

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

If so many understood at once the crisis that *Citizens United* poses for America, how did it happen? To answer that question, 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 happened without the deliberate drive for corporate power and rights that began more than three decades ago.<sup>4</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>5</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>6</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>7</sup> Even President Martin Van Buren, hardly a radical, warned of “the already overgrown influence of corporate authorities.”<sup>8</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:

- First 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 extraordinarily well and 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 so 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 racked with crisis and challenge. Yet the American people worked the levers of democracy, and the government responded. It actually seemed as if some connection existed between those levers—voting, organizing, debating, petitioning, marching—and our government's conduct.

Environmental protection was not all. We often remember the strife and problems of the late 1960s and early 1970s but think of the progress 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 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 may 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 1971, Lewis Powell, a mild-mannered, courtly, and shrewd corporate lawyer in Richmond, Virginia, soon to be appointed to the United States Supreme Court, wrote a memorandum to his client, the United States Chamber of Commerce. He outlined a critique and a plan that changed America.<sup>9</sup>

Lewis Powell, like the *Citizens United* dissenter Justice John Paul Stevens, was a decorated World War II veteran who returned to his hometown to build a most respected corporate law practice. By all accounts, Powell 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>10</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>11</sup> Even the rare critic will cite Lewis Powell's decency and kindness.<sup>12</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.<sup>13</sup> 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 Chamber of Commerce "Attack on American Free Enterprise System." He explained, "No thoughtful person 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 U.S. 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 a corporate rights campaign 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 the time of his 1971 memorandum, Lewis Powell was a director of more than a dozen international corporations, including Philip Morris Inc., a global manufacturer and seller of cigarettes. Powell joined Philip Morris as a director in 1964, when the United States surgeon general released the most devastating and comprehensive report to date about the grave dangers of smoking. He remained a director of the cigarette company until his appointment to the Supreme Court in 1971. Powell also advised the Tobacco Institute, the cigarette lobby that finally was exposed and 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>14</sup>

The story of the cigarette corporations and their response to public efforts to address addiction, smoking, and health is a big piece of the larger story of how corporate rights took such significant pieces of the Constitution and American democracy. The ideas expressed by Powell in his 1971 memorandum to the Chamber of Commerce came out of his personal involvement in the aggressive resistance of the cigarette corporations to efforts to address the devastating social and public costs of its lethal products. 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, which reflected the broader campaign of the company and the cigarette industry to discredit the science about smoking and health and to misrepresent

the facts to keep people smoking and get young people to start. We now know, thanks to the 2007 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."

1969: "No biological or clinical proof that smoking is causally related to human disease . . . serious doubt that smoking is a causative factor in heart disease."

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

Absent convincing evidence, 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. But now that the evidence is in, we know that that is exactly what happened. We know this thanks to scientists, victims of the con-

spiracy, state attorneys general (both Democrats and Republicans), the United States Department of Justice (under both Presidents Bill Clinton and George W. Bush), and Judge Gladys Kessler and a panel of U.S. Court of Appeals judges appointed by Presidents Ronald Reagan, Bill Clinton, and George H. W. Bush.

In 2006, the U.S. 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>15</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.” Therefore, 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>16</sup>

Even the U.S. 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 Chamber of Commerce laid out a corporate rights and a 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, President Nixon filled two Supreme Court vacancies, appointing Powell to one seat and William Rehnquist, a conservative Republican lawyer from Phoenix, Arizona, to the other. Rehnquist never hid his conservative views, which were well known and, to some, controversial. At the same time, neither Congress nor most Americans knew of Powell's radical corporatist views. In his Senate confirmation hearing, no one asked about his recent proposal to the Chamber of Commerce recommending the use of an "activist-minded Supreme Court" to impose those views on the nation. No one asked because neither Powell nor the Chamber of Commerce disclosed the memo during his confirmation proceedings.<sup>17</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 by the Supreme Court even after Powell retired in 1987, the new corporate rights theory has invalidated

laws addressing the environment, tobacco and public health, food and drugs, financial regulation, and more.<sup>18</sup>

Powell helped shape a new majority to serve the interest of corporations, but for years, several vigorous dissents resisted the concept of corporate rights. The most vigorous 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>19</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>20</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 that “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 corporate 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 “bad” government for us.

A 1977 brief of 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. . . ."21

By 1978, the millions of dollars invested in the radical corporate rights campaign began to pay off. The first major victory for the corporate rights advocates came in 1978, with a corporate 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 referendum. 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>22</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 array of corporate legal foundations all argued that a New York law prohibiting utility corporations 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>23</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 U.S. 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 U.S. 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, Inc.<sup>24</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 new political power at the expense of average citizens and voters. 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 *Bellotti v. First National Bank of Boston*—and

now much more so, *Citizens United*—corporations could threaten “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 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 and our political system. Between 1998 and 2010, for example, the Chamber of Commerce spent \$739 million on lobbying. Pharmaceutical and health care corporations spent more than \$2 billion on lobbying in the past twelve years. Three corporations seeking military contracts, Northrop Grumman Corporation, Lockheed, and Boeing, spent more than \$400 million on lobbying. GE Corporation (\$237 million), AT&T (\$162 million), the pharmaceutical corporate lobby PHRMA (\$195 million), ExxonMobil (\$151 million), Verizon (\$149 million), and many more corporations all joined the lobby-fest.<sup>25</sup> Financial, labor, energy, environmental, health, trade, and other legislation and policy tilted in favor of corporate interests; the hurdles for advancing the public interest became much higher.

Second, the successful corporate rights campaign created a corporate trump card over public interest laws. If laws that were inconvenient to corporate business models somehow made it through the corporate 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 federal judges to decide whether the law served an “important” state interest and was not too “burdensome.”

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

On that far-off 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 pollution.

While 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 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 can-

not continue to 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 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.<sup>26</sup> From 1995 to 2008, when the independent multiyear Gallup poll was last done, through every variety of political environment, from good economies to bad, from terrorist attacks to war, the American people have been consistent in the 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 has stayed between 80 and 90 percent over the past ten years. The percentage of those who chose the status quo answer ("we should just take the same



actions we have been taking on the environment") has ranged from 13 to 20 percent.

For years, most of us have known that the gathering and urgent environmental and energy crisis cannot be ignored, but what has our government done? Maintain the status quo, more or less, and usually much less as the global environmental crisis has worsened and the demand for fossil fuel exploitation soars.

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-long wars in the Middle East and bloated military budgets, agri-corporate subsidies and industrial food systems, or 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 U.S. Chamber of Commerce, and the corporate rights movement that massive, global corporate entities are the same as people.