Corporations, Democracy and the US Supreme Court

On Jan 21, 2010 our High Court shocked Americans by ruling in *Citizens United v. Federal Elections Commission* that a corporation may contribute unlimited funds advertising its views for and against political candidates. The ideas behind this are that a corporation is a "legal person" with all the rights of a human being; including that of donating money, which is a form of speech. This culminates a long series of actions and reactions (decisions, legislative acts, and electoral results) that bit by bit have raised the power of corporations in American economic and public life.

Some critics react apocalyptically, calling *Citizens United* a death blow to democracy; some cynically, calling this merely making *de jure* what is already *de facto;* some legalistically, saying the Court ruled more broadly than justified by the case brought before it. Supporters, naturally, take this contentedly as righting an injustice of long standing. Some economists would applaud this as a step toward sunsetting the corporate income tax, by electing more candidates beholden to corporate money. Many of them – not all – have been seeking this end for years in their learned journals and op-eds. Even the late William Vickrey, otherwise an egalitarian, gave high priority to this change.

I applaud neither sunsetting the tax, nor this step. I agree with Joseph Stiglitz that the corporate income tax is mainly a tax on economic rent. That means that a high tax rate does not destroy the tax

base. It is not the ideal form of such a tax, but it beats any tax on work, or sales of the necessities of the poor, or value-added, or gross sales. Both Vickrey and Stiglitz rate high in the profession and garnered Nobels, so we cannot simply appeal to "authority." To prepare our minds, let us review some milestones in the history of corporations, especially in America.

My own postulates here, in brief, are 1) that corporations own a large fraction of the wealth in the country; 2) much of that wealth is land; 3) taxes that do fall on capital are in part shifted to land; 4) pure land taxes would, indeed, be better; and 5) payroll taxes are worse and must bear most of the burdens that are shifted off corporations.

Roman Law knew no such thing as corporate personhood. It grew in Europe after the 12th Century, to be used by bodies both civil (cities and guilds) and ecclesiastical, including universities. "The church" was a huge set of interlocking corporate bodies. Being immortal, corporations would progressively agglomerate land and power, leading to restrictions like the English Statutes of Mortmain (1279 and 1290), and direct attacks like confiscations as by Henry VIII. So, when America rebelled in 1776, Europe had had long experience with corporations and relevant law.

England, when it was our "mother country," gave the East India Company extraordinary powers. It was a private corporation acting as the "chosen instrument" of the Crown. The Company's powers included the governance of India, supported by the royal military; and a monopoly of tea export, enforced by the British Navy. Americans' early experience with this monopoly corporation was hostile: we were its angry exploited customer. Its monopoly power, coupled with Lord North's excise tax on tea, led of course to the "Boston Tea Party." The modern "Tea Party" seriously misinterprets this event, as a symbol to use against all taxes — while supporting politicians who support corporate monopolies. "It was the danger of this (tea) monopoly rather than the tax itself, only five pence to the pound, that aroused resentment in the colonies"*

* Henry Steele Commager, *Spirit of Seventy-Six*.

Some of the original 13 colonies were founded by chartered companies resembling corporations, with powers to grant land. A goal of the American Revolution was to strip these original governments of their corporate powers, and redistribute lands they had granted to their favorites. It was not the national government that confiscated Tory lands, but independent local militia seizing the occasion. Our "Minute Men" were the guerillas then. As John Adams said,"The Revolution was in the hearts and minds of men." The British controlled many major cities, but militia controlled the countryside, and made the most of it.

The girls in Boston are dancin' tonight;
the gol-durned redcoats are holdin' 'em tight
When we git there we'll show them how,
but that ain't a-doin' us no good now

What did "do them good" and motivate the militia was seizing lands from Tories. The Continental Congress had little tax power. Its currency fell to two cents on the dollar — "not worth a continental." Commander George Washington lost every battle against the redcoats until Yorktown. He was elsewhere when the Green Mountain Boys, organized to validate their "Wentworth" land grants, enabled General Horatio Gates to turn the tide at Saratoga:

Johnny Burgoyne in the wilderness,
got his army in an awful mess
The farmers got mad at the British and the Huns,
and captured ten thousand son-of-a-guns

It was southern militia that drove Cornwallis into his refuge at Yorktown:

General Washington and Rochambeau,
drinking their wine by the firelight's glow,
Big Dan Morgan come a-gallopin' in,
we got Cornwallis in the old cowpen – (Soldiers' Joy)

After the Revolution, naturally, Americans were not eager to restore the authority of colonial corporations. A common attitude in

this era was that corporations are not persons because "they have neither souls to be damned nor bodies to be kicked" — they are outside and above social sanctions. Corporations are "soulless" and their directors' only social responsibility is to the shareholders (or, as it often turns out, to themselves and their top brass). The US Constitution did not mention corporations, leaving them to be chartered by the states, as they still are. It has been the US Supreme Court, using its power of judicial review, that gradually built up corporate power. The Constitution does not mention judicial review, either — it is a power that the Court, under Chief Justice John Marshall, gradually assumed from an early date and made into a tradition. Marshall was a Federalist politician and a disciple of Alexander Hamilton, whose chief concern was upholding "property," including property in land and slaves. Marshall was wily and took power effectively over a long tenure, 1801-35. His was the original "Activist Court" that propertied people have always supported (until it briefly became a pejorative to be used against the Warren Court).

The next milestone was the decision in *Trustees of Dartmouth College v. Woodward*, 1819. The Governor of New Hampshire, William Plumer, and his Legislature sought to take control of Dartmouth College to turn it from an elite private institution into a public university for a wider student body. Dartmouth had been founded by Eleazar Wheelock in 1769 under a corporate Charter from King George III — not a popular name in America. The original purpose was to "save" and instruct the Indians in European ways like drinking rum and privatizing lands.

> *Oh, Eleazar Wheelock was a very pious man*
> *He went into the wilderness to teach the Indian*
> *With a gradus and a Parnassum, a Bible and a drum*
> *And five hundred gallons of New England rum.*
> *— (Dartmouth student song)*

Governor Plumer believed that the Revolution had transferred sovereignty from the King to American legislatures, so he

might take control by appointing new trustees. Daniel Webster, representing the trustees, prevailed upon John Marshall to validate King George's charter on the grounds that a privilege, once given, was a contract in perpetuity and could not be withdrawn. The effect on academic freedom was to subject faculty members completely to the will of self-perpetuating boards of trustees. The effect on privileges was to give them *sanctity* — however they originated and whatever damage they do to society at large. Before that the grant of a corporate charter was seen as a *privilege*, not a right; it was not property, but something more like a license to sell liquor or cut hair. It was subject to conditions, and revocable without compensation. After *Dartmouth* it had the best of both worlds: it was still not taxable as property, but otherwise protected under the 5th and later 14th Amendments.

In 1832 Andrew Jackson defied the High Court in *Worcester v. Georgia*. Apparently Jackson never actually said "Marshall has made his decision, now let him enforce it" as often quoted, but that was the idea. Jackson was morally wrong, by modern values – he and Georgia aimed to force the Cherokees from their ancient homeland. The point for us here, though, is that Jackson prevailed, demonstrating that a strong, assertive President can face down a Chief Justice when he thinks the stakes are high enough. This is relevant today: *Citizens United* has indeed raised the stakes high enough.

The next legal milestone was the dreadful *Dred Scott* decision by Roger Taney' s Court, 1857. *Dred Scott* demonstrated two things we should note today. One is the tendency of the Court, left to its own devices, to uphold "property rights" of whatever kind, even in human flesh, in disregard of human rights like personal freedom. The other is the tendency of median Americans to react against the Court when it overreaches.

The reaction to *Dred Scott* produced, besides an awful war, The Emancipation Proclamation in 1863. This was an extra-legal act that Lincoln felt strong enough to perform after Union troops blocked Lee's invasion at Antietam, and no slave-owner felt strong enough

to challenge as invading the "sanctity of property" and no Court to review. Following the war came the Radical Republican Congress that pushed Reconstruction in the South, and the 13th, 14th and 15th Amendments establishing the freedmen as citizens with full rights. These were radical acts under radical leaders like Thaddeus Stevens, leading towards considerable taxation of real estate in the south, temporarily.

Next came the Grant Administration, 1869-77, filled with bribery scandals and giveaways of public lands to private corporations, mainly to build railways. The Desert Land Act of 1876 also rationalized a giveaway of vast lands plus the Kern River, supposedly to promote irrigation. Mark Twain and Charles DudleyWarner labeled it "The Gilded Age" (the first one), and "The Great Barbecue." Greed in corporate forms rushed in to exploit the sacrifices of millions of soldiers in the bloodiest war in US history.

In 1871 an obscure San Francisco journalist, Henry George, published *Our Land and Land Policy*, with a map showing the extent of the railroad land grants, painting them as broad swaths comprising a large fraction of the west. Historians like Paul Gates now credit him with being first to sound the alarm, slowly resulting in various political reactions like the Populist, Progressive, and Single Tax movements.

Meantime, propertied northerners recaptured the Republican Party and joined forces with propertied southerners to install Rutherford Hayes as President in the disputed election of 1876. Thus ended Reconstruction and Radical Republicanism.

In 1873 came a great crash, starting a ten-year depression that slowly turned minds against corporations and the enormous land grants that the "robber barons" controlled. These bided their time until recovery and complacency let our High Court rule in *Santa Clara County v. The Southern Pacific Railroad*, 1886, that the corporation was a "legal person" within the meaning of the 14th Amendment. The Court hijacked the Amendment, passed to protect the rights and properties of former slaves, to protect corporations. The tenures

deriving from the notorious bribery scandals of the Grant years were now above the reach of any state.

The reaction to the *Santa Clara* kind of judicial activism was voter receptivity to another wave of reform. History books dwell on changes at the Federal level during The Age of Reform, led by the Populist and Progressive Movements; but the unsung part of reform was that states, cities, counties and school districts struck back at land barons by raising state and local property taxes to finance public schools and public works of many kinds. 1880-1920 was the golden age of urbanization in the USA, and growing cities taxed property to provide schools to make people literate, and many services like sanitation and water supply to make urban life possible. Henry George and his followers were leaders of this movement.

At the Federal level many dissidents joined to form The Populist Party, who won a million votes and 22 electoral votes in 1892 for their little-known presidential candidate, James Weaver. Two years later they polled 50% more votes. They elected six senators and several congressmen and enough influence to pass a desired progressive personal income tax that included a tax on property income. In 1896 they merged with the Democrats, cast out old leaders like Cleveland and went with Bryan and his brain, John Peter Altgeld. Republicans, trolling for their votes, became Progressives themselves under T. Roosevelt and Wm. H. Taft, followed by Progressive Democrat Wilson, so for two decades, we had two Progressive Parties. Many Progressive Republicans and their ideas even survived the postwar reaction against Wilson. Few have called Andrew Mellon, powerful Treasury Secretary who virtually ruled Presidents Harding, Coolidge and Hoover, a Progressive — and yet he wrote in 1924, in *Taxation: the People' s Business,* that we should tax property-derived income higher than wage income.

Of course in 1894 our High Court had overturned the Populist personal income tax on the grounds that it included a tax on real estate income, which they construed as a "direct" tax (*Pollock v. Farmers' Loan and Trust Co.*). The U.S. Constitution reads that

a "direct" tax must be apportioned among the states according to population. This setback, however, only led first of all to the corporate income tax of 1909, a major blow to corporations, and then in 1913 to the 16th Amendment and the personal income tax. In 1916 the first substantial income tax bill under the amendment exempted most wage and salary income, making this more a tax on property income even than envisioned in the Act that the 1894 Court had disallowed.

By 1917 the old Populists could say they had achieved most of their goals through other Parties. The postwar reaction of 1920, however, was all the Court needed to rule in *Eisner v. Macomber*, 1920, that the IRS could not tax unrealized capital gains without another Act of Congress — an Act that Congress never provided. This has provided a major loophole ever since, both for corporations and their shareholders.

Meantime in England a parallel movement led by the "Radical-Liberals" installed in series three Prime Ministers: Henry Campbell-Bannerman, Herbert Asquith, and David Lloyd-George. In 1909 Lloyd-George, then Chancellor of the Exchequer under Asquith, introduced his radical "Peoples' Budget" including a token tax on the hitherto untouchable ancestral lands of the Lords. When the House of Lords vetoed it, Asquith demonstrated how a strong executive can overawe such a body: he prevailed upon King Edward VII to threaten to "pack" the House by creating new peers. The Lords bowed to superior fire power and passed the budget — an event known since as the Constitutional Revolution in England. Americans were watching.

In 1937 President FDR, at the height of his electoral strength, tired of having the High Court reject his programs. He copied Lloyd-George's 1909 success against the House of Lords. He didn't just threaten to "pack" the Court by adding new justices; he played hardball with the Reorganization of Judiciary Act. This did not go down easily and a major battle loomed, when Justice Owen Roberts, who had been joining in 5-4 majorities against the

President, prudently changed sides in a minimum wage case. It's been called "the switch in time that saved nine" (cutely mimicking an old saying that many young people today have never heard). It demonstrated that there are limits to the Court's power to override a united electorate.

All along, though, an accumulation of small actions was helping corporations at the expense of labor. The Warren Court, 1953-69, did many notable deeds for the common man and woman, but it did not stop the decremental fall of the share of corporate income tax revenues in Federal finance. In 1968 the payroll tax quietly surpassed the corporate tax as the second biggest source of Federal Revenue. Just think: the corporate income tax of 1909 antedated the payroll tax of 1935 by 26 years, and it was another 33 years, 1935-68, before the payroll tax took in more money than the corporate tax did. That was a revolution indeed, but so quiet and gradual that most people never noticed. Nor was that the end of it: by 2008 the corporate tax raised just 11% of Federal revenues, compared with 38% for the payroll tax, nearly 4 times as much. That is a measure of the growing power of corporations in politics.

On top of that, *personal* income taxes on corporate dividends and capital gains have been singled out for preferentially low rates. In 2003 President Bush and his Congress lowered the tax rate on both dividends and capital gains to 15%, so that a smaller share of the personal income tax now comes from corporate shareholders. As late as in the Tax Reform Act of 1986, dividends were taxed like other "ordinary" income. So, briefly, were capital gains. President George H. W. Bush then devoted most of his presidency, and sacrificed a second term, to get a token cut in the capital gains rate. It was the thin end of a wedge, leading soon to the present cap of 15%. "Capital gains" so-called by Congress, derive from many sources, but one of the biggest is sales of corporate stock.

And so things stood until January 21, 2010, when the High Court authorized corporate leaders to contribute unlimited amounts of their shareholders' cash to political causes. This poses a challenge

to our tabloid-and-TV-numbed generation. Will "ordinary" taxpayers rebel, as they did in the American Revolution, Emancipation, the Progressive Age of Reform, and the New Deal? Or will corporate power wax unchecked until it replaces democracy altogether? Cyclical theory says we will have another anti-corporate reaction, but history also records tipping points in the decline of nations from which they do not recover for generations, if ever. This one may be a squeaker.

— Adapted from the article that appeared in Groundswell, *January-February 2010*

The Top Ten Problems with "Corporate Personhood":

1. Corporations never die, never pay estate taxes, never divide their wealth among succeeding generations. In this they resemble medieval Churches that agglomerated over many years so much land they threatened the state itself.

2. Besides not dying, corporations merge with or otherwise acquire other corporations, progressing, if unchecked, from competition to cartel to oligopoly to monopoly.

3. A corporation is by nature a combination in restraint of trade – that is, a union of many individuals with their wealth to act as a unit, dealing with customers, suppliers, and workers. The courts, historically, have borne down on labor unions as illegal combinations — while treating this combination of lands and capitals as an individual.

4. Corporations enjoy the legal privilege of limited liability.

5. The ownership of corporations is very often secret. Many stocks are recorded in "street names." Hugo Chavez is one such owner whose name has been revealed: others might be Al Qaeda, the Nazi Party, the heirs of Mao Tse-Tung, La Cosa Nostra, or anyone. No citizenship is required for a corporation to sway American government more than any private citizen.

6. No person is easily held responsible for corporate acts. The first duty of CEOs is to the shareholders, so they say, to dodge guilt for any outrage against others. Most shareholders, in turn, have little idea what their CEOs are doing.

7. The internal governance of most corporations is intensely undemocratic.

8. The corporation cannot be jailed, and its officers seldom are, as they have great opportunities to pass the buck.

9. The corporation has no spiritual counselor or confessor to prick its conscience.
10. Before *Citizens United,* the attitude, as expressed by Justices White and Rehnquist in the 1970s, has been that corporations are "creatures of the law," not equal to natural persons in their civil rights. Suddenly to reverse this now is to upset many expectations that relied on the previous rule.

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