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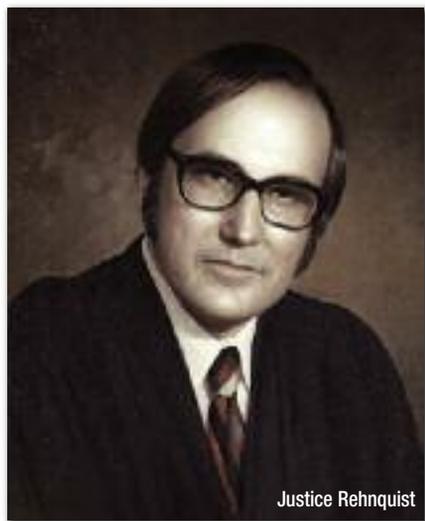


The Conservative vs. the Corporatist

Justice Rehnquist and “Corporate Speech” Rights

BY JEFF CLEMENTS

In the November 2012 election, the same Montana voters who gave the State’s presidential electoral votes to Republican Mitt Romney by a wide margin also approved a ballot initiative that called for a constitutional amendment to overturn *Citizens United v. Federal Election Commission*. Challenging the twin propositions on which that 5-4 decision rests, the ballot question declared the policy of Montana as follows:



Justice Rehnquist

1. Political spending may be regulated in order to defend the integrity of elections, prevent corruption, and to defend the political equality of all Americans; and
2. Corporations do not have the constitutional rights of human beings but rather have the rights and obligations of state corporation laws.

Montana voters passed the ballot initiative by 75 percent to 25 percent, making Montana the 16th state to call for the 28th Amendment.

Some were surprised by the overwhelming margin. Clearly, many Montana conservatives and Republicans joined Democrats, progressives and independents in supporting the ballot initiative. The landslide margin, however, followed similar results in virtually every region of the country when Americans have had a chance to vote on the question of *Citizens United* (as they did in Colorado and in hundreds of cities and towns that have enacted constitutional amendment resolutions.) Indeed, conservative opposition to special constitutional rights for corporations and the protection of political privilege for an elite of large donors is not new. It is rooted in the traditional American concern about concentrations of power corrupting republican government.

Birthing Corporate Speech

Too frequently, the mainstream media misses this point and labels the current



Justice Powell

Court’s remarkable expansion of corporate rights and power as “conservative.” In fact, a proper distinction between “conservative” and what might be better labeled as “corporatist” lies at the very heart of the Supreme Court’s narrow and curious path to *Citizens United*.

In a series of cases in the 1970s and 1980s, the Supreme Court began the fabrication of a First Amendment “corporate speech” doctrine that paved the way to *Citizens United*. The leading antagonists at the time were Justice Lewis Powell, a former corporate lawyer and Chamber of Commerce adviser, and Justice (later Chief Justice) William Rehnquist, a Barry Goldwater/movement conservative from Arizona.

President Richard Nixon had nominated Rehnquist and Powell on the same day in 1971. But their legal backgrounds, and their beliefs and aspirations about the

JEFF CLEMENTS is the Co-Founder and Board Chair of Free Speech For People and the author of the 2014 updated and expanded edition of *Corporations Are Not People: Reclaiming Democracy From Big Money & Global Corporations*. More information: <http://corporationsarenotpeople.com/>



country and the Constitution, could not have been more different.

The Protagonists

Lewis Powell had practiced corporate law in Richmond, Virginia, had a national client base that included some of the largest corporations in the world, and he eventually served as president of the American Bar Association. He was a member of numerous corporate boards and an active participant on the executive committee of tobacco giant Philip Morris Inc. Powell advised the largest corporations and the U.S. Chamber of Commerce not only on law but also on political strategies. He came to the Court

with a judicial robe presented to him by Philip Morris—along with a determination to fabricate new “corporate rights.”¹

While neither Powell nor the U.S. Chamber of Commerce disclosed it at the time of his nomination, a few months earlier Powell had privately outlined a plan for the Chamber to take the lead in organizing corporations for “political power available only through united action” and to deploy “the scale of financing available only through joint effort.” In calling for “business to go on the offensive,” the 1971 Powell Memo, as the Chamber called it, described an opportunity: “[E]specially with an activist-minded Supreme Court, the judiciary may be the most important instrument for social, economic and political change.”²

William Rehnquist, in the meantime, showed little interest in the corporate world in which Lewis Powell worked so well.

Rehnquist had moved to Arizona following his graduation from Stanford Law School (where he served on the Law Review with Sandra Day O’Connor) and a clerkship with Justice Robert Jackson. While practicing law in Phoenix, Rehnquist became active in conservative politics and Barry Goldwater’s presidential campaign. With a deep interest in federalism and the relationship of the states and federal government, Rehnquist joined the Nixon Administration in 1969, where he served as Assistant Attorney General for the Office of Legal Counsel.

Both Powell and Rehnquist were confirmed by the Senate in 1972, though Rehnquist’s conservative views made his path to confirmation more bumpy. In the following years, the argument between the two about the role of corporations in the Constitution, and the right of the people and the states to define the role of corporations in society, would begin to illuminate a critical distinction between a conservative and a corporatist Justice. It is a distinction that today is more relevant than ever in the wake of *Citizens United* and the new corporate rights doctrine of the Roberts Court.

WASHINGTON - OCTOBER 20: Volunteers help roll up a giant banner printed with the Preamble to the United States Constitution during a demonstration against the Supreme Court’s *Citizens United* ruling at the Lincoln Memorial on the National Mall, October 20, 2010 in Washington, DC. The rally at the memorial was organized by brothers Laird and Robin Monahan who spent five months walking from San Francisco, California, to Washington to protest the court decision, which overturned the provision of the McCain-Feingold law barring corporations and unions from paying for political ads made independently of candidate campaigns. (Photo by Chip Somodevilla/Getty Images)



Powell's Court Strategy

Once on the Court, Powell forged a shifting majority, including at times liberals such as Justices William Brennan and Harry Blackmun, to create new “rights for corporations,” as Powell called it in his notes at the time.³ In four decisions between 1978 and 1986, Powell created a new doctrine of free speech for corporate “speakers,” striking down state laws on corporate political spending (*First National Bank of Boston v. Bellotti*), as well as energy, the environment, and utility regulation (*Central Hudson Gas & Electric Corp. v. Public Service Commission*, *Pacific Gas & Electric Corp. v. Public Utilities Commission*, *Consolidated Energy Co. v. Public Service Commission*).

With increasing aggressiveness over the next two decades, large corporations and the U.S. Chamber of Commerce’s litigation project (self-described as “the brainchild of Justice Lewis Powell”) increasingly deployed this new corporate veto to eliminate state or federal laws perceived as restricting the power of global corporations.

According to Justice Powell’s conference notes, when the first “corporate speech” cases began to make headway with the Court, Justice Rehnquist warned his colleagues of the dangers of going “back to substantive due process,” the long discredited doctrine used by Gilded Age corporations to attack even the most rudimentary public laws. He also warned that corporate rights are inconsistent with a federalism that respects the state’s power to create (or not) corporations, and on what terms. Rehnquist did not leave his concerns in the Justices’ chambers; over and over again, he wrote strong dissents in the Powell corporate speech cases.

In 1978, when the Court, for the first time in American history, struck down a state law on corporate political spending in *First Nat’l Bank of Boston v. Bellotti*, Rehnquist wrote a separate dissent. The state, he pointed out, creates corporations in the first place, and provides for “perpetual life and limited liability to enhance its efficiency as an economic entity.”

“[T]hose properties,” Rehnquist continued, “so beneficial in the economic sphere, pose special dangers in the political sphere.”⁴

Bellotti Sets the Stage

In *Citizens United*, the majority rested on the *Bellotti* decision more than any other.

And *Bellotti* almost did not happen.

In the *Bellotti* case, three large international corporations—the First National Bank of Boston, Gillette Corporation, and Digital Equipment Corporation—had filed a lawsuit against the Attorney General of Massachusetts, Frank Bellotti. The corporations demanded an injunction to stop the Attorney General from enforcing a state law intended to keep corporations from spending corporate money to influence the outcome of a citizens’ referendum. The three corporations made the unprecedented claim that corporations are like people and corporate money is like speech; therefore, the law keeping corporate money out of referendum votes violated the corporations’ First Amendment right of free speech.

In many ways, the corporate challenge to the Massachusetts law reflected the execution of the Powell Memo to the U.S. Chamber from seven years before. With support from a Chamber of Commerce amicus brief, the corporations challenging

the initiative spending law indeed were going “on the offensive,” seeking to use an “activist-minded Supreme Court” to drive change.

As the Court began deliberations about the case, Justice Rehnquist’s arguments about the distinction between corporations and human beings under the Constitution began to persuade other Justices. Indeed, at one point, Powell had to take over the writing of the Court’s opinion after William Brennan, who had originally been assigned the opinion, changed his mind and joined Justice Rehnquist’s views. In a memorandum to the Justices, Brennan explained, “I very much regret that I doubt I can write an opinion that will command majority support. ... I would write to sustain its constitutionality.”⁵

Powell had been surprised by Brennan’s change of position (writing “Wow!” on the Brennan memorandum), and he was concerned about holding together a bare majority for creating the new right for corporations to trump state ballot spending



laws. Powell began reaching out to the other Justices. He sought to contain Rehnquist and hold onto the vote of Chief Justice Warren Burger.

In a letter to Rehnquist, Powell admitted, “[N]o prior decision has expressly recognized corporate speech generally as explicitly as my opinion does.” Nevertheless, Powell asked Rehnquist to consider “whether it is in the public interest” to stand against what Powell called “a trend” toward “the proposition that artificial entities are treated as ‘persons’ for purposes of exercising and relying upon constitutional rights.”⁶

Rehnquist declined the invitation to go along. He did not buy the “trend” toward recognizing artificial entities as “persons” for purposes of constitutional rights—because there was no such trend. In fact, the trend was the exact opposite since the Court had stepped back from substantive due process and the experiment in corporate rights in the early part of the 20th Century. By 1978, for the previous four decades, the Court had consistently turned back efforts by corporations to “constitutionalize” economic or other regulations that were inconvenient to certain business models.

Powell’s predecessor on the Court, Hugo Black, had maintained as early as 1938 that “neither the history nor the language of the Fourteenth Amendment justifies the belief that corporations are included within its protections” for “persons.”⁷ And notwithstanding Powell’s urging, this was the theme that Rehnquist picked up in his *Bellotti* dissent, writing that the “Fourteenth Amendment does not require a State to endow a business corporation with the power of political speech.”⁸

Unable to neutralize Rehnquist, Powell focused on Chief Justice Burger, the crucial fifth vote needed to invalidate state limits on corporate spending in *Bellotti*. The task was not easy because Burger too was beginning to have his doubts about rights for corporations. He was particularly concerned that if the Court struck down the Massachusetts law excluding corporate spending from citizen ballot initiatives, federal and state restrictions on corporate election spending that had stood without controversy for

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nearly a century would be at risk of invalidation next.

In a memorandum to the Justices, Chief Justice Burger wrote that even before learning of Justice Brennan’s change of mind, “I had begun having misgivings about the case, particularly on its potential for undermining the well-established Corrupt Practices Act limitations. It seems to me there are differences in the First Amendment rights of the individual as compared with the corporate-collective body.”⁹

Despite assurances from Powell, Burger continued to worry that the decision could “place under a shadow” the many state corrupt practices laws that had long sought to separate corporate money from state elections.¹⁰ To address these concerns, Powell added language to the final opinion that suggested that state corrupt practices laws were not called into question by the *Bellotti* decision because, unlike ballot initiative spending restrictions, a prohibition on direct corporate election spending might be warranted by corruption concerns. In doing so, he held onto the crucial fifth vote of Chief Justice Burger, who accepted Powell’s reassurance.

In going with Powell’s reassurance over Rehnquist’s warnings, Burger bet wrong.

Rehnquist had argued that “the analytical framework employed by the Court clearly raises great doubt about the [federal] Corrupt Practices Act,” and similar state statutes.¹¹ Despite Powell’s reassuring words, wrote Rehnquist, “if the corporate identity of the speaker makes no difference, all the Court has done is to reserve the formal interment of the Corrupt Practices Act and similar state statutes for another day.”¹² That day came in 2012 when the Court, in a 5-4 summary decision in *American Tradition Partnership v. Bullock*, declared the 1912 Montana Corrupt Practices Act and all such state laws invalid under

Citizens United.

The Powell Trend Continues

Following the 1978 *Bellotti* decision, Powell continued his effort to fabricate a new corporate speech doctrine in the First Amendment. Rehnquist continued his resistance.

Responding in each of the several decisions authored by Justice Powell in which the Court created new rights for corporations to “speak” or “refrain from speaking,” Rehnquist expanded his dissenting critique. Over and over again, Rehnquist made the conservative case that the free speech rights of people in our Constitution do not limit “state regulation of an economic activity by an entity that could not exist in corporate form, to say nothing of enjoy monopoly status, were it not for the laws of New York” and other states.¹³ Rehnquist argued that the Powell theory “returns to the bygone era of *Lochner v. New York* [1905] in which it was common practice for this Court to strike down economic regulations adopted by a State based on the Court’s own notions of the most appropriate means for the State to implement its considered policies.”¹⁴

The Rehnquist–Powell debate, of course, did not mean that the two Justices could not find common ground, even in First Amendment cases involving regulations of election spending. In *Fed. Election Commission v. Nat’l Right to Work Committee*,¹⁵ for example, Justice Rehnquist wrote for a unanimous Court to uphold federal election law restrictions on corporations, including non-profit corporations. Rehnquist’s opinion for the Court stated: “The governmental interest in preventing both actual corruption and the appearance of corruption of elected representatives has long been recognized, and there is no reason why it may not in this

case be accomplished by treating unions, corporations, and similar organizations differently from individuals.”¹⁶

In 1985, Rehnquist and Powell again found themselves in agreement, this time in striking down a federal election spending restriction as a violation of the First Amendment when applied to two PAC corporations that sought to raise and spend money in support of the election of Ronald Reagan, independently of the President’s campaign. Again, Justice Rehnquist wrote the opinion, this time for a divided Court. While the decision invalidated the spending restriction in this case, Rehnquist’s opinion emphasized why this was different from what he called “corporations cases.” He noted the significance of the fact that the entities in this case raised much of the money from hundreds of thousands of people giving \$25 and \$75. He then distinguished *National Right To Work*:

Our decision in *FEC v. National Right to Work Committee*... is not to the contrary. *That case turned on the special treatment historically accorded corporations. In return for the special advantages that the State confers on the corporate form, individuals acting jointly through corporations forgo some of the rights they have as individuals. ...* Like the National Right to Work Committee, NCPAC and FCM are also formally incorporated; however, *these are not ‘corporations’ cases* because [the regulation] applies not just to corporations but to any ‘committee, association, or organization (whether or not incorporated)’ that accepts contributions or makes expenditures in connection with electoral campaigns.¹⁷

The common ground between Powell and Rehnquist did not last the year. In two 1986 cases, they found themselves on opposite sides once again in application of the First Amendment to corporations.

First, Rehnquist wrote for four dissenters in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*,¹⁸ where the Court, per Justice Brennan, in effect created a non-profit “exception” to federal limitations on corporate election spending. To Rehnquist, such line-drawing

among different kinds of corporations was for the legislature, not the judiciary:

I do not dispute that the threat from corporate political activity will vary depending on the particular characteristics of a given corporation; it is obvious that large and successful corporations with resources to fund a political war chest constitute a more potent threat to the political process than less successful business corporations or nonprofit corporations. It may also be that those supporting some nonbusiness corporations will identify with the corporations’ political views more frequently than the average shareholder of General Motors would support the political activities of that corporation. These distinctions among corporations, however, are “distinctions in degree” that do not amount to “differences in kind.” As such, they are more properly drawn by the Legislature than

by the Judiciary.¹⁹

That same year, Powell led the court in *Pacific Gas & Electric Co. v. Public Utility Commission* to recognize a right of utility corporations to invoke “freedom of conscience” precedents that had protected people with unpopular religious views from discrimination. In response, Rehnquist’s dissent called out the sloppy metaphors behind the fabrication of corporate rights: “Extension of the individual freedom of conscience decisions to business corporations,” Rehnquist argued, “strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an ‘intellect’ or ‘mind’ for freedom of conscience purposes is to confuse metaphor with reality.”²⁰

At times, Rehnquist’s stand was a lonely one. Even Powell’s clerks were dismissive, with one telling Powell in a 1980 memo that Rehnquist “seems to be the only one still fighting that battle.”²¹



Rehnquist's Short-Lived Opportunity

After Powell left the Court in 1987, Justice Rehnquist had a chance to persuade his colleagues anew. The high-water mark of Rehnquist's conservative stand against the Chamber of Commerce's "corporate rights" doctrine came in 1990, with *Austin v. Michigan Chamber of Commerce*. With a new conservative ally from Arizona, Sandra Day O'Connor, on the Court, Rehnquist found himself in the majority as the Court upheld the right of states to limit corporate spending in elections.

Turning aside the Chamber of Commerce's attack on state election spending restrictions for corporations, the Court's opinion sounded much like Rehnquist's earlier dissents: "State law,"

wrote Justice Thurgood Marshall in an opinion joined by Justice Rehnquist, "grants corporations special advantages," and states may prevent corporate "resources amassed in the economic marketplace [from] obtaining an unfair advantage in the political marketplace."²²

This Rehnquist majority did not last, and with his death and the retirement of Justice O'Connor, a new Court was in place to consider the *Citizens United* case. This new 5-4 arrangement resurrected the Powell corporate rights theory with a vengeance, casting aside *Michigan Chamber of Commerce*, among other precedent.²³

Conclusion

While *Citizens United* may mark the triumph of the Powell-Chamber of Commerce plan, the growing backlash of Americans—including conservatives—shows that William Rehnquist may have

the last word after all. His prescient words of dissent in 1986 are likely to long outlast the metaphorical sleights of hand that invent corporate "speakers," "voices" and "persons": "For in a democracy," he said, "the economic is subordinate to the political, a lesson that our ancestors learned long ago, and that our descendants will undoubtedly have to relearn many years hence."²⁴

Americans are relearning this lesson, as Montanans showed in November 2012. And millions of Americans of widely varied political viewpoints are working to overturn *Citizens United* and the fabrication of corporate rights in our Constitution of the people.

When that day comes, William Rehnquist's work, at times lonely, to remind his colleagues and the nation of the dangers of misplaced metaphor about corporations and the Constitution will be vindicated once again. 

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endnotes

1. At a December 1971 event celebrating Powell's Supreme Court appointment, Philip Morris CEO Joseph Cullman presented Powell with a judicial robe as a gift from the company, declaring that "it is customary for friends and associates to present a newly appointed Supreme Court justice with his robes of office." The record of this event is contained in documents revealed by the conspiracy and racketeering litigation against the cigarette industry successfully prosecuted by the U.S. Department of Justice and state Attorneys General.
2. The Powell memo is available at <http://jefclements.files.wordpress.com/2014/08/powellmemorandumtypescript.pdf>
3. Powell notes, Feb. 24, 1977.
4. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 825-6 (1978) (Rehnquist, J., dissenting).
5. Memorandum to the Justices From William Brennan, Dec. 1, 1977. Linda Greenhouse, the former Supreme Court reporter for the *New York Times* and author, first reported Justice Brennan's change of mind in *Bellotti* in 2011.
6. Letter from Justice Powell to Justice Rehnquist, April 17, 1978.
7. *Connecticut Life Ins. Co. v. Johnson*, 303 U.S. 77, 89-90 (1938) (Black, J., dissenting).
8. *Bellotti*, 435 U.S. at 826 and n.6.
9. Memorandum to the Justices, Dec. 6, 1977.
10. Memorandum from the Chief Justice, March 11, 1978.
11. *Bellotti*, 435 U.S. at 820-21 (Rehnquist, J., dissenting).
12. *Id.*
13. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 588 (1980) (Rehnquist, J., dissenting).
14. 447 U.S. at 589.
15. 459 U.S. 197 (1982).
16. *Id.* at 210-11, citing *California Medical Ass'n v. FEC*, 453 U.S. 182, 201 (1981).
17. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 495-96 (1985) (emphasis added).
18. 479 U.S. 238, 266-67 (1986).
19. *Id.* at 268-69.
20. *Pacific Gas & Elec. Co. v. Public Util. Comm'n of California*, 475 U.S. 1, 32-34 (1986) (Rehnquist, J., dissenting).
21. Memorandum, June 12, 1980.
22. *Austin*, 494 U.S. at 658-659.
23. *Citizens United* also overturned *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003). Chief Justice Rehnquist joined Justice Kennedy's dissent in *McConnell*, though his separate dissenting opinion made no note of the corporate and union restrictions that *McConnell* upheld, nor offered any explanation to suggest that Rehnquist had changed his mind about his views in earlier cases such as *Austin*, *National Right To Work*, and *Massachusetts Citizens For Life*. Possible explanations may include: (1) Rehnquist's federalism views and a distinction in assessing state versus federal laws under the First Amendment; (2) other specifics of the Bipartisan Campaign Reform Act at issue in *McConnell*; (3) resignation about—though not agreement with—the Court's creation of "rights for corporations" and an unwillingness to continue to be "the only one still fighting that battle." On the last point, see Earl M. Maltz, "I Give Up!" *William Rehnquist and Commercial Speech*, in THE REHNQUIST LEGACY 11, 12 (Craig M. Bradley ed., 2006) (discussing Rehnquist's later acquiescence in commercial speech cases). On the first point see Sheri J. Engelken, *Majoritarian Democracy in a Federalist System: The Late Chief Justice Rehnquist and the First Amendment*, 30 HARV. J.L. & PUB. POL'Y 695 (2007).
24. *Central Hudson*, 447 U.S. at 597-99 (Rehnquist, J., dissenting).