry then followed through on the threat to sue. Now that Vermont law supported the people’s right to know about rBST, the cry of “Free corporate speech!” became the cry of “Corporations are like people and have the right

not to speak!” Covington & Burling argued that the “public right to know” must fall to “a manufacturer’s right to decide when to speak and when to remain silent.” According to Covington & Burling’s legal brief, “Corporations have the same rights to remain silent as individuals.”<sup>31</sup>

At first, Vermont had some success in the case. The chief judge of the federal court in Vermont concluded that corporate rights do not overpower the people’s right to know:

*Apparently, a majority of Vermonters do not want to purchase milk products derived from rBST-treated cows. Their reasons for not wanting to purchase such products include: (1) They consider the use of a genetically-engineered hormone in the production unnatural; (2) they believe that use of the hormone will result in increased milk production and lower milk prices, thereby hurting small dairy farmers; (3) they believe that use of rBST is harmful to cows and potentially harmful to humans; and, (4) they feel that there is a lack of knowledge regarding the long-term effects of rBST.*<sup>32</sup>

The industry appealed to the same federal Court of Appeals that had decided the Bad Frog beer label case. Once again the court sided with corporations, striking down the Vermont law. The appellate court decreed that the lower court judge had “abused his discretion” by failing to agree with the corporations that the law violated corporate speech rights. According to the Court of Appeals, the people of Vermont had caused a “wrong” to the industrial dairy manufacturers’ “constitutional right not to speak.”<sup>33</sup>

That was the end of the line for the Vermont law and for disclosure laws around the country. “It was a long, hard battle getting the legislation passed, and it wasn’t in place for any length,” says dairy farmer Dexter Randall. “We saw the end coming before it

happened. I learned a lot about the power of corporations—about Monsanto’s power.”<sup>34</sup>

### **Corporate Rights Weaken People and Citizenship**

Look again at how the Court of Appeals labeled what dairy farmer Dexter Randall and so many other Vermont people had done by deciding to participate in our government of the people. According to the court, by passing a right-to-know law, the people of Vermont committed a “wrong” to the constitutional rights of others, specifically, to the industry’s “constitutional right not to speak.”

This is how the fabrication of corporate rights hollows out American citizenship. A successful demand by a person or class of people for rights amounts to a declaration that such a person or class is equal to everyone else and has an equal share of sovereignty in our nation. Government then is accountable to that person, rather than the other way around. When we accept that people have constitutional rights, we quite properly have disdain for those who deprive our fellow people of rights, and we will resist. At a minimum, we are careful, or should be, not to press for government action that might hinder rights of others. After all, in a society of people with equal rights, when the government violates the rights of any of us, none of us is secure.

When courts strike down laws where they conflict with constitutional rights, they make a statement about who we are as a people and as a country. As we come to accept these judgments of the courts (or when we do not), our culture and politics, and even our way thinking and acting, can change. *Brown v. Board of Education* ruled that segregation violates the equality rights of African Americans; that helped transform who we are and how we act. *Reed v. Reed* ruled for the first time in 1971 that laws that discriminate against women are wrong; that contributed to a

transformation of how we view gender in America. More recently, we are seeing the role of the courts in shaping how Americans perceive the freedom of all people to marry the person they love. Court cases about rights may reflect and accelerate, rather than cause, movements and change. Yet when the courts rule, an insistent proposition about American life begins to become a fact.

The same phenomenon tends to occur when courts declare that corporations hold the constitutional rights of people, as Dexter Randall found out. Lewis Powell's advice to the US Chamber of Commerce in 1971 sought not merely to propose policies but to change American society. As Powell made clear, the creation of corporate rights is an "instrument for social, economic, and political change."<sup>35</sup>

These corporate rights cases, then, mean much more than allowing the Bad Frog Corporation to say whatever it wants on its beer labels, or the cigarette corporations to target children for addiction to a fatal product, or Monsanto to deprive people of information about food. All of that would be bad enough. The impact of these cases goes beyond their specific facts; they push people back from exercising vigilance about corporate power and from acting as citizens in a republic. Even mild proposals that might serve the public good, from environmental stewardship to disclosure and transparency in the financial system, now get buried under savage attacks from corporate interests. Those who might serve as potential public champions are accused not merely of being "wrong" but of violating constitutional principles. Public champions retreat into defensiveness and uncertainty. As with other major developments of previously unrecognized constitutional rights, the fabrication of corporate rights is changing American culture.

The new metaphor of corporations as people in our Bill of Rights threatens to erode, perhaps we can say "corporatize," the American character. We can see this in many areas of American

life, from the state of our media to declining civic participation and voting. What we thought of as public for generations, from the sublime, such as mountains or groundwater, to the utilitarian, such as prisons, is shifting away from us, and over to corporate control. Corporate power is shifting the law, our public assets, even how we think about ourselves and what we teach our children.

## **Learning to Be Corporate**

Education in America is linked to our egalitarian vision of a free, democratic people who govern a republic. Thomas Jefferson wrote, “Of all the views of this law [for public education], none is more important, none more legitimate, than that of rendering the people safe as they are the ultimate guardians of their own liberty.”<sup>36</sup> The Supreme Court relied on Jefferson’s view of public education “as a bulwark of a free people against tyranny” to hold that “providing public schools ranks at the very apex of the function of a State.”<sup>37</sup>

Now schools and children have joined the Constitution, legislatures, and courts as subjects for increasingly aggressive assertions of corporate influence. The critical civic function of our schools—teaching equality, citizenship, as well as the critical thinking and competence needed to participate in a vibrant, free society—is deteriorating to make room for corporate access to children’s minds and wallets. More corporations seek to turn schools into marketing outlets; more corporations seek to teach children, regardless of the wishes of parents, to be consumers rather than citizens; and more corporations seek to make the curriculum itself reflect the corporations’ position on public issues. As corporations increasingly “embed” in education, will the next generation recognize when the promise of American self-government has evaporated, let alone summon the will to restore it?

Joe Camel was not lurking alone outside the playground and school gates. Compared to some other corporate child-targeting efforts, Joe Camel was downright shy by waiting outside the gate. Ronald McDonald walked right inside. The McDonald's Corporation is a Fortune 150 global corporation in 117 countries, with \$27.5 billion in revenue in 2012. The corporation sends employees or contractors dressed up as clowns with enormous shoes, bright clothes, and glistening red grins into schools to talk to children about "character education" and "fitness."<sup>38</sup> In 2008, some schools in Florida began "branding" report cards with the McDonald's logo and the clown-costumed pitchman promising a free Happy Meal to reward student performance.<sup>39</sup>

Eight thousand middle and high schools in the country have contracted with the Channel One Corporation. Channel One beams into classrooms ten minutes of video news and two minutes of mandatory advertisements, which children are compelled to watch. Channel One contracts require that the advertising content "must be shown when students are present in a homeroom or classroom (i.e., not before school, after school, or during lunch)" on at least 90 percent of the days in which school is in session.<sup>40</sup>

Most schools, to which we are required by law to deliver our children each day, now serve as corporate marketing outlets. In 1983, corporations spent \$100 million per year on child-targeted marketing; they now spend \$17 billion per year.<sup>41</sup> Virtually every school in the land now carries corporate advertising.<sup>42</sup> School districts such as Los Angeles negotiate corporate naming rights, logo placements, and "school visits" during which corporate representatives can pass out samples to the children. One Los Angeles school board member reluctantly voted for the corporate plan in 2010, but he knew that "the implications of doing this are really disconcerting and really bother me to the core."<sup>43</sup>

Corporations now spend billions of dollars on “embedding” advertising into the schools, including into the curriculum. They do so because “students are generally unable to avoid these activities; moreover, they tend to assume that what their teachers and schools present to them is in their best interest.” According to the National Education Policy Center, “Advertising makes children want more, eat more, and think that their self-worth can and should come from commercial products. It heightens their insecurities, distorts their gender socialization, and displaces the development of values and activities other than those associated with commercialism.”<sup>44</sup>

In school and out of school, corporations now spend billions of dollars to make kids fat and unhealthy. The food and beverage industry spends more than \$12 billion per year to market to children, and the vast majority of advertisements on television shows watched by children are for snacks, fast food, and candy.<sup>45</sup> “Nearly 20 percent of caloric intake among 12-to-18-year-olds comes from fast food, compared with 6.5 percent in the late 1970s.”<sup>46</sup> Since 1980, as those billions of dollars in youth targeting were spent, the number of overweight children and adolescents has soared.<sup>47</sup> In 2005, Congress requested that the Federal Trade Commission (FTC) conduct a study of food and beverage marketing to children and adolescents. The FTC found that forty-four companies alone spent \$1.6 billion in a single year to advertise fast food, soda, snacks, and other food and beverages to children as young as two years old.<sup>48</sup>

The FTC mission is to ensure that people are not hurt by unfair business practices; so why doesn't the FTC do something to stop the unfair practice of exploiting children and undermining parents? Because Congress passed a law in 1980 saying that the FTC is *not allowed* to do something. The law says, “The Commission shall not have any authority to promulgate any rule in the children's advertising . . . on the basis of a determination by the



Commission that such advertising constitutes an unfair act or practice in or affecting commerce.”<sup>49</sup>

Increasingly, corporations influence and embed marketing into the actual curriculum itself. BP and other corporations participated in the writing of California’s environmental curriculum.<sup>50</sup> Materials provided to schools by Chevron suggest that global warming may not exist, while the American Coal Foundation class materials state that increased carbon dioxide levels in the earth’s atmosphere could be beneficial.<sup>51</sup> The American Petroleum Institute (API), with 400 corporate members, offers “lesson plans” for kindergarten through twelfth grade, including “Progress through Petroleum.”<sup>52</sup>

Kindergartners and elementary school kids will learn that “most of our energy needs are being met by nonrenewable energy sources—oil, natural gas, coal, and uranium (nuclear). This is because these energy sources are more reliable, affordable, and convenient to use than most renewable energy resources.” The API lesson plan does not mention climate change, oil spills, toxic wastes, or any air, land, or water pollution issues. The lesson plan offers an “Environmental Progress Report” that promotes the industry’s investment in “improving the environmental performance of its products, facilities, and operations—\$11.3 billion in 2006 alone.” What about offshore drilling and the environment? Didn’t BP’s Deepwater Horizon oil disaster in April 2010 nearly destroy the Gulf of Mexico? The API lesson plan instead teaches kids something a little different about offshore drilling and the environment: “Floating platforms, anchored to the ocean floor, allow energy companies to recover oil and natural gas reserves located under deeper parts of the ocean—and have proved to be valuable habitats for marine life.”<sup>53</sup>

The Council for Corporate-School Partnerships says nothing is wrong with corporations embedding into children’s education.

Then again, the council was founded and funded by the Coca-Cola Company, a corporation under Delaware law that operates in 200 countries with more than \$35 billion in annual revenue. One need not be too cynical to think that the council's opinion might not be a good-faith assessment made with due regard for the American interest.<sup>54</sup>

### **On to College: The Subprime Student Loan Game**

In the age of corporate bailouts, the Wall Street financial system privatizes huge profits and socializes big risks. That model of enriching a very few at the expense of the many has created a new "industry" of for-profit colleges. For-profit corporations now own more than 2,000 colleges or universities. The number of students enrolled in for-profit colleges has increased 500 percent in the past several years, to 1.8 million.<sup>55</sup> According to a 2012 Senate investigative committee report, "Virtually all of the revenues of for-profit colleges come directly from taxpayers."<sup>56</sup> In effect, operation of corporate universities transfers billions of dollars in federal student loans and government guarantees from American taxpayers to corporate executives and shareholders.<sup>57</sup>

Most of these students (1.4 million) attend for-profit colleges that are owned and controlled by fourteen corporations. Wall Street values the publicly traded corporations at \$26 billion, due to huge revenue flows based on high tuition, minimal standards, and government backing for tuition payment. In 2009 alone, American taxpayers provided these corporations and others that operate for-profit colleges with more than \$4 billion in Pell Grants and \$20 billion in guaranteed student loans.<sup>58</sup>

Among for-profit schools examined by a Senate investigation, "over 87 percent of total revenues came directly from the federal government, but 57 percent of the students who enrolled between 2008–2009 have departed without a diploma but with a high

probability of debt.”<sup>59</sup> The sixteen largest for-profit schools had profits of \$2.7 billion in 2009, with some corporations doubling profits between 2009 and 2010 alone.<sup>60</sup> In 2011, when the Department of Education proposed to apply minimal performance standards (based on actual student graduation rates) to corporations that take billions of taxpayer dollars, the corporations threatened a lawsuit challenging the constitutionality of such action.

A recent US Senate committee investigation focused on one school owned and operated by Bridgepoint Education, Inc., a Delaware corporation traded on the New York Stock Exchange. In 2005, Bridgepoint Education used financial backing from a global private equity firm to acquire a religious college in Clinton, Iowa. Bridgepoint bought the school, Franciscan University (originally Mount St. Clare College), from the Sisters of Saint Francis. At the time, the Bridgepoint CEO announced, “Bridgepoint Education and the Sisters of Saint Francis have much in common. We believe in quality academic training and in service to others.”<sup>61</sup>

The new corporate owner then changed the name to Ashford University. Before the corporate acquisition, Franciscan University was spending \$5,000 per student on instruction. After the buyout by Bridgepoint, Ashford University spent \$700 per student on instruction. The savings were not passed on to students, who now are charged as much as \$46,000 in tuition and fees. Most of the tuition payment actually comes from taxpayer-funded federal programs. In the 2009–2010 school year, Bridgepoint’s Ashford University received \$613 million in federal student aid funds. Most of the revenue (86 percent) at the university comes directly from the US government—in other words, from all of us. With all that revenue, how did instruction spending per student fall from \$5,000 before corporatizing the school to \$700 after?

From 300 students at Franciscan University in 2005, enrollment (including online students) at the newly corporatized

Ashford University zoomed to nearly 78,000 by 2010. Bridgepoint Education spends \$2,700 per student to recruit new students (who need new federal loans). Bridgepoint directed \$1,500 per student to corporate profit. Most of the students who enroll quickly drop out. Fully 84 percent of students who enroll in an associate degree program at Ashford University are gone by the following year, and 63 percent of students in the bachelor's degree program do not return the next year. Bridgepoint employs more than 1,700 people to recruit new students; it employs one person to help students with job placement.<sup>62</sup>

Bridgepoint paid its CEO, Andrew Clark, \$20.5 million in 2009, and another \$11.5 million to four other top executives. The CEO refused an invitation to testify at the Senate hearing.

Corporate university companies are unapologetic about the betrayal of students and virtual theft of tax money. When the Government Accountability Office (GAO) simply reported facts about the for-profit corporate education industry, its corporate lobby group sued the GAO for "negligence" and "malpractice." They claim that the report is "biased" and "erroneous." When the government proposed reform that would require some actual education performance before the taxpayers sent billions of dollars to Wall Street investors and CEOs, the industry sued to block the Department of Education reform. The corporate school lobby argues that the rules are unconstitutional because they are "vague."<sup>63</sup>

No one can doubt that education is challenging and no model is perfect. Why, though, would corporations rush into a Wall Street model of university education that so clearly fails far too many students and costs American taxpayers far too much money? Why would corporations in this business pay their CEOs \$20 million for such awful performance? Why does our government not stop this?

The answer to all three questions lies in the massive profit that a corporation can reap from recruiting thousands of unwary students, taking the proceeds of government-backed student loans, and shaving costs from the educational program. In Wall Street parlance, that was the “play,” the opportunity. A CEO who executes the play and delivers that massive corporate profit has accomplished what the corporation was designed to do. From a corporate perspective, the CEO’s performance was not awful, even if debt-burdened students drop out by the thousands and the transfer of government money to Wall Street and executives runs into the billions of dollars.

As currently operated, large public corporations (meaning those with shares that are actively traded on the stock exchanges) seek profit above all. Yes, socially responsible investing, responsible corporate conduct, and many efforts to “hardwire” corporations with ethical behavior matter a great deal. Nevertheless, the “market judgment” of global corporations measures profit into the share price and little else. And at least so far, we have not required a “character test” or imposed other responsibility requirements for corporate conduct.

Can we design a different corporation, an entity that engages in economic activity with more responsibility and ethical conduct? Can we conceive of corporations as holding public duties rather than constitutional rights? Or are we destined to become a corporate nation of underpaid hucksters in clown suits, trying to juice corporate profit and executive compensation by pushing school kids around?

I don’t think Americans will accept the latter path for long. When we begin to insist that corporate money is not “speech” and that corporations are not people, we begin to take back power. Addressing the complex problem of corporate power requires, of course, more than recognition that corporations are not people.

We also need a shared understanding of what corporations are and what they should and should not be doing in our national life.

This is the topic for the next chapter. A corporation is not a person, nor is it simply an association or group of people. A corporation is a creation of law, a public tool of economic policy. If we appreciate this point, corporate “rights” are exposed as unconstitutional folly. Moreover, we can decide to create better corporations. We can require that corporations be much more effective, useful, and supportive instruments for the American people and our economy.

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