Chief Justice Roberts: Judicial Activist for Corporate Power

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One of the phrases bandied about during the confirmation hearings for Judge Sonia Sotomayer's nomination to the United States Supreme Court is "judicial activism" - a tendency of judges to use the cases they decide to implement their own notions of public policy. Of course, all recent Supreme Court nominees have steadfastly denied any shred of judicial activism and have uniformly maintained that the proper role of a judge, even a Supreme Court Justice, is to apply existing law, whether Constitutional, statutory or precedent, to the facts of the case before him or her. No one has been more outspoken against the evils of judicial activism than Chief Justice Roberts.

Now it appears that the Chief may be undertaking a bit of judicial activism of his own. The case is *Citizens United v. FEC*. The conservative group that sponsored *Hillary: The Movie* just before the Democratic primary is seeking to avoid or roll back the 2002 McCain-Feingold campaign finance law that prohibits the use of corporate funds to influence elections. Chief Justice Roberts and his conservative Supreme Court majority are getting ready to use *Citizens United* as the vehicle to overrule established precedent (and overturn carefully drafted legislation) and grant business corporations a constitutional right to use their funds to participate in political debate, not only on public

issues, but even in the election of candidates to office. Such a move would be judicial activism on a grand scale!

1. Freedom of Speech for Corporations

Business corporations and their owners have participated in political life in many ways for many years. Corporate lobbying, campaign contributions by business leaders, "soft money campaign support" by businesses, the "revolving door" of businessmen and public servants: these are only a few of the many ways that corporations interact with politicians and political institutions in an effort to influence public action to their advantage. The American public has learned to live with a strong connection between business and politics.

What is relatively new, however, is the claim that business entities have a *constitutional right* to utilize their economic power to participate in political campaigns and influence the outcome of public votes free of meaningful public regulation. The idea can be traced to the 1978 case of *First National Bank of Boston v. Bellotti*, 435 U.S. 765, where a 5 to 4 majority of the Court[1] voided a Massachusetts law that prohibited corporations from expending funds in connection with state referenda having nothing to do with their business on the ground it was an unconstitutional interference with corporate freedom of speech. In brief, *Bellotti* stands for the principle that corporations

[1] The majority opinion was written by Justice Powell, who was joined by Justices Stewart, Blackmun, and Stevens. Chief Justice Burger concurred in the decision but wrote separately. Dissenting were Justices Rehnquist, White, Brennan, and Marshall.

may spend money to influence the outcome of a public referendum regardless of whether the issue relates to the corporation's business interests.

Bellotti is the handiwork of Lewis Powell, the consummate corporate lawyer from Richmond, Virginia, who was drafted to the Supreme Court by Richard Nixon in 1971. Although Powell was considered a moderate on most issues during his fifteen years on the Court, he was an activist to the core in matters affecting corporations and their role in American political life. In fact, only two months before he was nominated, the future Justice wrote a secret memorandum to the Director of the U.S. Chamber of Commerce on the vital need of corporate America to take a more direct and powerful role in American politics:

> But one should not postpone more direct political action, while awaiting the gradual change in public opinion to be effected through education and information. Business must learn the lesson, long ago learned by labor and other self-interest groups. This is the lesson that political power is necessary; that such power must be assidously (sic) cultivated; and that when necessary, it must be used aggressively and with determination -- without embarrassment and without the reluctance which has been so characteristic of American business.

It is thus not too surprising that it was Powell who wrote the Court's opinion sustaining the First National Bank of Boston's constitutional challenge to the Massachusetts statute.

In holding that the First Amendment of the United States Constitution prevents the states from seriously restricting corporations from using their funds to influence the outcomes of political referenda, Powell reached back to a statement reported to have been made by Chief Justice Waite at the outset of oral argument in a 19th Century railroad tax assessment case, *Santa Clara County v. Southern Pacific R. Co.*, 118 U.S. 394, 396 (1886): "The court does not wish to hear argument on the question whether the

provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does."

This dictum was in dissonance with the general view that corporations, as artificial creations of the laws of men, enjoyed no "inalienable rights" but only those legal properties that the Legislature chooses to give them. *Belotti*, 435 U.S. at 822-823 (Rehnquist, J., dissenting). While there are numerous cases applying the Due Process Clause of the 14th Amendment to the property of corporations, no case prior to *Bellotti* had suggested that corporations had the rights to freedom of speech, assembly, petition, etc. spelled out in the First Amendment. *Id.*

Justice Powell's discovery (or invention) of First Amendment rights for corporations in *Bellotti* let a genie out of the bottle. Justice Rehnquist, who dissented in *Belotti*, recognized that:

> A State grants to a business corporation the blessings of potentially perpetual life and limited liability to enhance its efficiency as an economic entity. It might reasonably be concluded that those properties, so beneficial in the economic sphere, pose special dangers in the political sphere.

Belotti, 435 U.S. at 825-826 (Rehnquist, J., dissenting). Even the *Bellotti* majority acknowledged that allowing corporations to deploy their financial power in elective politics would go too far. In a footnote to the majority opinion, Justice Powell noted that the Massachusetts statute under review also prohibited corporate contributions to candidates or political parties. *Belotti*, 435 U.S. at 787 n. 26. That portion of the statute was not being challenged and Justice Powell noted how important it was for the government to be

able to prevent the corruption of elected officials by contributors. *Id.* This footnote left open (perhaps even embraced) the idea that Congress still has the power to curb a corporation's use of its economic power to influence candidate elections.

2. Curbing Corporate Influence on Elections

History since *Bellotti* has affirmed Justice Rehnquist's foresight. The role of money in politics at all levels has burgeoned.[2] Both states and the federal government have been scrambling to get things under some control. At the state level this struggle has brought forth various forms of campaign finance legislation.

A Michigan law that restricted a corporation's ability to use general corporate funds to influence elections of candidates came before the Rehnquist Court In 1990. In *Austin v. Michigan Chamber of Commerce*, 494 U. S. 652 (1990), a majority of the Court (including Chief Justice Rehnquist) somewhat narrowed the negative implications of *Bellotti* by ruling that the state could prohibit a corporation from spending its own funds in support of a candidate. At the federal level the battle to curb excesses of corporate (and individual) campaign and election spending ultimately resulted in the Bipartisan Campaign Reform Act of 2002, commonly known as "McCain-Feingold" after its Senate sponsors. When Congress crafted the prohibitions of corporate electioneering and related political activity in McCain-Feingold it paid careful attention to Austin and to footnote 26 in *Bellotti*. The

[2] In the 1976 Presidential campaign, concluded shortly before the Court handed down a decision in *Bellotti*, the candidates spent about $66.9 million dollars. In the 2008 Presidential campaisn, the candidates spent about $1.3 *billion* dollars. Center for Responsive Politics at http://www.opensecrets.org/pres08/totals.php?cycle=2008 (downloaded August 5, 2009).

reform legislation contained an express prohibition on corporate funding of "electioneering communications" that referred to a political candidate within 30 days of a primary and 60 days of a general election.

McCain-Feingold was immediately tested by a constitutional challenge in a suit by U.S. Senator Mitch McConnell that reached the Supreme Court in 2003. *McConnell v. Federal Election Commission*, 540 U. S. 93 (2003). McCain-Feingold survived the challenge; the Court's decision held that corporate political speech in the form of "issue advertisements" that are the "functional equivalent" of "electioneering communications" can be legally banned without infringing any corporate constitutional rights of freedom of speech .

3. The Roberts Majority and Corporate Influence in Politics

Enter Chief Justice John G. Roberts, who was confirmed in 2005. During his hearings the new Chief Justice repeatedly referred to the role of a Supreme Court justice as akin to that of "umpire". It now appears that the umpire may be about to change the rules of the game.

In *FEC v. Wisconsin Right to Life Committee*, 551 U.S. 449 (2007), the Wisconsin Right to Life Committee (a nonprofit corporation subject to the limitations of McCain-Feingold) ran ads encouraging viewers to contact Wisconsin's U.S. Senators and urge them to oppose filibusters of Bush administration judicial nominees. The Federal Election Commission deemed the ads to be the "functional equivalent" of electioneering communications and refused to allow them to be aired within 60 days of the election.

The conservative majority of the Roberts Court ruled that the "functional equivalent" test must be applied narrowly, too narrowly to cover the activities of WRL. According to Chief Justice Roberts and his conservative colleagues, unless an ad was reasonably interpreted as urging the support or defeat of a candidate, it was eligible for an "as applied" exception to the McCain-Feingold limits on issue ads close to an election. By construing the statute narrowly, the Court did not have to attack the pre-existing authority of *McConnell* or *Austin*, although Justices Scalia, Thomas and Kennedy were ready and eager to do so. As Chief Justice Roberts observed,

> *McConnell* held that express advocacy of a candidate or his opponent by a corporation shortly before an election may be prohibited, along with the functional equivalent of such express advocacy. We have no occasion to revisit that determination today.

Wisconsin Right to Life, 551 U.S. at 476 n. 8. The clear implication is that on some "tomorrow" the Court may indeed be ready to overrule *McConnell* and *Austin.* Such a move would unshackle the genie that was first uncorked by Justice Powell in *Bellotti*, and let corporate financial power loose on the election process.

4. *Citizens United* and the Unshackling of the Genie

Citizens United may be the case that the Roberts majority has been waiting for. Since it is hard to imagine that a film about then-presidential candidate Hilary Clinton can "reasonably be interpreted as anything other than an ad urging the support or defeat of a candidate", Citizens United is asking the Roberts Supreme Court to overrule *McConnell* and kill the "functional equivalent" rule that the Rehnquist Supreme Court crafted only 6

years ago.

The case was argued on March 23, 2009. During the argument it became apparent that some Supreme Court Justices may be thinking about the *Citizens United* case as an opportunity to strip away any meaningful restrictions on the ability of corporate America to participate in all aspects of the political process including the election of candidates for public office.[3]

This concern became more concrete when Chief Justice Roberts took the unusual step of setting the case for re-argument on September 9. The order for re-argument specifically invites the parties to address the issue of whether the *McConnell* or *Austin* precedents should be overruled, either in whole or in part. Enter judicial activism - of the conservative variety.

McConnell and *Austin* are four-square precedents of the United States Supreme Court that establish limits to the corporate free speech genie conjured up in *Bellotti*. Important national legislation is grounded on these precedents. There is no national hue and cry for the repeal of McCain-Feingold or for overruling the judicial foundation of its constitutionality. Certainly there is no indication that *Austin, McConnell* or McCain-Feingold have become obsolete or outdated. In fact, all indications are to the contrary. With each successive election the role of corporations and their money is becoming ever more evident.

Austin, McConnell and McCain-Feingold sought to place limits on the corporate

[3] *Corporate Money and Campaigns*, New York Times Editorial (March 24, 2009) available at http://www.nytimes.com/2009/03/24/opinion/24tue2.html (downloaded August 5, 2009).

genie's capacity to do serious mischief on our political institutions. There is good reason now to fear that the Roberts majority may be poised to wipe away these limits in an act of judicial activism that is breathtaking in its implications. Based on the shaky constitutional bases of *Bellotti*, such a decision by the Roberts majority would transform the core of our nation's political structure.

a) The Illegitimacy of *Bellotti*

As noted before, the sole authority for the proposition that the free speech rights of the 1st Amendment benefits and protects corporate entities as well as natural persons is *First National Bank of Boston v. Bellotti*. At the time the Constitution was originally adopted, corporations were very rare and special entities, created by legislative acts for particular described purposes. The word "corporation" appears nowhere in the Constitution or Bill of Rights. It is scarcely conceivable that the drafters of the Constitution had anything resembling corporate entities in mind when they drafted the Bill of Rights.

For nearly a century it was assumed that the Bill of Rights protected persons, not corporations. The14th Amendment ban on deprivation of property without due process or equal protection of the law has been consistently applied to property of corporations and natural persons alike. However prior to *Bellottii* there was never any hint that the purely personal rights of the first Amendment of the Bill of Rights belong to corporate entities as well as human beings. As Justice Rehnquist noted in his *Bellotti* dissent, "The question presented today, whether business corporations have any constitutionally protected

liberty to engage in political activities, has never been squarely addressed by any previous decision of this court." *Belotti*, 435 U.S. at 822 (Rehnquist, J., dissenting).

The lack of legal foundation for Bellotti together with its disturbing policy considerations have been pointed out in legal literature ever since the case came down in 1978.[4] That the Court may be on the verge of taking a step for which *Bellotti* is the main basis of support demonstrates the lengths to which the Roberts majority is prepared to go to promote corporate "rights".

b) Judge-Made Law and Political Institutions

Judge-made law does not have the democratic legitimacy of measures that have been adopted by legislatures and ratified by executive action. Judges are not legislators. They are not, and should not be, politically accountable to anyone. They do not take part in the political debate concerning the matters that they decide.

The lack of democratic legitimacy for judges and their rulings counsels a degree of restraint in the creation of judge-made law. Such restraint is even more important when judges are confronted with the potential of transforming by their own decisions the structure or function of essential political institutions.

The common law system gives courts the authority to develop rules of law based on accretion of case by case decisions. Such a system has decided strengths in the creation of responsive doctrines of private law governing the legal dealings of private actors with each other. On the other hand, the authority of public law, particularly laws

[4] See, e.g., J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Col. L. Rev. 609 (May 1982).

establishing the structure and function of various participants in the political process, derives entirely from the democratic composition of the law-giving body. Widely representative legislative bodies can act to restructure American politics and can be held accountable for their actions in political elections. On the other hand, when courts act to change the political playing field, they are in no way accountable for the havoc that their decisions may wreak. Ever since the founding of the Republic the United States Supreme Court has been conscious of this issue and has refrained from adjudicating issues of political structure and role and has deferred to the democratically constituted legislature in these matters.[5]

Thus, when Justice Roberts and his colleagues consider transforming the American political landscape to the great benefit of corporate business entities, they are on very uncertain ground as far as their basic judicial legitimacy is concerned.

5. Overrule *Bellotti*!

Now that 30 years have passed since Justice Powell took a prefatory comment in a 19th Century railroad case and used it to enfranchise corporations in the political process, events have shown that it is *Belotti*, not the cases that tried to limit its mischief, which should be up for reconsideration. The incredible growth of corporate presence in all forms of political activity has indeed brought about the corruption of the political process

[5] A notable exception to this policy of restraint was *Bush v. Gore*, 531 U.S. 98 (2000) in which the Rehnquist Court intervened in the Florida election process in a manner that gave George W. Bush the 2000 presidential election.

that Justice Powell acknowledged might occur if corporate enterprises were allowed to employ their resources to influence the election of candidates. The "problem of corruption of elected representatives through the creation of political debts" has become the American political reality in the 21st Century. Why not put *Bellotti* on the table for reconsideration when the Court convenes on September 9?

Emboldened by *Bellotti*, corporations have indeed taken the program of the Powell Memorandum to heart. The number of registered lobbyists in Washington has increased from 3,400 in 1977 to almost 34,000 in 2006. In the 2008 House and Senate races $400 million dollars was raised and spent for candidates by political action committees, mostly linked to business corporations. Corporate spending for such events as the Inauguration, Party Conventions and even Presidential Debates has become embarrassingly blatant.

A recent study of the relationship of health care industry campaign support to positions of congressmen on health care reform concluded.

> These findings also point to a need to address the fundamental problem in the financing of American politics. Members of Congress spend time courting donors when they could be passing legislation, building relationships with other lawmakers, or addressing constituents' needs. With ever increasing campaign costs, members follow the infamous bank robber Willie Sutton's advice to go to "where the money is" – the industries regulated by their committees. That only makes the public more skeptical that policy is for sale.

Advancing Health Care Reform Through the Swamp of $187 Million in Interested Political Money, Public Campaign Action Fund, Released July 2009, available at http://www.campaignmoney.org/node/272173/print (downloaded August 5, 2009).

It is now clear that Justice Powell's judicial activism in Bellotti has not stood the test of time. The notion that artificial legal entities organized to facilitate the transaction of

business and the accumulation of wealth should have constitutionally protected rights that the Framers believed came to human beings from their Creator has even less credibility today than in 1978. Certainly the amorality of corporate America has only become clearer since Justice Powell gave corporations political rights. A fair-minded and conservative Court, in tune with traditional values of all Americans, would take the opportunity posed by Citizens United to reconsider the juridical basis on which *McConnell* and *Austin* are being attacked rather than consider overruling these useful and important mainstream precedents. It is instead *Bellotti* that should be overruled to give our public institutions a chance to escape the corruption of corporate money that is overwhelming politics at all levels.

The evident intention of the Roberts Court to undermine, roll back and ultimately overrule the useful *McConnell* and *Austin* precedents is the very kind of judicial activism that Chief Justice Roberts and his conservative brethren have so consistently deplored. In fact, the activism that Justice Roberts is now contemplating goes far beyond even such "activist" decisions as *Roe v. Wade*. The conservative activists of the Roberts Court are poised to turn over the American elective process to the tender mercies of Corporate America. Sadly, it appears that our judicial tradition of constitutional restraint with respect to issues affecting politics may be out the window when an opportunity arises to increase the power and influence of America's corporate entities. The many senators who have expressed concern over judicial activism in the Sotomayer hearings need only look to the

Roberts Court on September 9 for an example of judicial activism that will take our breath away.